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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 745

RIN 3133-AE49

Pass-Through Share Insurance for Interest on Lawyers Trust Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its share insurance regulations to implement statutory amendments to the Federal Credit Union Act (FCU Act or the Act) resulting from the recent enactment of the Credit Union Share Insurance Fund Parity Act (Insurance Parity Act). The statutory amendments require NCUA to provide enhanced, pass-through share insurance for interest on lawyers trust accounts (IOLTA) and other similar escrow accounts. As its name implies, the Insurance Parity Act ensures that NCUA and the Federal Deposit Insurance Corporation (FDIC) insure IOLTAs and other similar escrow accounts in an equivalent manner.

DATES: This rule is effective January 27, 2016.

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Associate General Counsel, Office of General Counsel, at the above address or telephone (703) 518-6540.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Summary of the April 2015 Proposed Rule
- III. Public Comments on the April 2015 Proposed Rule
- IV. Final Rule
- V. Regulatory Procedures

I. Background

A. History of IOLTAs

According to the National Association of IOLTA Programs (NAIP),¹ IOLTA programs began in Australia and Canada in the late 1960s to generate funds for legal services to the poor.² In the United States, Congress passed legislation in the 1980s permitting the establishment of certain interest-bearing checking accounts,³ which, among many things, helped to enable the creation of IOLTA accounts throughout the United States. The various states operate IOLTA programs pursuant to their own laws.⁴

Under an IOLTA program, an attorney or law firm may establish an account at one or more financial institutions to hold their clients' funds to pay for legal services or for other purposes. An attorney or a law firm would deposit clients' funds in one or more IOLTAs and hold these funds in trust until needed. Typically, the interest or dividends on IOLTAs are donated to charities or other 501(c)(3) tax exempt organizations pursuant to state law. Generally, the donated funds are used to subsidize legal aid services or for other charitable purposes.

B. The Credit Union Share Insurance Fund Parity Act of 2014

On December 18, 2014, President Obama signed into law the Insurance Parity Act.⁵ The Insurance Parity Act amended the share insurance provisions of the FCU Act by requiring enhanced, pass-through share insurance coverage for IOLTAs and other similar escrow accounts.⁶ The Insurance Parity Act specifically defines "pass-through share insurance," with respect to IOLTAs and other similar escrow accounts, as "insurance coverage based on the interest of each person on whose behalf funds are held in such accounts by the

attorney administering the IOLTA or the escrow agent administering a similar escrow account, in accordance with regulations issued by [NCUA]."⁷

The Insurance Parity Act defines an IOLTA as "a system in which lawyers place certain client funds in interest-bearing or dividend-bearing accounts, with the interest or dividends then used to fund programs such as legal service organizations who provide services to clients in need."⁸ Pursuant to the Insurance Parity Act, IOLTAs are treated as escrow accounts for share insurance purposes. Further, IOLTAs and other similar escrow accounts are considered member accounts if the attorney administering the IOLTA or the escrow agent administering the escrow account is a member of the insured credit union in which the funds are held.⁹

C. Comparison of FDIC's and NCUA's Current Insurance Regulations Regarding IOLTAs

The FDIC's deposit insurance regulations¹⁰ do not specifically mention IOLTAs by name. Rather, the FDIC insures an IOLTA as an agent or nominee account. To be insured by the FDIC, an agent or nominee account like an IOLTA must expressly disclose, by way of specific reference, the existence of any fiduciary relationship such as an agent or nominee pursuant to which funds are deposited into a bank account and on which a claim for deposit insurance coverage is based. The FDIC has stated that such an account, including an IOLTA, must disclose that the funds are held by the nominal account holder on the behalf of others.¹¹ To be insurable, the FDIC must be able to ascertain the interests of the other parties in the IOLTA from the records of the insured depository institution or from the records of the lawyer.¹² Funds attributable to each client will be insured on a pass-through basis if this

¹ The NAIP was established in 1986 to enhance legal services for the poor and for the administration of justice through the growth and development of IOLTA programs. <http://www.iolta.org/about-naip>.

² <http://www.iolta.org/what-is-iolta/iolta-history>.

³ The Depository Institutions Deregulation and Monetary Control Act of 1980 (Pub. L. 96-221; 94 Stat. 132).

⁴ http://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs.html. As determined by each state, an IOLTA program may be mandatory, voluntary, or an attorney may opt out of the program.

⁵ Pub. L. 113-252, 128 Stat. 2893 (2014).

⁶ 12 U.S.C. 1787(k).

⁷ Pub. L. 113-252, 128 Stat. 2893 (2014).

⁸ *Id.*

⁹ The Insurance Parity Act also emphasizes that its amendments to the FCU Act do not authorize an insured credit union to accept deposits of an IOLTA or similar escrow account in an amount greater than such credit union is authorized to accept under any other provisions of federal or state law.

¹⁰ 12 CFR part 330.

¹¹ FDIC Opinion Letter No. 98-2 (June 16, 1998) at <https://www.fdic.gov/regulations/laws/rules/4000-9940.html>.

¹² *Id.*

recordkeeping requirement is satisfied.¹³

Prior to the enactment of the Insurance Parity Act, NCUA's position with respect to the insurability of IOLTAs was very similar to FDIC's, except that NCUA's coverage was limited only to those clients of the attorney who were also members of the insured credit union in which the IOLTA was kept. This was due to the FCU Act's general limitation to insure only member accounts, with some exceptions not applicable to this rulemaking.

Many federally insured credit unions maintained that NCUA's position on this issue placed them at a competitive disadvantage. The Insurance Parity Act removed any such disadvantage, however. Specifically, provided the lawyer administering the IOLTA or the escrow agent administering a similar escrow account is a member of the insured credit union in which such account is maintained, then the interests of each client or principal, on whose behalf funds are being held in such accounts by the lawyer or escrow agent, will be insured on a pass-through basis in accordance with the limits in part 745 of NCUA's regulations, regardless of the membership status of the client or principal. In an IOLTA and other similar escrow accounts, the true owners of the funds are the clients and principals. The lawyers or law firms and the escrow agents are only agents holding the funds on the clients' and principals' behalf.

II. Summary of the April 2015 Proposed Rule

In April 2015, the Board issued a proposed rule amending its share insurance regulations to implement statutory amendments to the FCU Act resulting from the enactment of the Insurance Parity Act.¹⁴ The sections below reiterate the discussion in the proposed rule.

A. Why NCUA issued a proposed rule?

The Insurance Parity Act clearly states that NCUA shall provide pass-through share insurance for IOLTAs, and it defines an IOLTA. Accordingly, share insurance coverage for IOLTAs took effect with the enactment of the Insurance Parity Act, even without any regulatory action on NCUA's part. No implementing regulations were required to effect this aspect of the legislation. However, the proposed rule addressed other aspects of the legislation that did require NCUA to take regulatory action.

Additionally, some of the language in the Insurance Parity Act is ambiguous and left certain questions unanswered. For example, these questions included:

- What escrow accounts should be included in the category "other similar escrow accounts" as that phrase is used in the Insurance Parity Act?
- Should prepaid card programs, such as payroll cards, be considered IOLTAs or other similar escrow accounts for share insurance purposes?
- What recordkeeping requirements must be satisfied to receive share insurance on IOLTAs and other similar escrow accounts?
- Does the enhanced share insurance coverage provided by the Insurance Parity Act affect the Bank Secrecy Act (BSA) requirements for insured credit unions?
- Should nonmember funds kept in a federal credit union as a result of the enhanced share insurance coverage provided by the Insurance Parity Act count towards a federal credit union's limit on the receipt of payments on shares from nonmembers pursuant to § 701.32 of NCUA's regulations?

As discussed below, NCUA analyzed the above questions and proposed how each should be addressed. However, NCUA requested public comment on alternative interpretations of the Insurance Parity Act and alternative regulatory approaches that commenters believe are appropriate and beneficial.

B. Pass-Through Share Insurance for IOLTAs and Other Similar Escrow Accounts

As noted above, the Insurance Parity Act defines "pass-through share insurance," with respect to IOLTAs and other similar escrow accounts, as "insurance coverage based on the interest of each person on whose behalf funds are held in such accounts by the attorney administering the IOLTA or the escrow agent administering a similar escrow account, in accordance with regulations issued by [NCUA]." ¹⁵ This definition is clear and accurate, as well as consistent with how NCUA currently defines "pass-through share insurance" in its share insurance regulations relating to coverage of certain employee benefit plans.¹⁶ Accordingly, the Board proposed to adopt that statutory definition of "pass-through share insurance" as the regulatory definition of that term in part 745.

C. What escrow accounts should be included in the category "other similar escrow accounts" as that phrase is used in the Insurance Parity Act?

The Insurance Parity Act provides that, for share insurance purposes, IOLTAs are treated as escrow accounts. It also provides that pass-through insurance coverage is available for other kinds of escrow accounts that are similar to IOLTAs. However, the Insurance Parity Act does not define or further describe what constitutes an escrow account that is "similar" to an IOLTA.

The Insurance Parity Act defines an IOLTA as "a system in which lawyers place certain client funds in interest-bearing or dividend-bearing accounts, with the interest or dividends then used to fund programs such as legal service organizations who provide services to clients in need." NCUA is tasked with defining the kinds of escrow accounts that are similar enough to IOLTAs to be eligible for pass-through share insurance as discussed above. In the proposed rule, the Board acknowledged the challenge to describe with precision the circumstances under which such coverage should be provided. There are many different kinds of escrow accounts in use, with varying forms and structures. Also, the Board noted in the proposed rule that "similar" is a relative term that may necessitate NCUA reviewing escrow accounts with varying structures on a case-by-case basis to determine which are similar enough to IOLTAs to receive pass-through insurance coverage.

Despite the amorphous nature of escrow accounts, the Board noted in the proposed rule the importance of providing insured credit unions with as much regulatory clarity and certainty as possible about which escrow accounts are considered similar enough to IOLTAs to receive pass-through insurance coverage. NCUA seeks to avoid, to the greatest extent possible, the need to make case-by-case analyses of escrow accounts, as that process is labor intensive and inefficient and it creates uncertainty for insured credit unions.

There are some escrow accounts whose nature and structure are immediately recognizable as similar to an IOLTA. For example, the Board noted in the proposed rule that typical real estate escrow accounts and prepaid funeral accounts have attributes that, while not identical to IOLTAs, are similar to IOLTAs and should be entitled to pass-through share insurance coverage. One of the signature characteristics common to typical real estate escrow accounts, prepaid funeral

¹³ *Id.*

¹⁴ 80 FR 27109 (May 12, 2015).

¹⁵ Pub. L. 113–252, 128 Stat. 2893 (2014).

¹⁶ 12 U.S.C. 1787(k)(4); 12 CFR 745.9–2.

accounts, and IOLTAs is that each of these kinds of account has a licensed professional or other individual serving in a fiduciary capacity and holding funds for the benefit of a client as part of some transaction or business relationship.

The Board proposed, at a minimum, to extend pass-through share insurance coverage to escrow accounts with these characteristics, up to the limits provided for in part 745 of NCUA's regulations. However, the Board encouraged commenters to identify and discuss other kinds of escrow accounts, in addition to real estate and prepaid funeral accounts, which also have characteristics similar enough to IOLTAs to warrant pass-through insurance coverage.

Specifically, the Board requested comment on the following: (1) what kinds of escrow accounts should qualify for pass-through share insurance coverage and why; (2) what specific attributes these escrow accounts need to possess to obtain coverage; (3) how NCUA can define these accounts to capture their essence and minimize the need for case-by-case analyses of their characteristics; and (4) any other aspect of this topic. In addition, the Board specifically invited comment on whether it is appropriate to limit the pool of other similar escrow accounts to those where a recognizable fiduciary duty is owed by the escrow agent to the principal.

D. Prepaid Cards

In the proposed rule, the Board welcomed comments on NCUA's proposed treatment of prepaid card programs. To put this issue in context and provide background information about such programs, the Board included the following excerpt on prepaid cards from the Federal Financial Institutions Examination Council's Web site.¹⁷

The market for prepaid cards, sometimes called stored-value cards, is one of the fastest-growing segments of the retail financial services industry. While the terms prepaid cards and stored-value cards are frequently used interchangeably, differences exist between the two products.

Prepaid cards are generally issued to persons who deposit funds into an account of the issuer. During the funds deposit process, most issuers establish an account and obtain identifying data from the purchaser (e.g., name, phone number, etc.).

Stored-value cards do not typically involve a deposit of funds as the value is prepaid and stored directly on the cards. Because its

business model requires cardholders to pay in advance, it substantially eliminates the nonpayment risk for the issuing financial institution. The functionality of this product is leading to a wide range of card programs that operate in either closed or open-loop systems, and program innovation has resulted in the development of systems that operate in both structures. Closed-loop systems are generally retailer/issuer business models, while general-purpose cards issued by financial institutions tend to operate in open-loop systems. Open-loop system prepaid cards are processed using the same systems as the branded network cards (MasterCard, Visa, American Express, and Discover) and offer the same functionality.

In the past, prepaid cards were mostly issued by nonfinancial businesses in limited deployment environments such as mass transit systems and universities. In recent years, prepaid cards have grown significantly as financial institutions and nonbank organizations target under-banked markets and overseas remittances. Technological innovations in the way information is stored (e.g., magnetic strip or computer chip), the physical form of the payment mechanism, and biometric account access and authentication are converging to create efficiencies, reduce transaction times at the point of sale, and lower transaction costs.

There are several types of prepaid cards, including gift, payroll, travel, and teen cards. Either the consumer or an issuer funds the account for the card. When a consumer uses the card to make a purchase, the merchant deducts the amount of the purchase from the card. Transaction authorization can take place through an existing network, a chip stored on the card, or information coded on the magnetic strip. Once the stored value in the card is exhausted, customers may either replenish the value or acquire a new card.

In addition to cards, stored-value payment devices are emerging in a variety of other physical forms, most notably key fobs. With the recent introduction of contactless payment technologies, use of chips (smart cards), radio frequency identification (RFID), and near-field communication (NFC) payment devices are becoming more innovative. Initiatives are underway to introduce mobile phones with integrated microchips that can initiate a payment when waved over a specially-equipped reader. The integrated chip can store value, authenticate a consumer, or contain consumer preferences and loyalty program information that can be used for marketing purposes.

Prepaid cards may be subject to legal and regulatory risks. For example, the Federal Reserve Board's final rule on Regulation E, issued August 30, 2006, extended its applicability to prepaid cards used for consumers' payroll. The Federal Reserve Board noted that it will monitor the development of other card products and may reconsider Regulation E coverage as these products continue to develop. State laws vary widely with regard to fees. Additionally, financial institutions should ensure that prepaid card product programs comply with the Bank Secrecy Act and anti-money laundering guidance.

The proposed rule articulated NCUA's general position that prepaid card

programs, including payroll cards, should not be considered escrow accounts similar to IOLTAs for share insurance purposes because the characteristics that define an attorney's relationship with, and the fiduciary duties owed to, the attorney's clients are typically not present in the prepaid card scenario. An IOLTA and a prepaid card program serve very different purposes and typically have significantly different structures. For this and other reasons, a prepaid card program is not sufficiently similar to an IOLTA, for purposes of the Insurance Parity Act, to qualify for pass-through share insurance coverage as an escrow account similar to an IOLTA. However, the Board encouraged comments and requested information about prepaid card programs that commenters thought may be sufficiently similar to IOLTAs for share insurance purposes.

E. Insurance for Prepaid Cards Outside of the Insurance Parity Act Context

The Board explained in the proposed rule that, under certain circumstances, some prepaid card programs currently may be entitled to pass-through share insurance coverage under other aspects of part 745 unrelated to IOLTAs and the Insurance Parity Act. For example, if funds in a prepaid card program deposited in a federally insured credit union qualify as a share account that can be traced back to a specific owner in a specific dollar amount and the owner is a member of the credit union where the funds are kept, then those funds would be entitled to share insurance pursuant to the current terms and limits of part 745.

F. What recordkeeping requirements must be met to receive share insurance on IOLTAs and other similar escrow accounts?

As noted in the proposed rule, FDIC's deposit insurance regulations provide that the FDIC will recognize a claim for insurance coverage based on a fiduciary relationship (such as an IOLTA or escrow account) only if the relationship is expressly disclosed, by way of specific references, in the deposit account records of the insured depository institution.¹⁸ FDIC's deposit insurance regulations further provide that if the deposit account records of an insured depository institution disclose the existence of a relationship which might provide a basis for additional insurance, then the details of the relationship and the interests of other parties in the account must be ascertainable either from the deposit

¹⁷ [http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments,-clearing,-and-settlement/card-based-electronic-payments/prepaid-\(stored-value\)-cards.aspx](http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments,-clearing,-and-settlement/card-based-electronic-payments/prepaid-(stored-value)-cards.aspx)

¹⁸ 12 CFR 330.5(b)(1).

account records of the insured depository institution or from records maintained, in good faith and in the regular course of business, by the depositor or by some person or entity that has undertaken to maintain such records for the depositor.¹⁹

Similarly, NCUA's current share insurance regulations provide that the account records of an insured credit union shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are deposited and on which a claim for insurance coverage is founded. Examples of such relationships include those involving trustees, agents, and custodians.²⁰ These kinds of accounts also include IOLTAs and other escrow accounts similar to IOLTAs. NCUA will not recognize a claim for insurance based on such a relationship in the absence of such disclosure. Further, NCUA's share insurance regulations provide that if the account records of an insured credit union disclose the existence of a relationship which may provide a basis for additional insurance, then the details of the relationship and the interests of other parties in the account must be ascertainable either from the records of the credit union or the records of the member maintained in good faith and in the regular course of business.²¹

IOLTAs and other similar escrow accounts exemplify the kinds of accounts in which a relationship exists upon which a claim for insurance coverage could be founded. They are among the kinds of accounts that NCUA's regulations are intended to cover. Accordingly, based on NCUA's current share insurance regulations, for IOLTAs and other similar escrow accounts to receive the share insurance coverage to which they are entitled, the recordkeeping provisions of NCUA's share insurance regulations must be satisfied. No additional recordkeeping requirements are imposed by the Insurance Parity Act. Therefore, the Board did not propose any regulatory changes or additions in this regard, but nonetheless welcomed comments on this topic.

G. Does the enhanced share insurance coverage provided by the Insurance Parity Act affect the BSA requirements for insured credit unions?

The proposed rule did not intend to discuss in detail an insured credit union's BSA requirements. Rather, NCUA intended it to remind insured

credit unions of their continued BSA responsibilities with respect to IOLTAs and other similar escrow accounts. This is especially true given that IOLTAs and other similar escrow accounts will begin to contain funds for nonmembers which are likely not known by the credit unions in which the accounts are kept. The Board did not propose to make any regulatory changes in this regard, but nonetheless welcomed comments.

F. Do nonmember funds kept in a credit union as a result of the enhanced share insurance coverage provided by the Insurance Parity Act count towards a federal credit union's limit on the receipt of payments on shares from nonmembers pursuant to § 701.32 of NCUA's regulations?

The Insurance Parity Act provides that IOLTAs and other similar escrow accounts are considered member accounts if the attorney administering the IOLTA or the escrow agent administering the escrow account is a member of the insured credit union in which the funds are held. In the proposed rule, the Board stated that if an IOLTA or other similar escrow account satisfies the above requirement and, therefore, is treated by the Insurance Parity Act as a member account, then the IOLTA or other similar escrow account also should be considered a member account for purposes of § 701.32 of NCUA's regulations. Therefore, funds in those member accounts do not count towards a federal credit union's limit on the receipt of payments on shares from nonmembers pursuant to § 701.32 of NCUA's regulations.²² Accordingly, the Board did not propose any regulatory changes in this regard, but nonetheless welcomed comments.

III. Public Comments on the April 2015 Proposed Rule

NCUA received eighteen comment letters on the proposed rule: four from credit unions; three from national trade associations; nine from credit union leagues; one from an attorney; and one from a credit card company. Below is a summary of those comments.

A. General Comments

Generally, all of the commenters supported the proposed rule. However, as explained in more detail below, several commenters offered suggestions for additional types of escrow accounts that they believed should be afforded enhanced pass-through share insurance coverage. In addition, most commenters advocated for pass-through share

insurance coverage on prepaid cards but did not provide legal analysis to support such expanded coverage.

B. Definition of "Pass-Through Share Insurance"

All of the commenters that addressed this definition supported the proposed use of the statutory definition of "pass-through share insurance." Accordingly, this final rule adopts the proposed definition without change.

C. Other Similar Escrow Accounts and Prepaid Cards

As a preface to the following discussion of the commenters' positions on escrow accounts and prepaid cards, a reminder of how NCUA currently insures those accounts and how that might change as a result of the Insurance Parity Act will provide additional clarity. In the written comments received and in other forms of communications NCUA has had with various stakeholders on this topic, there appears to be some degree of misunderstanding.

Accordingly, the Board reiterates and emphasizes that, even in the absence of the Insurance Parity Act, it currently insures certain escrow accounts and prepaid cards under current share insurance provisions. The Insurance Parity Act amends the membership requirements associated with covering those kinds of accounts, but it does not organically create or authorize such coverage as though such authority did not previously exist.

The membership requirements in the Insurance Parity Act shift the focus from the membership status of the principals, the actual owners of the funds, to the membership status of: (1) The attorney administering the IOLTA; (2) the escrow agent administering the escrow account; and (3) if prepaid cards are deemed "other similar escrow accounts," then the party associated with a prepaid card that is acting in a similar capacity as the attorney or escrow agent. As discussed more fully below, in many instances, the shift in whose membership status matters will make it logistically easier for certain kinds of accounts to obtain enhanced pass-through coverage, for example IOLTAs. However, for some kinds of accounts including certain prepaid cards if they are determined to qualify, this shift in focus could actually make it significantly more difficult to obtain enhanced pass-through coverage.

Further, any increase in an insured credit union's total amount of insured shares as a result of the enhanced coverage provided by the Insurance Parity Act will require that credit union to increase proportionally the 1%

¹⁹ 12 CFR 330.5(b)(2).

²⁰ 12 CFR 745.2(c)(1).

²¹ 12 CFR 745.2(c)(2).

²² 12 CFR 701.32.

deposit it is required to maintain with the National Credit Union Share Insurance Fund (NCUSIF) pursuant to the Act.²³ Finally, the Board notes that the shift in membership focus in the Insurance Parity Act represents a rare departure from the Act's general requirement that share insurance coverage be provided only to credit union members. Accordingly, this final rule respects the major implications of such an exception in interpreting congressional intent.

1. Escrow Accounts

Several commenters suggested other types of accounts that they believed satisfies the definition of "other similar escrow accounts" and, therefore, should be afforded pass-through share insurance coverage in the same manner as an IOLTA, specifically meaning that the membership status of the principal, the owner of the funds, is irrelevant provided the escrow agent is a member of the credit union in which the funds are held. Those suggestions included: (1) Agent-trust fiduciary accounts such as vacation rental security accounts and cemetery trust accounts; (2) any escrow account used to facilitate a purchase transaction such as the purchase of boats, commercial vessels, and planes; (3) any account established by a licensed or registered escrow agent; (4) landlord/tenant accounts; and (5) public adjuster accounts and education disbursement accounts.

As indicated in the proposed rule, there are many escrow accounts currently in use that are similar to IOLTAs and entitled to the enhanced pass-through insurance contemplated by the Insurance Parity Act. The Board supports providing enhanced insurance coverage for those accounts. In the proposal, the Board requested that commenters specifically identify the attributes of those accounts they believe should receive enhanced pass-through coverage and to define the essence of those accounts. Such a detailed description would help NCUA identify certain accounts as similar to IOLTAs without the need for a case-by-case analysis of escrow accounts. Unfortunately, while commenters identified broad and general categories of escrow accounts, they did not provide specifics in a way that allows NCUA to eliminate the need for case-by-case review. This is not surprising as there is a lack of universally accepted titles to describe certain kinds of escrow accounts. Further, there are many kinds of escrow accounts that are similar to each other but which are not

structurally or functionally identical which further hampers precise labeling.

It is this lack of uniformity in language, function, and organizational structure that makes it difficult for NCUA to promulgate regulations that identify by name the escrow accounts eligible for enhanced share insurance coverage. Despite this obstacle, NCUA will provide enhanced share insurance coverage to certain escrow accounts, in addition to real estate escrow accounts and prepaid funeral accounts as proposed, on a case-by-case basis, provided such escrow accounts satisfy the definition of "other similar escrow account" as defined in both the proposed rule and this final rule.²⁴ Specifically, "other similar escrow account" means an account where a licensed professional or other individual serving in a fiduciary capacity holds funds for the benefit of a client as part of a transaction or business relationship, such as real estate escrow accounts and prepaid funeral accounts.

Two commenters advocated a less restrictive definition of "other similar escrow account" that would consider the existence of a fiduciary relationship as an indicia of evidence of an "other similar escrow account," but would not make it a determinative factor. These commenters stated that a less restrictive definition would allow for inclusion of accounts that, while not rising to the level of a fiduciary relationship, exhibit trust and confidence and involve the holding of funds on behalf of another. The commenters offered landlord/tenant accounts as examples of accounts that would fall into that broader definition. However, several other commenters disagreed with having a broader definition of "other similar escrow account." Instead, these commenters preferred NCUA's proposed requirement that an actual fiduciary relationship exist. The Board agrees with those commenters supporting the proposed definition that makes a fiduciary relationship a required component for enhanced share insurance. Congress made it clear that only escrow accounts that are similar to IOLTAs are to be provided with enhanced pass-through coverage. The lawyer-client relationship is largely characterized by the fiduciary

²⁴ 80 FR 27109, 27114 (May 12, 2015). In the proposed rule, NCUA used the term "realtor" account to describe what is being called in this final rule a "real estate escrow" account. NCUA is changing terminology in this final rule at the suggestion of two commenters, who have indicated that the term "realtor" is a federally registered collective membership mark. NCUA agrees it is better to use the more generic term, but confirms that there is no substantive change being made from the proposed rule to the final.

duty lawyers owe their clients. Accordingly, requiring the fiduciary component to be present with respect to providing enhanced pass-through insurance coverage for "other similar escrow accounts" comports with congressional intent.

Two commenters stated that NCUA should clarify that real estate escrow accounts and prepaid funeral accounts qualify as "other similar escrow accounts" that are eligible for enhanced insurance coverage, but that the universe of "other similar escrow accounts" is not limited to those two named accounts. The Board made this clear in the proposed rule, but, as discussed above, the Board reiterates it here nonetheless.

One commenter argued that enhanced pass-through coverage should be expanded to include accounts held and administered by entities, such as law firms, real estate agencies, and funeral homes. This commenter stated that, as written, the proposed rule could be read as only permitting pass-through share insurance for accounts opened and held by individuals such as a lawyer or real estate agent, but not by their firms or brokerages. The Board agrees with the commenter that coverage should not be limited to accounts held and administered only by individual professionals but not their firms, and confirms the proposed rule did not have that effect. However, accounts opened by a law firm instead of an individual attorney, for example, will still need to satisfy the fiduciary relationship requirement. Accordingly, law firms and other entities administering the accounts must comply with all relevant law to maintain that relationship, which may or may not require an individual lawyer or escrow agent to also be named on the account.

Further, the Insurance Parity Act did not eliminate the membership requirement to obtain share insurance. Rather, it shifted the membership requirement from the owner of funds to the administrator of the IOLTA or escrow account. That means, for example, that a law firm that wishes to open an escrow account at a credit union must meet the credit union's field of membership criteria. NCUA recognizes, however, that a law firm, as an entity, may have difficulty meeting the membership criteria of the credit union of its choosing. Accordingly, if the firm itself does not qualify for membership in a particular credit union, but one of its lawyers does, then the firm may maintain an IOLTA in that credit union if the eligible lawyer joins the credit union. This is consistent with congressional intent to place credit

²³ 12 U.S.C. 1782(c)(1).

unions on a more level playing field with banks with respect to IOLTAs and other similar escrow accounts. It is the responsibility of the law firm or other entity wishing to establish an escrow account, however, to first determine if state and other applicable law and rules of professional conduct allow for such an arrangement. This final rule does not authorize any parties to create an illegal or unethical account relationship.

2. Prepaid Cards

Generally, all of the commenters that addressed prepaid cards believed NCUA should include them as “other similar escrow accounts.” However, the commenters did not provide sufficient legal analysis to support their position. Rather, these commenters generally suggested that NCUA should offer the same insurance coverage as FDIC on prepaid cards and that failure to do so would place credit unions at a competitive disadvantage. In this regard, no commenters acknowledged that NCUA currently insures some prepaid cards held by members and that, except for the membership requirement, NCUA’s analysis for calculating this coverage is essentially the same as the FDIC’s analysis.

One commenter provided a detailed analysis of the prepaid card industry and suggested ways in which NCUA could offer pass-through share insurance coverage on these accounts. This commenter divided prepaid cards into two categories: general-purpose reloadable cards (GPRs) and cards that allow for the disbursement of funds. The commenter stated that GPRs function like checking or share draft accounts, without checks or drafts, and allow a member to add or load additional funds onto the card. Cards for the disbursement of funds are used by employers and governments to distribute salaries and other benefits. The commenter did not specifically explain why these mechanisms for accessing funds are escrow accounts or how the distributors of such products would obtain the required credit union membership under the Insurance Parity Act.

This commenter went on to state that prepaid account funds are typically, but not always, deposited in omnibus accounts in a bank or a credit union in a master account held in the name of the prepaid card program for the benefit of the individual accountholders in the program. Individual cardholder funds are typically, but not always, tracked on a subaccount basis and recorded by the prepaid card issuer, processor, or prepaid program manager. The commenter acknowledged that while an

attorney-client fiduciary relationship is not present, the Electronic Fund Transfer Act²⁵ imposes the same or similar type of fiduciary obligations on the issuer with respect to disbursing and safeguarding funds in accordance with the instructions of the account holder. The commenter argued that, as a result, NCUA should provide pass-through share insurance on prepaid cards even where the cardholder is not a member of the credit union where the funds are held. The Board notes that Regulation E, which implements portions of the Electronic Fund Transfer Act, views escrow accounts and certain prepaid cards such as payroll cards as quite different for regulatory purposes, which further highlights the dissimilarities between certain prepaid cards and escrow accounts.

One commenter stated that pass-through coverage should be provided on cards where the owners of those cards are members of the credit union where the funds are held. As noted above, NCUA currently does this under appropriate circumstances.

Several commenters argued that NCUA currently, and irrespective of the Insurance Parity Act, has the authority to permit prepaid cards to be considered member accounts. These commenters stated that the FCU Act provides the Board with broad latitude in defining a member account and that NCUA regulations and legal opinions have created a precedent for allowing insurance coverage to nonmembers in certain instances. We agree that these statements are true but only in certain instances as discussed above.

These commenters further reasoned that any account opened at a credit union is a “member account,” thereby allowing the Board to authorize insurance coverage for payroll cards or other accounts established by credit union members that hold nonmember accounts. The Board does not agree that this statement is legally accurate.

One commenter stated that NCUA should provide pass-through share insurance coverage on prepaid cards where a fiduciary relationship can be clearly established and the fiduciary is a member of the credit union. Another commenter stated that NCUA should provide pass-through share insurance coverage only on those prepaid card accounts that have the characteristics of “other similar escrow accounts.” This commenter suggested that NCUA could stipulate that a qualifying prepaid card account must meet the proposed record keeping requirements for escrow accounts, thereby eliminating those

prepaid card accounts that lack the characteristics of escrow accounts because the record keeping requirements are not part of the business model of these types of products. Conversely, the commenter reasoned that prepaid card accounts that meet the record keeping requirements would present similar characteristics of escrow accounts. Because “other similar escrow accounts,” as that term is defined in this rule, are entitled to enhanced pass-through insurance under the Insurance Parity Act, a prepaid card satisfying that definition would be entitled to such treatment. However, prepaid cards currently do not satisfy that definition.

Two other commenters also advocated pass-through share insurance on prepaid card accounts that establish a similar relationship as escrow accounts and have similar characteristics, including payroll cards and prepaid gift cards. These commenters, however, did not elaborate on how to assess those characteristics or the level of similarity.

Finally, one commenter suggested that NCUA should simply stipulate that credit unions can exercise the same powers authorized for banks under 12 CFR part 300 or allow credit unions to request to have all of the same trust powers that are exercised by banks. This would exceed NCUA’s authority under the FCU Act and the Insurance Parity Act.

For many years, the credit union industry has requested that NCUA and Congress enable the NCUSIF to insure IOLTAs on a pass-through basis without regard to the membership status of the lawyer’s clients. The essential purpose of the Insurance Parity Act is to provide that relief with respect to IOLTAs. Further, the Insurance Parity Act granted additional enhanced coverage for escrow accounts similar to IOLTAs, which is relief the credit union industry historically has not requested.

The Insurance Parity Act limits enhanced coverage to a narrow universe of accounts. The Insurance Parity Act is not intended to eliminate every distinction between banks and credit unions or alter how every kind of credit union account may be created, structured, and insured. The fact that credit unions, generally speaking, must only serve their members is a critical distinction between banks and credit unions. While there are some statutory exemptions from the membership requirements applicable to accounts the NCUSIF may insure, the general principle of share insurance coverage is that coverage is member-based. Accordingly, in interpreting whether prepaid cards are to be considered

²⁵ 15 U.S.C. 1693 *et seq.*

“other similar escrow accounts” for purposes of the Insurance Parity Act, NCUA must respect the statutory limitations in place and interpret the Insurance Parity Act in a responsible, justifiable, and not overly broad manner.

NCUA’s research on prepaid cards has yielded results similar to those of the Federal Financial Institutions Examination Council and the FDIC, although those two entities may use different terminology to discuss prepaid cards. Prepaid cards are an ever expanding vehicle in the financial services marketplace, and they seem to be constantly evolving into new shapes and forms. They come in many varieties and are structured in many different ways. This variety and continuous evolution makes it difficult to devise a single, universal, and useful definition that applies to all prepaid cards.

In its General Counsel’s Opinion No. 8, the FDIC discussed prepaid products, in relevant part as follows:

Stored value products, or “prepaid products,” may be divided into two broad categories: (1) Merchant products; and (2) bank products.

A merchant card (also referred to as a “closed-loop” card) enables the cardholder to collect goods or services from a specific merchant or cluster of merchants. Generally, the cards are sold to the public by the merchant in the same manner as gift certificates. Examples are single-purpose cards such as cards sold by book stores or coffee shops. Another example is a prepaid telephone card.

Merchant cards do not provide access to money at a depository institution. When a cardholder uses the card, the merchant is not paid through a depository institution. On the contrary, the merchant has been prepaid through the sale of the card. In the absence of money at a depository institution, no insured “deposit” will exist under section 3(l) of the FDI Act. *See FDIC v. Philadelphia Gear Corporation*, 476 U.S. 426 (1986).

Bank cards are different. Bank cards (also referred to as “open-loop” cards) provide access to money at a depository institution. In some cases, the cards are distributed to the public by the depository institution itself. In many cases, the cards are distributed to the public by a third party. For example, in the case of “payroll cards,” the cards often are distributed by an employer to employees. In the case of multi-purpose “general spending cards” or “gift cards,” the cards may be sold by retail stores to customers.

A bank card usually enables the cardholder to effect transfers of funds to merchants through point-of-sale terminals. A bank card also may enable the cardholder to make withdrawals through automated teller machines (“ATM’s”). In other words, a bank card provides access to money at a depository institution. The money is placed at the depository institution by the card distributor (or other company in association with the card distributor), but is transferred

or withdrawn by the cardholders. In some cases, the card is “reloadable” in that additional funds may be placed at the depository institution for the use of the cardholder.

This General Counsel’s opinion does not address merchant cards because such cards do not involve the placement of funds at insured depository institutions. The applicability of this General Counsel’s opinion is limited to bank cards and other nontraditional access mechanisms, such as computers, that provide access to funds at insured depository institutions.²⁶

Merchant cards, as discussed above, do not involve a deposit of funds at a financial institution by the card holder as the value is prepaid and stored directly on the cards. Accordingly, this kind of vehicle is clearly not insurable under the Insurance Parity Act as there is no account held at a federally insured credit union.

Because open loop cards, which FDIC refers to as bank cards, provide access to money at an insured depository institution such as a federally insured credit union, NCUA has examined these instruments carefully to determine if they should be insured as escrow accounts similar to IOLTAs. The Board noted in the proposed rule that open loop cards are currently insured by the NCUSIF under certain circumstances, which include the requirement that the cardholder be a member of the federally insured credit union in which the funds are held. The Board also noted in the proposed rule that prepaid card programs, including open loop cards such as payroll cards, should not be considered escrow accounts similar to IOLTAs for share insurance purposes because, among other reasons, the characteristics that define an attorney’s relationship with, and the fiduciary duties owed to, the attorney’s clients are typically absent in the open loop prepaid card scenario. Commenters argued that there is some element of a trust relationship in the prepaid card scenario but generally acknowledged that it does not rise to the level of an attorney-client relationship. NCUA’s ongoing research of prepaid cards supports the position NCUA took in the proposed rule that an IOLTA and a prepaid card program serve very different purposes for the client and card holder and have drastically different structures.

In addition to the structural and functional dissimilarities between open loop cards and IOLTAs, open loop cards are not escrow accounts as that term is

commonly understood and contemplated in the Insurance Parity Act. Further, in evaluating prepaid card products, the FDIC has determined that while not all prepaid card programs are structured the same, it generally views companies that sell or distribute general purpose prepaid cards as deposit brokers and the funds they deposit as brokered deposits. While this does not directly address whether open loop cards are escrow accounts similar to IOLTAs, FDIC’s position on open loop cards supports NCUA’s determination in this regard. More specifically, a deposit broker serves a drastically different purpose than an attorney representing a client, and a brokered deposit placed in a depository institution to obtain a high investment yield also is drastically different from funds a client places in trust with its lawyer as part of their legal relationship. The fact that the characteristics and purposes of an IOLTA and a brokered deposit are so dissimilar supports NCUA’s conclusion that open loop cards are not escrow accounts similar to IOLTAs for purposes of the Insurance Parity Act and, therefore, not entitled to pass-through coverage unless the cardholder is a member of the federally insured credit union in which the funds are deposited and satisfies other criteria discussed above.

In conducting this analysis, NCUA paid particular attention to payroll cards as many in the credit union industry seemed particularly interested in those accounts. NCUA’s research shows that there are several different kinds of payroll card products, including some that while called a “payroll card” may actually be a debit card product sponsored by a third party vendor that is not the cardholder’s employer. NCUA’s analysis revealed that many of the same barriers to enhanced pass-through coverage that exists for other types of prepaid cards also apply to payroll cards. More specifically, the structure and characteristics of a payroll card are not that of an escrow account that is similar to an IOLTA. The Board notes, however, that even without the special membership treatment provided by the Insurance Parity Act, the NCUSIF currently insures on a pass-through basis those payroll cards that satisfy NCUA’s regular account and membership requirements as discussed above.

In conclusion, NCUA will expand its insurance coverage pursuant to the Insurance Parity Act for IOLTAs and other accounts that satisfy the definition of “other similar escrow account,” as defined herein. NCUA also will continue to insure on a pass-through

²⁶ FDIC General Counsel’s Opinion No. 8—Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms; 74 FR 67155 (November 13, 2008).

basis those prepaid card products and escrow accounts that are *not* similar to IOLTAs as it currently does based on the provisions of part 745, but will not afford those accounts enhanced coverage under the Insurance Parity Act. NCUA will continue to monitor the prepaid card industry and its evolution and may revisit this subject in the future if necessary.

E. Recordkeeping Requirements

Only two commenters addressed this topic. One commenter fully supported the proposed language, while one commenter recommended that specific fields be included on the 5300 Call Report to capture the value of negotiable instruments, IOLTAs, and prepaid cards. This commenter believed that the additional fields would assist in accurate reporting of balances covered by federal insurance. This final rule maintains the recordkeeping requirements as proposed.

IV. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.²⁷ For purposes of this analysis, NCUA considers small credit unions to be those having under \$50 million in assets.²⁸ This rule implements the Insurance Parity Act, which enhances share insurance coverage for IOLTAs and other similar escrow accounts. Accordingly, NCUA certifies the rule will not have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.²⁹ For purposes of the PRA, a paperwork burden may take the form of either a reporting or a record-keeping requirement, both referred to as information collections. This rule, which enhances share insurance coverage for IOLTAs and other similar escrow accounts, will not create new

paperwork burdens or modify any existing paperwork burdens.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rule will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined this rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

NCUA has determined that this rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.³⁰

List of Subjects in 12 CFR Part 745

Credit, Credit unions, Share insurance.

By the National Credit Union Administration Board on December 17, 2015.

Gerard Poliquin,

Secretary of the Board.

For the reasons stated above, NCUA amends 12 CFR part 745 as follows:

PART 745—SHARE INSURANCE AND APPENDIX

- 1. The authority for part 745 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; title V, Pub. L. 109–351; 120 Stat. 1966.

- 2. Add § 745.14 to subpart A to read as follows:

§ 745.14 Interest on lawyers trust accounts and other similar escrow accounts.

(a)(1) *Pass-through share insurance.* The deposits or shares of any interest on lawyers trust account (IOLTA) or other similar escrow account in an insured credit union are insured on a “pass-through” basis, in the amount of up to the SMSIA for each client and principal on whose behalf funds are held in such accounts by either the attorney administering the IOLTA or the escrow agent administering a similar escrow

account, in accordance with the other share insurance provisions of this part.

(2) Pass-through coverage will only be available if the recordkeeping requirements of § 745.2(c)(1) of this part and the relationship disclosure requirements of § 745.2(c)(2) of this part are satisfied. In the event those requirements are satisfied, funds attributable to each client and principal will be insured on a pass-through basis in whatever right and capacity the client or principal owns the funds. For example, an IOLTA or other similar escrow account must be titled as such and the underlying account records of the insured credit union must sufficiently indicate the existence of the relationship on which a claim for insurance is founded. The details of the relationship between the attorney or escrow agent and their clients and principals must be ascertainable from the records of the insured credit union or from records maintained, in good faith and in the regular course of business, by the attorney or the escrow agent administering the account. NCUA will determine, in its sole discretion, the sufficiency of these records for an IOLTA or other similar escrow account.

(b) *Membership requirements and treatment of IOLTAs.* For share insurance purposes, IOLTAs are treated as escrow accounts. IOLTAs and other similar escrow accounts are considered member accounts and eligible for pass-through share insurance if the attorney administering the IOLTA or the escrow agent administering the escrow account is a member of the insured credit union in which the funds are held. In this circumstance, the membership status of the clients or the principals is irrelevant.

(c) *Definitions.* (1) For purposes of this section:

(i) *Interest on lawyers trust account and IOLTA* mean a system in which lawyers place certain client funds in interest-bearing or dividend-bearing accounts, with the interest or dividends then used to fund programs such as legal service organizations who provide services to clients in need.

(ii) *Other similar escrow account* means an account where a licensed professional or other individual serving in a fiduciary capacity holds funds for the benefit of a client or principal as part of a transaction or business relationship. Examples of such accounts include, but are not limited to, real estate escrow accounts and prepaid funeral accounts.

(iii) *Pass-through share insurance* means, with respect to IOLTAs and other similar escrow accounts, insurance coverage based on the interest

²⁷ 5 U.S.C. 603(a).

²⁸ On September 24, 2015, the Board published Interpretative Ruling and Policy Statement 15–1, which amends the definition of small credit unions for purposes of the RFA to credit unions with assets of less than \$100 million. 80 FR 57512 (Sept. 24, 2015). This change, however, does not take effect until November 23, 2015, which is after the date this rule was issued by the Board.

²⁹ 44 U.S.C. 3507(d); 5 CFR part 1320.

³⁰ Public Law 105–277, 112 Stat. 2681 (1998).

of each person on whose behalf funds are held in such accounts by the attorney administering the IOLTA or the escrow agent administering a similar escrow account.

(2) The terms “interest on lawyers trust account”, “IOLTA”, and “pass-through share insurance” are given the same meaning in this section as in 12 U.S.C. 1787(k)(5).

[FR Doc. 2015–32164 Filed 12–24–15; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 150825778–5999–01]

RIN 0694–AG64

Russian Sanctions: Addition of Certain Persons to the Entity List

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding sixteen persons under seventeen entries to the Entity List. The sixteen persons who are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. BIS is taking this action to ensure the efficacy of existing sanctions on the Russian Federation (Russia) for violating international law and fueling the conflict in eastern Ukraine. These persons will be listed on the Entity List under the destinations of the Crimea region of Ukraine, Cyprus, Luxembourg, Panama, Russia, Switzerland, and the United Kingdom. Lastly, this final rule includes a clarification for how entries that include references to § 746.5 on the Entity List are to be interpreted.

DATES: This rule is effective December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary, Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Fax: (202) 482–3911, Email: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Entity List (Supplement No. 4 to Part 744 of the EAR) identifies entities and other persons reasonably believed

to be involved in, or that pose a significant risk of being or becoming involved in, activities that are contrary to the national security or foreign policy of the United States. The EAR imposes additional licensing requirements on, and limits the availability of most license exceptions for, exports, reexports, and transfers (in-country) to those persons or entities listed on the Entity List. The license review policy for each listed entity is identified in the License Review Policy column on the Entity List and the impact on the availability of license exceptions is described in the **Federal Register** notice adding entities or other persons to the Entity List. BIS places entities on the Entity List based on certain sections of part 744 (Control Policy: End-User and End-Use Based) and part 746 (Embargoes and Other Special Controls) of the EAR.

The End-user Review Committee (ERC) is composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy, and where appropriate, the Treasury. The ERC makes decisions to add an entry to the Entity List by majority vote and to remove or modify an entry by unanimous vote. The Departments represented on the ERC have approved these changes to the Entity List.

Entity List Additions

Additions to the Entity List

This rule implements the decision of the ERC to add sixteen persons under seventeen entries to the Entity List. These sixteen persons are being added on the basis of § 744.11 (License requirements that apply to entities acting contrary to the national security or foreign policy interests of the United States) of the EAR. The seventeen entries to the Entity List are located in the Crimea region of Ukraine (seven entries), Cyprus (one entry), Luxembourg (one entry), Panama (one entry), Russia (four entries), Switzerland (one entry), and the United Kingdom (two entries). There are seventeen entries for the sixteen persons because one person is listed in two locations, resulting in one additional entry.

Under § 744.11(b) (Criteria for revising the Entity List) of the EAR, persons for whom there is reasonable cause to believe, based on specific and articulable facts, have been involved, are involved, or pose a significant risk of being or becoming involved in, activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such persons may be added to the Entity List. The persons

being added to the Entity List in this rule have been determined to be involved in activities that are contrary to the national security or foreign policy interests of the United States. Specifically, in this rule, BIS adds persons to the Entity List for violating international law and fueling the conflict in eastern Ukraine. These additions ensure the efficacy of existing sanctions on Russia. The particular additions to the Entity List and related authorities are as follows:

A. Entity Additions Consistent With Executive Order 13661

Eight entities are added based on activities that are described in Executive Order 13661 (79 FR 15533), *Blocking Property of Additional Persons Contributing to the Situation in Ukraine*, issued by the President on March 16, 2014. This Order expanded the scope of the national emergency declared in Executive Order 13660, finding that the actions and policies of the Government of the Russian Federation with respect to Ukraine—including the deployment of Russian military forces in the Crimea region of Ukraine—undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, and thereby constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

Executive Order 13661 includes a directive that all property and interests in property that are in the United States, that hereafter come within the United States, or that are or thereafter come within the possession or control of any United States person (including any foreign branch) of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: Persons determined by the Secretary of the Treasury, in consultation with the Secretary of State to have either materially assisted, sponsored or provided financial, material or technological support for, or goods and services to or in support of a senior official of the Russian government or operate in the defense or related materiel sector in Russia. Under Section 8 of the Order, all agencies of the United States Government are directed to take all appropriate measures within their authority to carry out the provisions of the Order.

The Department of the Treasury's Office of Foreign Assets Control, pursuant to Executive Order 13661, on behalf of the Secretary of the Treasury, and in consultation with the Secretary

of State, has designated the following eight persons: Avia Group Terminal Limited Liability Company, Fentex Properties Ltd., Lerma Trading S.A., LTS Holding Limited, Maples SA, OAO Volgogradneftemash, Transservice LLC, and White Seal Holdings Limited.

In conjunction with those designations, the Department of Commerce adds the eight entities to the Entity List under this rule, and imposes a license requirement for exports, reexports, or transfers (in-country) to these persons. This license requirement implements an appropriate measure within the authority of the EAR to carry out the provisions of Executive Order 13661.

B. Entity Additions Consistent With Executive Order 13685

Eight entities are added based on activities that are described in Executive Order 13685 (79 FR 77357), *Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to the Crimea Region of Ukraine*, issued by the President on December 19, 2014. This Order took additional steps to address the Russian occupation of the Crimea region of Ukraine with respect to the national emergency declared in Executive Order 13660 of March 6, 2014, and expanded in Executive Order 13661 of March 16, 2014 and Executive Order 13662 of March 20, 2014. In particular, Executive Order 13685 prohibited the export, reexport, sale or supply, directly or indirectly, from the United States or by a U.S. person, wherever located, of any goods, services, or technology to the Crimea region of Ukraine. Under Section 10 of the Order, all agencies of the United States Government are directed to take all appropriate measures within their authority to carry out the provisions of the Order.

The Department of the Treasury's Office of Foreign Assets Control, pursuant to Executive Order 13685 on behalf of the Secretary of the Treasury and in consultation with the Secretary of State, has designated the following eight persons as operating in the Crimea region of Ukraine: Aktsionernoe Obschestvo 'Yaltinskaya Kinostudiya,' Crimean Enterprise Azov Distillery Plant, Otkrytoe Aktsionernoe Obshchestvo Vneshneekonomicheskoe Obedinenie Tekhnopromeksport, Resort Nizhnyaya Oreanda, State Concern National Production and Agricultural Association Massandra, State Enterprise Factory of Sparkling Wine Novy Svet, State Enterprise Magarach of The National Institute of Wine, and State Enterprise Universal-Avia.

In conjunction with that designation, the Department of Commerce adds the eight entities to the Entity List under this rule and imposes a license requirement for exports, reexports, or transfers (in-country) to these persons. This license requirement implements an appropriate measure within the authority of the EAR to carry out the provisions of Executive Order 13685.

For the sixteen persons under seventeen entries added to the Entity List on the basis of activities described in Executive Orders 13661 or 13685, BIS imposes a license requirement for all items subject to the EAR and a license review policy of presumption of denial. The license requirements apply to any transaction in which items are to be exported, reexported, or transferred (in-country) to any of the persons or in which such persons act as purchaser, intermediate consignee, ultimate consignee, or end-user. In addition, no license exceptions are available for exports, reexports, or transfers (in-country) to the persons being added to the Entity List in this rule. The acronyms "a.k.a." (also known as) and "f.k.a." (formerly known as) are used in entries on the Entity List to help exporters, reexporters and transferors to better identify listed persons on the Entity List.

This final rule adds the following sixteen persons under seventeen entries to the Entity List:

Crimea Region of Ukraine

(1) *Aktsionernoe Obschestvo 'Yaltinskaya Kinostudiya,'* a.k.a., the following eight aliases:

- CJSC Yalta-Film;
- Film Studio Yalta-Film;
- Joint Stock Company Yalta Film Studio;
- JSC Yalta Film Studio;
- Kinostudiya Yalta-Film;
- Oao Yaltinskaya Kinostudiya;
- Yalta Film Studio; *and*
- Yalta Film Studios.

Ulitsa Mukhina, Building 3, Yalta, Crimea 298063, Ukraine; *and* Sevastopolskaya 4, Yalta, Crimea, Ukraine;

(2) *Crimean Enterprise Azov Distillery Plant,* a.k.a., the following five aliases:

- Azovsky Likerogorilchany Zavod, Krymske Respublikanske Pidpryemstvo;
- Azovsky Likerovo-Dochny Zavod;
- Crimean Republican Enterprise Azov Distillery;
- Crimean Republican Enterprise Azovsky Likerovodochny Zavod; *and*
- Krymske Respublikanske Pidpryemstvo Azovsky Likerogorilchany Zavod.

Bud. 40 vul. Zaliznychna, Smt Azovske, Dzhanoksky R–N, Crimea 96178, Ukraine; *and* 40 Railway St., Azov, Dzhanoksky District 96178, Ukraine; *and* 40 Zeleznodorozhnaya str., Azov, Jankovsky District 96178, Ukraine;

(3) *Resort Nizhnyaya Oreanda* (f.k.a., Federalnoe Gosudarstvennoe Byudzhethnoe Uchrezhdenie Sanatori Nizhnyaya Oreanda Upravleniya), a.k.a., the following three aliases:

- Federalnoe Gosudarstvennoe Byudzhethnoe Uchrezhdenie Sanatori Nizhnyaya Oreanda Upravleniya Delami Prezidenta Rossiskoi Fe;
- FGBU Sanatori Nizhnyaya Oreanda; *and*
- Sanatorium Nizhnyaya Oreanda.

Pgt Oreanda, Dom 12, Yalta, Crimea 298658, Ukraine; *and* Resort Nizhnyaya Oreanda, Oreanda, Yalta 08655, Crimea; Oreanda—12, Yalta 298658, Crimea;

(4) *State Concern National Production and Agricultural Association Massandra,* a.k.a., the following four aliases:

- Massandra National Industrial Agrarian Association of Wine Industry;
- Massandra State Concern, National Production and Agrarian Union, OJSC;
- Nacionalnoye Proiz-Vodstvenno Agrarnoye Obyedinenye Massandra; *and*
- State Concern National Association of Producers Massandra.

6, str. Mira, Massandra, Yalta 98600, Ukraine; *and* 6, Mira str., Massandra, Yalta, Crimea 98650, Ukraine; *and* Mira str, h. 6, Massandra, Yalta, Crimea 98600, Ukraine; *and* 6, Myra st., Massandra, Crimea 98650, Ukraine;

(5) *State Enterprise Factory of Sparkling Wine Novy Svet,* a.k.a., the following six aliases:

- Derzhavne Pidpryemstvo Zavod Shampanskykh Vyn Novy Svet;
- Gosudarstvennoye Predpriyatiye Zavod Shampanskykh Vin Novy Svet;
- Novy Svet Winery;
- Novy Svet Winery State Enterprise;
- State Enterprise Factory of Sparkling Wines New World; *and*
- Zavod Shampanskykh Vyn Novy Svet, DP.

1 Shaliapin Street, Novy Svet Village, Sudak, Crimea 98032, Ukraine; *and* Bud. 1 vul. Shalyapina Smt, Novy Svet, Sudak, Crimea 98032, Ukraine; *and* 1 Shalyapina str. Novy Svet, Sudak 98032, Ukraine;

(6) *State Enterprise Magarach of the National Institute of Wine,* a.k.a., the following five aliases:

- Agrofirma Magarach Natsionalnogo Instytutu Vynogradu I Vyna Magarach, DP;
- Derzhavne Pidpryemstvo Agrofirma Magarach Natsionalnogo Instytutu Vynogradu I Vyna Magarach;
- Gosudarstvennoye Predpriyatiye Agro-Firma Magarach Nacionalnogo Instituta Vinograda I Vina Magarach;
- Magarach Agricultural Company Of National Institute Of Wine And Grapes Magarach; *and*
- State Enterprise Agricultural Company Magarach National Institute of Vine and Wine Magarach.

Bud. 9 vul. Chapaeva, S.Viline, Bakhchysaraisky R–N, Crimea 98433, Ukraine; *and* 9 Chapayeva str., Vilino, Bakhchisaray Region, Crimea 98433, *and* Ukraine; *and* 9 Chapayeva str., Vilino, Bakhchisarayski district 98433, Ukraine; *and* 9, Chapaeva Str., Vilino, Bakhchisaray Region, Crimea 98433, Ukraine; *and*

(7) *State Enterprise Universal-Avia*, a.k.a., the following six aliases:

- Crimean State Aviation Enterprise Universal-Avia;
- Gosudarstvennoye Unitarnoe Predpriyatie Respubliki Krym Universal;
- Gosudarstvennoye Unitarnoe Predpriyatie Respubliki Krym Universal-Avia;
- Gosudarstvennoye Predpriyatiye Universal-Avia;
- Universal-Avia, Crimea State Aviation Enterprise; *and*
- Universal-Avia, Gup RK.

5, Aeroflotskaya Street, Simferopol, Crimea 95024, Ukraine.

Cyprus

(1) *White Seal Holdings Limited*, 115 Spyrou Kyprianou Avenue, Limassol 3077, Cyprus.

Luxembourg

(1) *Maples SA*, Boulevard Royal 25/B 2449, Luxembourg.

Panama

(1) *Lerma Trading S.A.*, Calle 53a, Este, Panama.

Russia

(1) *Avia Group Terminal Limited Liability Company*, a.k.a., the following three aliases:

- AG Terminal OOO;
- LLC AG Terminal; *and*
- Obshchestvo S Ogranichennoi Otvetstvennostyu Avia Grupp Terminal, Ter.

Aeroport Sheremetyevo, Khimki, Moscovskaya Oblast 141400, Russia;

(2) *OAO Volgogradneftemash* (f.k.a. Dochernee Aktsionernoe Obshchestvo

Otkrytogo Tipa Volgogradneftemash Rossiiskogo Aktsionernogo Obshchestva Gazprom), a.k.a., the following two aliases:

- JSC Volgogradneftemash; *and*
- Otkrytoe Aktsionernoe Obshchestvo Volgogradneftemash.

45 Ulitsa Elektrolesovskaya, Volgograd, Volgogradskaya Oblast 400011, Russia;

(3) *Otkrytoe Aktsionernoe Obshchestvo Vneshneekonomicheskoe Obedinenie Tekhnopromeksport*, a.k.a., the following seven aliases:

- Joint Stock Company Foreign Economic Association Tekhnopromeksport;
- JSC Tekhnopromeksport;
- JSC Vo Tekhnopromeksport;
- OJSC Technopromeksport;
- Open Joint Stock Company Foreign Economic Association Tekhnopromeksport;
- VO Tekhnopromeksport, OAO; *and*
- “JSC TPE.”

d. 15 str. 2 ul. Novy Arbat, Moscow 119019, Russia; *and*

(4) *Transservice LLC*, a.k.a., the following three aliases:

- Limited Liability Company Transservis;
- Obshchestvo S Ogranichennoi Otvetstvennostyu Transservis; *and*
- OOO Transservis.

35 Prospekt Gubkina, Omsk, Omskaya Oblast 664035, Russia.

Switzerland

(1) *LTS Holding Limited* (f.k.a. IPP-International Petroleum Products Ltd.), Rue du Conseil-General 20, Geneva 1204, Switzerland. (See alternate address under United Kingdom).

United Kingdom

(1) *Fentex Properties LTD.*, Tortola, British Virgin Islands; *and*

(2) *LTS Holding Limited* (f.k.a. IPP-International Petroleum Products Ltd.), Tortola, British Virgin Islands. (See alternate address under Switzerland).

C. Clarification of Entity List Entries That Reference § 746.5

This final rule includes a clarification for how entries that include references to § 746.5 on the Entity List are to be interpreted. There are twenty entities on the Entity List that reference § 746.5 (Russian Industry Sector Sanctions). Nineteen of these entries advise an exporter, reexporter or transferor to review § 746.5 to make a determination whether an export, reexport or transfer (in-country) to any of the nineteen entities is destined to one of the three

prohibited end uses in Russia specified in § 746.5. The entries further advise that if the contemplated export, reexport, or transfer (in-country) is destined for one of the prohibited end uses, a license is required for all items subject to the EAR. The entries for these nineteen entities specify under the License Requirements column that a license is required “for all items subject to the EAR when used in projects specified in § 746.5 of the EAR.”

The twentieth entry, for Yuzhno-Kirinskoye Field, in the Sea of Okhotsk, also includes a reference to § 746.5, but uses different text to reference § 746.5, which was intentional by BIS. Specifically, this entry uses the parenthetical phrase “(See § 746.5 of the EAR)” in the License Requirements column for this entity. As was noted in the August 7, 2015 final rule (80 FR 47402), exports, reexports, and transfers (in-country) of all items subject to the EAR to this entity by any person without first obtaining a BIS license has been determined by the U.S.

Government to present an unacceptable risk of use in, or diversion to, the activities specified in paragraph (a)(1) of § 746.5, namely exploration for, or production of, oil or gas in Russian deepwater (greater than 500 feet) locations. Therefore, a license requirement for all items subject to the EAR is warranted. This means unlike the other nineteen entries that reference § 746.5 where the license requirement only applies if the item is destined for one of the three prohibited end uses specified in § 746.5, in the case of this one entry, Yuzhno-Kirinskoye Field, in the Sea of Okhotsk, any export, reexport or transfer (in-country) is presumptively within the scope of § 746.5, meaning a license is required for any item subject to the EAR without regard to the item’s end use. BIS also intends to include a new Russia FAQ on the BIS Web site to provide additional regulatory guidance on this issue of application, but the agency also determined it is helpful to include regulatory guidance on this issue in the preamble of this Entity List rule to assist the public’s understanding of these existing Entity List provisions. The scope of this entry is not changing, thus, this final rule does not make any changes to this entry.

Export Administration Act

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by the Notice of August 7,

2015, 80 FR 48233 (August 11, 2015), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222, as amended by Executive Order 13637.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct 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 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694-0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 43.8 minutes for a manual or electronic submission. Total burden hours associated with the PRA and OMB control number 0694-0088 are not expected to increase as a result of this rule. You may send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget (OMB), by email to *Jasmeet_K_*

Seehra@omb.eop.gov, or by fax to (202) 395-7285.

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

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment and a delay in effective date are inapplicable because this regulation involves a military or foreign affairs function of the United States. (See 5 U.S.C. 553(a)(1)). BIS implements this rule to protect U.S. national security or foreign policy interests by preventing items from being exported, reexported, or transferred (in country) to the persons being added to the Entity List. If this rule were delayed to allow for notice and comment and a delay in effective date, then the entities being added to the Entity List by this action would continue to be able to receive items without a license and to conduct activities contrary to the national security or foreign policy interests of the United States. In addition, publishing a proposed rule would give these parties notice of the U.S. Government's intention to place them on the Entity List and would create an incentive for these persons to either accelerate receiving items subject to the EAR to conduct activities that are contrary to the national security or foreign policy interests of the United States, and/or to take steps to set up additional aliases, change addresses, and other measures to try to limit the impact of the listing on the Entity List once a final rule was published. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

For the reasons stated in the preamble, the Bureau of Industry and Security amends part 744 of the Export Administration Regulations (15 CFR parts 730-774) as follows:

PART 744—[AMENDED]

■ 1. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of January 21, 2015, 80 FR 3461 (January 22, 2015); Notice of August 7, 2015, 80 FR 48233 (August 11, 2015); Notice of September 18, 2015, 80 FR 57281 (September 22, 2015); Notice of November 12, 2015, 80 FR 70667, November 13, 2015.

■ 2. Supplement No. 4 to part 744 is amended:

- a. By adding under Crimea region of Ukraine, in alphabetical order, seven entities;
- b. By adding under Cyprus, in alphabetical order, one Cypriot entity;
- c. By adding under Luxembourg, in alphabetical order, one Luxembourgish entity;
- d. By adding in alphabetical order the destination of Panama under the Country Column, and one Panamanian entity;
- e. By adding under Russia, in alphabetical order, four Russian entities;
- f. By adding under Switzerland, in alphabetical order, one Swiss entity; *and*
- g. By adding under the United Kingdom, in alphabetical order, two British entities.

The additions read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	Federal Register citation
*	*	*	*	*
CRIMEA REGION OF UKRAINE.	Aksionerhoe Obschestvo 'Yaltinskaya Kinodstudiya,' a.k.a., the following eight aliases: —CJSC Yalta-Film;	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.

Country	Entity	License requirement	License review policy	Federal Register citation
	<ul style="list-style-type: none"> —Film Studio Yalta-Film; —Joint Stock Company Yalta Film Studio; —JSC Yalta Film Studio; —Kinostudiya Yalta-Film; —Oao Yaltinskaya Kinostudiya; —Yalta Film Studio; <i>and</i> —Yalta Film Studios. Ulitsa Mukhina, Building 3, Yalta, Crimea 298063, Ukraine; <i>and</i> Sevastopolskaya 4, Yalta, Crimea, Ukraine.	*	*	*
	Crimean Enterprise Azov Distillery Plant, a.k.a., the following five aliases: <ul style="list-style-type: none"> —Azovsky Likero gorilchany Zavod, Krymske Respublikanske Pidpryemstvo; —Azovsky Likero vo-Dochny Zavod; —Crimean Republican Enterprise Azov Distillery; —Crimean Republican Enterprise Azovsky Likero vodochny Zavod; <i>and</i> —Krymske Respublikanske Pidpryemstvo Azovsky Likero gorilchany Zavod Bud. 40 vul. Zaliznychna, Smt Azovske, Dzhankoisky R–N, Crimea 96178, Ukraine; <i>and</i> 40 Railway St., Azov, Dzhankoy District 96178, Ukraine; <i>and</i> 40 Zeleznodorozhnaya str., Azov, Jankoysky District 96178, Ukraine.	*	*	*
	Resort Nizhnyaya Oreanda (f.k.a., Federalnoe Gosudarstvennoe Byudzhethnoe Uchrezhdenie Sanatori Nizhnyaya Oreanda Upravleniya), a.k.a., the following three aliases: <ul style="list-style-type: none"> —Federalnoe Gosudarstvennoe Byudzhethnoe Uchrezhdenie Sanatori Nizhnyaya Oreanda Upravleniya Delami Prezidenta Rossiskoi Fe; —FGBU Sanatori Nizhnyaya Oreanda; <i>and</i> —Sanatorium Nizhnyaya Oreanda Pgt Oreanda, Dom 12, Yalta, Crimea 298658, Ukraine; <i>and</i> Resort Nizhnyaya Oreanda, Oreanda, Yalta 08655, Crimea; Oreanda—12, Yalta 298658, Crimea.	*	*	*
	State Concern National Production and Agricultural Association Massandra, a.k.a., the following four aliases: <ul style="list-style-type: none"> —Massandra National Industrial Agrarian Association of Wine Industry; —Massandra State Concern, National Production and Agrarian Union, OJSC; —Nacionalnoye Proiz-Vodstvenno Agrarnoye Obyedinenye Massandra; <i>and</i> —State Concern National Association of Producers Massandra. 6, str. Mira, Massandra, Yalta 98600, Ukraine; <i>and</i> 6, Mira str., Massandra, Yalta, Crimea 98650, Ukraine; <i>and</i> Mira str, h. 6, Massandra, Yalta, Crimea 98600, Ukraine; <i>and</i> 6, Myra st., Massandra, Crimea 98650, Ukraine.	*	*	*
		For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.
		For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.
		For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.

Country	Entity	License requirement	License review policy	Federal Register citation
*	*	*	*	*
	<p>State Enterprise Factory of Sparkling Wine Novy Svet, a.k.a., the following six aliases:</p> <ul style="list-style-type: none"> —Derzhavne Pidpryemstvo Zavod Shampanskykh Vyn Novy Svit; —Gosudarstvenoye Predpriyatiye Zavod Shampanskykh Vin Novy Svet; —Novy Svet Winery; —Novy Svet Winery State Enterprise; —State Enterprise Factory of Sparkling Wines New World; <i>and</i> —Zavod Shampanskykh Vyn Novy Svit, DP. <p>1 Shaliapin Street, Novy Svet Village, Sudak, Crimea 98032, Ukraine; <i>and</i> Bud. 1 vul. Shalyapina Smt, Novy Svit, Sudak, Crimea 98032, Ukraine; <i>and</i> 1 Shalyapina str. Novy Svet, Sudak 98032, Ukraine.</p>	<p>For all items subject to the EAR. (See § 744.11 of the EAR).</p>	<p>Presumption of denial</p>	<p>80 FR [INSERT FR PAGE NUMBER];12/28/2015.</p>
*	*	*	*	*
	<p>State Enterprise Magarach of the National Institute of Wine, a.k.a., the following five aliases:</p> <ul style="list-style-type: none"> —Agrofirma Magarach Natsionalnogo Instytutu Vynogradu I Vyna Magarach, DP; —Derzhavne Pidpryemstvo Agrofirma Magarach Natsionalnogo Instytutu Vynogradu I Vyna Magarach; —Gosudarstvenoye Predpriyatiye Agro-Firma Magarach Nacionalnogo Instituta Vinograda I Vina Magarach; —Magarach Agricultural Company Of National Institute Of Wine And Grapes Magarach; <i>and</i> —State Enterprise Agricultural Company Magarach National Institute of Vine and Wine Magarach <p>Bud. 9 vul. Chapaeva, S.Viline, Bakhchysaraisky R–N, Crimea 98433, Ukraine; <i>and</i> 9 Chapayeva str., Vilino, Bakhchisaray Region, Crimea 98433, <i>and</i> Ukraine; <i>and</i> 9 Chapayeva str., Vilino, Bakhchisarayski district 98433, Ukraine; <i>and</i> 9, Chapaeva Str., Vilino, Bakhchisaray Region, Crimea 98433, Ukraine.</p>	<p>For all items subject to the EAR. (See § 744.11 of the EAR).</p>	<p>Presumption of denial</p>	<p>80 FR [INSERT FR PAGE NUMBER] 12/28/2015.</p>
*	*	*	*	*
	<p>State Enterprise Universal-Avia, a.k.a., the following six aliases:</p> <ul style="list-style-type: none"> —Crimean State Aviation Enterprise Universal-Avia; —Gosudarstvennoe Unitarnoe Predpriyatie Respubliki Krym Universal; —Gosudarstvennoe Unitarnoe Predpriyatie Respubliki Krym Universal-Avia; —Gosudarstvenoye Predpriyatiye Universal-Avia; —Universal-Avia, Crimea State Aviation Enterprise; <i>and</i> —Universal-Avia, Gup RK <p>5, Aeroflotskaya Street, Simferopol, Crimea 95024, Ukraine.</p>	<p>For all items subject to the EAR. (See § 744.11 of the EAR).</p>	<p>Presumption of denial</p>	<p>80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.</p>

Country	Entity	License requirement	License review policy	Federal Register citation
*	*	*	*	*
CYPRUS	White Seal Holdings Limited, 115 Spyrou Kyprianou Avenue, Limassol 3077, Cyprus.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.
*	*	*	*	*
LUXEMBOURG	Maples SA, Boulevard Royal 25/B 2449, Luxembourg.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.
*	*	*	*	*
PANAMA	Lerma Trading S.A., Calle 53a, Este, Panama.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.
*	*	*	*	*
RUSSIA	Avia Group Terminal Limited Liability Company, a.k.a., the following three aliases: —AG Terminal OOO; —LLC AG Terminal; <i>and</i> —Obshchestvo S Ogranichennoi Otvetstvennostyu Avia Grupp Terminal, Ter. Aeroport Sheremetyevo, Khimki, Moscovskaya Oblast 141400, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.
*	*	*	*	*
	OAO Volgogradneftemash (f.k.a. Dochernee Aktsionerhoe Obshchestvo Otkrytogo Tipa Volgogradneftemash Rossiiskogo Aktsionernogo Obshchestva Gazprom), a.k.a., the following two aliases: —JSC Volgogradneftemash; <i>and</i> —Otkrytoe Aktsionerhoe Obshchestvo Volgogradneftemash. 45 Ulitsa Elektrolesovskaya, Volgograd, Volgogradskaya Oblast 400011, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015.
*	*	*	*	*
	Otkrytoe Aktsionerhoe Obshchestvo Vneshneekonomicheskoe Obedinenie Tekhnopromeksport, a.k.a., the following seven aliases: —Joint Stock Company Foreign Economic Association Tekhnopromexport; —JSC Tekhnopromexport; —JSC Vo Tekhnopromexport; —OJSC Tekhnopromexport; —Open Joint Stock Company Foreign Economic Association Tekhnopromexport; —VO Tekhnopromeksport, OAO; <i>and</i> —“JSC TPE.”	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	80 FR [INSERT FR PAGE NUMBER] 12/28/2015.
*	*	*	*	*

Country	Entity	License requirement	License review policy	Federal Register citation
	d. 15 str. 2 ul. Novy Arbat, Moscow 119019, Russia. *	*	*	*
	Transservice LLC, a.k.a., the following three aliases: —Limited Liability Company Transservis; —Obschestvo S Ogranichennoi Otvetstvennostyu Transservis; and —OOO Transservis. 35 Prospekt Gubkina, Omsk, Omskaya Oblast 664035, Russia. *	For all items subject to the EAR. (See § 744.11 of the EAR) *	Presumption of denial *	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015. *
	*	*	*	*
SWITZERLAND	*	*	*	*
	LTS Holding Limited (f.k.a. IPP-International Petroleum Products Ltd.), Rue du Conseil-General 20, Geneva 1204, Switzerland. (See alternate address under United Kingdom). *	For all items subject to the EAR. (See § 744.11 of the EAR). *	Presumption of denial *	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015. *
	*	*	*	*
UNITED KINGDOM.	*	*	*	*
	Fentex Properties LTD., Tortola, British Virgin Islands. *	For all items subject to the EAR. (See § 744.11 of the EAR). *	Presumption of denial *	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015. *
	LTS Holding Limited (f.k.a. IPP-International Petroleum Products Ltd.), Tortola, British Virgin Islands. (See alternate address under Switzerland). *	For all items subject to the EAR. (See § 744.11 of the EAR). *	Presumption of denial *	80 FR [INSERT FR PAGE NUMBER]; 12/28/2015. *

Dated: December 22, 2015.

Eric L. Hirschhorn,

Under Secretary of Commerce for Industry and Security.

[FR Doc. 2015-32607 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 606 and 610

[Docket No. FDA-1999-N-0114 (formerly 1999N-2337)]

RIN 0910-AB76

Hepatitis C Virus “Lookback” Requirements Based on Review of Historical Testing Records; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the biologics regulations by removing the Hepatitis C Virus (HCV) “lookback” requirements regarding review of

historical testing records. FDA is taking this action because the HCV “lookback” regulations based on review of historical testing records expired on August 24, 2015, due to the sunset provision provided under the regulation.

DATES: This rule is December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Gretchen Opper, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 24, 2007 (72 FR 48766), FDA published a final rule entitled “Current Good Manufacturing Practice for Blood and Blood Components; Notification of Consignees and Transfusion Recipients Receiving Blood and Blood Components at Increased Risk of Transmitting Hepatitis C Virus Infection (‘Lookback’).” Under

§ 610.48 (21 CFR 610.48) of the final rule, FDA established HCV “lookback” requirements based on review of historical testing records. The requirements under § 610.48 were to remain in effect for 8 years after the date of publication of the final rule in the **Federal Register** (§ 610.48(e)). Section 610.48(e) specifically provides that the section expired on August 24, 2015; therefore, FDA is removing this regulation from Title 21 of the Code of Federal Regulations.

FDA is also making conforming changes to other biologics regulations where § 610.48 is referenced.

FDA is revising the biologics regulations as follows:

- Removing and reserving § 610.48.
- Revising § 606.100(b)(19) (21 CFR 606.100(b)(19)) by removing the reference to § 610.48.
- Revising § 606.160(b)(1)(viii) by removing the reference to § 610.48.

Publication of this document constitutes final action under the Administrative Procedure Act (5 U.S.C. 553). FDA has determined that notice and public comments are unnecessary because the amendments to the regulations provide only technical changes to remove and update information and are nonsubstantive.

List of Subjects

21 CFR Part 606

Blood, Labeling, Laboratories, Reporting and recordkeeping requirements.

21 CFR Part 610

Biologics, Labeling, 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 parts 606 and 610 are amended as follows:

PART 606—CURRENT GOOD MANUFACTURING PRACTICE FOR BLOOD AND BLOOD COMPONENTS

- 1. The authority citation for 21 CFR part 606 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 355, 360, 360j, 371, 374; 42 U.S.C. 216, 262, 263a, 264.

§ 606.100 [Amended]

- 2. Amend § 606.100(b)(19) introductory text by removing “§§ 610.46, 610.47, and 610.48” and adding in its place “§§ 610.46 and 610.47”.

§ 606.160 [Amended]

- 3. Amend § 606.160(b)(1)(viii) by removing “§§ 610.46, 610.47, and, 610.48” and adding in its place “§§ 610.46 and 610.47”.

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

- 4. The authority citation for 21 CFR part 610 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360c, 360d, 360h, 360i, 371, 372, 374, 381; 42 U.S.C. 216, 262, 263, 263a, 264.

§ 610.48 [Removed and Reserved]

- 5. Remove and reserve § 610.48.

Dated: December 21, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–32477 Filed 12–24–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2015–1074]

RIN 1625–AA00

Safety Zone; New Year’s Eve Firework Displays, Chicago River, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone that encompasses all waters of the Main Branch of the Chicago River between the Michigan Avenue Highway Bridge and the west entrance to the Chicago Harbor Lock. The safety zone is intended to restrict vessels from a portion of the Main Branch of the Chicago River from 11:30 p.m. on December 31, 2015 to 12:15 a.m. on January 1, 2016. This temporary safety zone is necessary to protect the surrounding public and vessels from the hazards associated with multiple barge based firework displays for Chicago’s New Year’s Eve Celebration.

DATES: This rule will be effective from 11:30 p.m. on December 31, 2015 to 12:15 a.m. on January 1, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG–2015–1074 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LT Lindsay Cook, Marine Safety Unit Chicago, U.S. Coast Guard; telephone (630) 986–2155, email Lindsay.N.Cook@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
E.O. Executive order
FR Federal Register
NPRM Notice of proposed rulemaking
Pub. L. Public Law
§ 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 public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish a NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be impracticable because it would inhibit the Coast Guard’s ability to protect the public and vessels from the hazards associated with multiple barge based firework displays on the Main Branch of the Chicago River.

We are issuing this rule, and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable.

III. Legal Authority and Need for Rule

The legal basis for the rule is the Coast Guard’s authority to establish safety zones: 33 U.S.C. 1231; 33 CFR 1.05–1, 160.5; Department of Homeland Security Delegation No. 0170.1.

December 31, 2015 and January 1, 2016 Chicago’s New Year’s Eve firework displays will take place from multiple barge based launch sites on the Main

Branch of the Chicago River. The Captain of the Port, Lake Michigan has determined that the firework displays will pose a significant risk to public safety and property. Such hazards include falling debris, flaming debris, and collisions among spectator vessels. The safety zone is necessary to protect spectators from hazards associated with aerial firework displays.

IV. Discussion of the Rule

With the aforementioned hazards in mind, the Captain of the Port, Lake Michigan has determined that a temporary safety zone is necessary to ensure the safety of the public and the participants during Chicago's New Year's Eve Fireworks Display on the Main Branch of the Chicago River. This safety zone will be effective from 11:30 p.m. on December 31, 2015 to 12:15 a.m. on January 1, 2016. The safety zone will encompass all waters of the Main Branch of the Chicago River between the Michigan Avenue Highway Bridge and west entrance of the Chicago Harbor Lock. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan, or a designated on-scene representative. The Captain of the Port or a designated on-scene representative may be contacted via VHF Channel 16.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

E.O.s 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. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action," under E.O. 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be

relatively small and effective for less than a one hour period on December 31, 2015 and January 1, 2016. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

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.

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this temporary rule on small entities. This rule will affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit on a portion of the Main Branch of the Chicago River on December 31, 2015 and January 1, 2016.

The safety zone will not have a significant economic impact on a substantial number of small entities for the reasons cited in the *Regulatory Planning and Review* section. Additionally, before the enforcement of the zone, we will issue local Broadcast Notice to Mariners and Public Notice of Safety Zone so vessel owners and operators can plan accordingly.

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The

Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under E.O. 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 E.O. 13132.

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, 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 the establishment of a safety zone for the New Year's Eve firework displays on the Main Branch of the Chicago River. It is categorically excluded from further review under paragraph 34(g) of Figure 2-1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09-1074 to read as follows:

§ 165.T09-1074 Safety Zone; New Year's Eve Fireworks Display, Chicago River, Chicago, IL.

(a) *Location*. All waters of the the Main Branch of the Chicago River between the Michigan Avenue Highway Bridge and the west entrance of the Chicago Harbor Lock.

(b) *Enforcement Period*. This rule will be enforced from 11:30 p.m. on December 31, 2015 to 12:15 a.m. on January 1, 2016.

(c) *Regulations*. (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan or a designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Lake Michigan or a designated on-scene representative.

(3) The "on-scene representative" of the Captain of the Port, Lake Michigan is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port, Lake Michigan to act on his or her behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Lake Michigan or an on-scene representative to obtain permission to do so. The Captain of the Port, Lake Michigan or an on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Lake Michigan, or an on-scene representative.

Dated: December 11, 2015.

A.B. Cocanour,

Captain, U. S. Coast Guard, Captain of the Port, Lake Michigan.

[FR Doc. 2015-32642 Filed 12-24-15; 8:45 am]

BILLING CODE 9110-04-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 152

[EPA-HQ-OPP-2010-0305; FRL-9934-44]

RIN 2070-AJ79

Pesticides; Revisions to Minimum Risk Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is revising its regulations to more clearly describe the active and inert ingredients that are permitted in products eligible for the minimum risk pesticide exemption. EPA is improving the clarity and transparency of the minimum risk exemption by codifying the inert ingredients list and by adding specific chemical identifiers, where available, for all eligible active and inert ingredients. These specific identifiers will make it easier for manufacturers, the public, and Federal, state, and tribal inspectors to determine the specific chemical substances that are permitted in minimum risk pesticide products. EPA is also modifying the labeling requirements in the exemption to require products to list ingredients on the label with a designated label display name and to provide the producer's

contact information on the product's label. These changes will provide more consistent information for consumers and clearer regulations for producers, and will simplify compliance determination by states, tribes, and EPA.

DATES: This final rule is effective February 26, 2016. The compliance date for the requirements to label ingredients with a label display name and to provide company contact information on the label is February 26, 2019.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2010-0305, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Ryne Yarger, Field and External Affairs Divisions (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (703) 605-1193; fax number: (703) 305-5884; email address: yarger.ryne@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be affected by this action if you manufacture, distribute, sell, or use minimum risk pesticide products. Minimum risk pesticide products are exempt from registration and other requirements under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and are described in 40 CFR 152.25(f). The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers of these products, which includes pesticide and other agricultural chemical manufacturers (NAICS codes 325320 and 325311), as well as other manufacturers in similar industries such as animal feed (NAICS

code 311119), cosmetics (NAICS code 325620), and soap and detergents (NAICS code 325611).

- Manufacturers who may also be distributors of these products, which includes farm supplies merchant wholesalers (NAICS code 424910), drug and druggists merchant wholesalers (NAICS code 424210), and motor vehicle supplies and new parts merchant wholesalers (NAICS code 423120).

- Retailers of minimum risk pesticide products (some of which may also be manufacturers), which includes nursery, garden center, and farm supply stores (NAICS code 444220), outdoor power equipment stores (NAICS code 444210), and supermarkets (NAICS code 445110).

- Users of minimum risk pesticide products, including the public in general, as well as exterminating and pest control services (NAICS code 561710), landscaping services (NAICS code 561730), sports and recreation institutions (NAICS code 611620), and child daycare services (NAICS code 624410). Many of these companies also manufacture minimum risk pesticide products.

B. What action is the agency taking?

EPA is revising its regulations to more clearly describe the active and inert ingredients permitted in products eligible for the minimum risk pesticide exemption (40 CFR 152.25(f)). EPA is doing this by codifying the inert ingredients list and reformatting the active and inert ingredients lists, adding specific chemical identifiers, where available, for each eligible active and inert ingredient. These identifiers, through the use of Chemical Abstracts Service Registry Numbers (CAS Nos.), will make it easier for manufacturers, the public, and Federal, state, and tribal inspectors to determine the specific chemical substances that are permitted in minimum risk pesticide products. EPA is also modifying the labeling requirements in the exemption to require the use of a designated label display name for each ingredient in the lists of ingredients on minimum risk pesticide product labels, and to require producers to provide contact information on their products' labels. EPA is finalizing most of the regulatory text that was proposed in the **Federal Register** of December 31, 2012 (Ref. 1), with changes based on the comments submitted to the Agency.

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

This action is issued under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act

(FIFRA), 7 U.S.C. 136 *et seq.*, particularly sections 3 and 25.

D. What are the incremental costs and benefits of the action?

EPA has determined that the total cost for industry to comply with the labeling requirements of this rulemaking is approximately \$800,000 under a 3-year implementation period as described in the Cost Analysis for this rulemaking (Ref. 2). EPA proposed a 2-year implementation period, but instead determined to use a 3-year implementation period based on public comments since 3 years would be the most sensitive to the smallest firms. The costs for industry to comply with this rulemaking are a result of meeting the new labeling requirements to list ingredients using a designated label display name and to list the company's contact information on the product's label. Since most companies update their labels every 3 years, EPA has determined that a rule implementation period of 3 years will allow most companies to meet the labeling requirements of the rule as part of their normal labeling practices and will therefore keep industry costs to a minimum.

Benefits of the rule include the improved clarity of the ingredient lists and the improved clarity and transparency of how minimum risk products are labeled. By providing specific chemical identifiers, such as the CAS Nos. for active and inert ingredients, manufacturers and Federal, state, and tribal inspectors will be able to easily determine whether a chemical substance can be used in a minimum risk product, *i.e.*, is eligible for the exemption. These regulatory changes improve compliance and enforcement of the exemption. Requiring ingredients to be listed on the label with common label display names will help inspectors to efficiently determine whether a product is in compliance with the exemption, and will also provide improved clarity and transparency for consumers who want more information about the ingredients used in a product. Additionally, requiring company contact information on labels will provide further transparency and accountability should an adverse event occur while using a product.

II. Background

A. Summary of the Proposed Rule

EPA published a notice of proposed rulemaking (NPRM) in the **Federal Register** of December 31, 2012 (77 FR 76979) (FRL-9339-1) (Ref. 1) proposing to revise the regulations in 40 CFR

152.25(f) that created an exemption from FIFRA requirements for minimum risk pesticide products. The primary goal of the proposed revisions was to clarify the conditions of exemption for minimum risk pesticides by clearly specifying the chemical substances permitted in minimum risk pesticide products. EPA's proposed revisions clarified the specific active and inert ingredients permitted in minimum risk pesticide products, specified how the ingredients should be presented on the label, and provided consumers with the manufacturer's contact information on the product's label. EPA's intent with the proposed revisions was to clarify the terms of the original exemption and to provide additional clarity and transparency concerning the ingredients that are currently used in exempted products. As described in the proposal, no ingredients were intended to be added or removed from the lists.

B. Public Comment on the Proposed Rule

EPA evaluated all comments received and developed a Response to Comments document, which is available in the docket at <http://www.regulations.gov> using Docket ID No. EPA-HQ-OPP-2010-0305 (Ref. 3). Only the key comments within the scope of the proposed rule and the Agency's responses to those comments are summarized here. For detailed responses, please see the Response to Comment document (Ref. 3).

1. *United States Pharmacopeia (USP) Specifications for 19 active ingredients.* Several commenters expressed concern that adding a USP specification for 19 active ingredients in the active ingredients table would go beyond the stated purpose of the proposal, which was to clarify the original active and inert ingredient lists. These commenters said that USP standards might ultimately result in the need to reformulate many products since technical grade active ingredients currently eligible would be removed from the exemption because the ingredients would be unlikely to meet the USP standards. These commenters said this change would create a new additional burden on minimum risk pesticide product manufacturers.

In response, for the final regulation, EPA has removed the USP specification for all of the active ingredients except for castor oil. EPA recognizes that the addition of USP specifications for the active ingredients identified would result in the removal of technical grade active ingredients that are currently eligible for the minimum risk exemption. Since this rulemaking is to

clarify the currently eligible active and inert ingredients and not to add or remove substances from the ingredients lists, EPA is not including the USP specification for 18 of the 19 active ingredients in the final regulatory text. EPA, however, has retained the specification for castor oil to say “United States Pharmacopeia (USP) standard or equivalent” since this specification was part of the original active ingredients list.

2. *Brackets in the label display name.* One commenter stated that requiring certain label display names to contain bracketed text fails to add additional clarity to consumers and inspectors and could create confusion. The commenter cited several inert ingredients with bracketed information in the label display name, such as vinegar (maximum 8% acetic acid in solution). The commenter recommended that the Agency remove the bracketed text included in the “Label Display Name” column, but continue to leave the bracketed information solely in the “Chemical Name” column since the bracketed text best serves as clarification for manufacturers to meet the requirements of the minimum risk exemption. The commenter suggested that keeping the information in the “Chemical Name” column and providing such information at state registration or upon request enables efficient monitoring of the exempted ingredients in a minimum risk pesticide, and allows for a more consumer-friendly label.

In response, EPA believes that the bracketed information provides important clarifying and safety information for manufacturers to meet the requirements of the exemption and for those states who review and register minimum risk pesticide products. This information ranges from safety limitations on certain inert ingredients such as vinegar (maximum 8% acetic acid in solution) to chemical formulas for inert ingredients such as calcite (Ca(CO₃)). However, after examining the inert ingredients with bracketed information in the label display name, EPA agrees with the commenter that this information is not necessary to include on the label. The information provided within the brackets is more for manufacturers to correctly identify the specific inert ingredients and understand limitations on inert ingredients than it is to improve the clarity of the labels for consumers. EPA agrees that this information could potentially create confusion for consumers and may add more information than what consumers would want or need about an inert

ingredient. Therefore, EPA has removed the bracketed information from the “Label Display Name” column in the final regulatory text. EPA, however, will continue to provide the bracketed information for those inert ingredients in the “Chemical Name” column to help manufacturers comply with the minimum risk exemption’s requirements.

3. *Missing active ingredients.* Two commenters noted that common salt (sodium chloride) was missing from the proposed active ingredients table, while one of the commenters also noted that ground sesame plant was not listed in the active ingredients list.

In response, the deletion of sodium chloride and ground sesame plant from the exemption were inadvertent omissions in the proposed regulatory text. EPA did not intend for these ingredients to be removed from the exemption. EPA is restoring sodium chloride (CAS No. 7647–14–5) into the table of active ingredients, and is placing “includes ground sesame plant” into the specifications column for “sesame” in the final regulatory text.

4. *Inclusion of “spearmint oil” under the term “mint oil.”* Several commenters suggested that spearmint oil (CAS No. 8008–79–5) should be included under the definition of “mint oil” in the active ingredients table. The commenters stated that “mint oil” could include several varieties under the genus *Mentha*, and that spearmint oil has traditionally been accepted as an eligible active ingredient by the Agency. One commenter suggested that EPA needs to address the other oils that are broadly categorized as mint, while another commenter suggested that EPA should include specific notation or include all CAS numbers whenever multiple CAS numbers may be applicable.

In response, during the development of the proposal, EPA considered the historical use of the terms “mint” and “mint oil.” “Mint” is a broad term for the genus *Mentha*, and could represent a number of different mint or mint oils. However, in promulgating the minimum risk exemption, EPA did not intend the term “mint and mint oil” to include all oils from the genus *Mentha*. Peppermint and peppermint oil (derived from *Mentha piperita*), for example, was listed separately from “mint and mint oil” in the 1996 active ingredient list. When the minimum risk exemption was promulgated in 1996, “mint and mint oil” was intended to refer only to cornmint and cornmint oil (*Mentha arvensis*), since spearmint oil (*Mentha spicata*) at that time was a registered active ingredient. However, “mint and

mint oil” was written broadly so that spearmint oil could also be included under this term (Ref. 3).

EPA agrees with the commenters that spearmint oil has traditionally been accepted under the definition of “mint oil” and has been regarded as a minimum risk active ingredient by the Agency. Therefore, in addition to cornmint oil, EPA is including the CAS No. for spearmint oil (CAS No. 8008–79–5) in the active ingredients list. Additionally, since no other ingredients were intended to be included under “mint and mint oil” when the minimum risk exemption was written, EPA is also revising how cornmint, cornmint oil, spearmint, and spearmint oil are listed in the table. Instead of being identified under the general terms “mint” and “mint oil,” which has caused confusion in the past, these terms are being removed from the active ingredients list and are being replaced with separate listings for “cornmint,” “cornmint oil,” “spearmint,” and “spearmint oil.” EPA believes that this change will improve the clarity and transparency of the listings for these mints and mint oils, while also being more consistent with how the Agency lists these specific substances in other databases.

Since the purpose of this rulemaking is to clarify those ingredients that were intended to be exempt under the original exemption and not to add or remove ingredients, EPA is not reassessing the appropriateness of whether or not other mints or mint oils should be included under this rulemaking. If stakeholders have information that they believe supports the inclusion of other mints or mint oils, they can provide such information to EPA in a petition for evaluation. EPA will consider and respond to all such petitions.

5. *Use of CAS Nos. to identify eligible ingredients.* While several commenters expressed support for using CAS Nos. to identify eligible ingredients when available, one commenter stated that EPA’s assumption that CAS Nos. are unique chemical identifiers is not accurate for every ingredient. The commenter noted, for example, that many ingredients have multiple CAS Nos. that could apply, other ingredients have none, and many CAS Nos. are defined as broad general categories.

The commenter recommended that EPA add the Consumer Specialty Products Association’s Consumer Product Ingredients Dictionary (CSPA Dictionary) to the list of reference sources because the CSPA Dictionary Nomenclature Committee addresses the issues identified above. The commenter stated that the CSPA Dictionary

contains monographs developed by the Committee to establish consistent nomenclature for consumer product ingredients (including those in antimicrobial and pest management products) submitted for inclusion, and carefully defines each ingredient, including all CAS Nos. and other names the Committee finds for the ingredient, in addition to recommending a CSPA name that is judged to be best for consumer ingredient communication. The commenter suggested that including the CSPA Dictionary as a nomenclature option would further the stated goals of identifying the active ingredients by universally accepted names, since it includes all of the CAS Nos. and names where they are available and considered applicable.

In response, EPA has consistently provided the chemical names, as determined by the Chemical Abstracts Service, and CAS Nos., when available, for each of the eligible ingredients on the minimum risk inert ingredients list that has been provided on the Agency's Web site. EPA's experience with providing this information on the publicly-available inerts list has not shown to be problematic in the past. CAS Index Names and CAS Nos. are generally recognized as universal identifiers for chemicals, which helps to reduce confusion and improves clarity for the permitted ingredients. In fact, the use of these chemical names and CAS Nos. have benefitted state reviewers and formulators by providing the specific chemical identifiers needed to determine whether an inert ingredient is or is not permitted in minimum risk pesticide products. CAS Nos. are also required on Material Safety Data Sheets, which makes the CAS No. a useful tool for enforcement purposes. EPA believes that continuing this practice for the inert ingredient list and providing similar information in the active ingredients list will provide the specificity needed to help with compliance and enforcement of the exemption while maintaining consistency with Agency practices.

Regarding the use of the CSPA Dictionary as a reference option, the CSPA Dictionary is not a publicly-available information source, and individuals would have to purchase the dictionary in order to reference the information provided in it. Therefore, EPA believes that referencing the CSPA Dictionary would reduce transparency. While a Web page does offer access to publicly-available indices associated with the CSPA Dictionary, EPA does not believe that these indices alone offer improved transparency and clarity. EPA's intent in proposing the use of a

label display name was to provide a chemical name more understandable to many consumers, thus increasing transparency and consistency. Additionally, a standardized label display name provides the opportunity for state inspectors to become familiar with the name, thus decreasing label review timeframes. EPA believes that the CAS approach provides the most consistent and transparent way to provide information since this information is universally recognized and consistent with how the Agency has been identifying chemicals in the past.

6. Codification of the inert ingredient list and the need for an efficient mechanism for adding or removing ingredients from the lists. Several commenters expressed concerns about the codification of the inert ingredient list. Since the 1996 promulgation of the minimum risk exemption, the list has been held as a reference within 40 CFR 152.25(f)(2), updated periodically, and maintained on EPA's public Web site. The commenters questioned what codification would mean for getting ingredients added or removed from the list. These commenters understood that notice and comment rulemaking would be needed to make changes to the inert ingredients list once codified in 40 CFR 152.25(f). Accordingly, the commenters suggested that the rulemaking process would inadvertently create a barrier to adding new ingredients, as well as potentially slowing the Agency's ability to remove an ingredient should the need arise. The commenters questioned if an efficient mechanism could be developed so that additions or deletions from the list could be easily accomplished.

In response, for the final regulation, EPA believes that codifying the inert ingredient list in 40 CFR 152.25(f)(2) provides immediate benefits to all parties. An inert ingredient list directly in the regulations offers much needed clarity to Federal, state, and tribal inspectors and manufacturers. Having all of the ingredients codified also improves the efficiency of inspections because inspectors will not have to look through multiple sources to find the information they need.

EPA understands that stakeholders may want to add or remove ingredients from the ingredient lists for various reasons. EPA has been examining ways to make the process of adding or removing an ingredient from the exemption as streamlined as possible while meeting the requirements of notice and comment rulemaking. For example, EPA is considering developing guidance that would describe the process and types of information EPA may need for a stakeholder to request

the addition or removal of an ingredient from the lists. Any guidance that EPA may develop in the future for minimum risk pesticides would be available on EPA's Web site at <http://www2.epa.gov/minimum-risk-pesticides>.

EPA believes that codifying the inert ingredient list and revising both the active and inert ingredient lists as soon as possible via this final rule, even if the guidance is not yet available, is appropriate to provide the immediate benefits previously described. Companies may at any time petition the Agency to add or remove an ingredient from the active or inert ingredient lists under the Administrative Procedure Act, even in the absence of guidance. EPA cannot predict in advance what the response will be to any particular petition to amend the list of ingredients eligible for the exemption. If the Agency were to grant such a petition, the changes to the ingredient lists would be subject to notice and comment rulemaking.

7. Proposed timeframe for implementation. Most commenters indicated that the proposed 2-year compliance period was reasonable, although a few commenters supported a 3-year implementation period that would allow the smallest companies more time to complete the changes and sell existing stock at minimal cost.

In response, EPA has decided to use a 3-year compliance period instead of the proposed 2-year compliance period. EPA's Cost Analysis document (Ref. 2) indicated that the costs to change labels over a 2-year compliance period would cost the average small business \$14,634, or 0.5% of their gross revenue. However, a 3-year compliance period would be the most sensitive to the smallest firms, costing the average small business \$3,857, or 0.1% of their gross revenue. Based on estimates described in the Cost Analysis, companies typically change labels every 3 years, so costs to comply with the changes made in this rulemaking would be reduced by almost 75% when using a 3-year compliance period instead of a 2-year timeframe.

8. Tolerance/tolerance exemptions for minimum risk pesticide ingredients. One state commenter indicated that the most challenging issue for their state has been the lack of understanding about when residue tolerances or tolerance exemptions are required for products intended for use on food or feed sites. The commenter stated that they regularly encounter minimum risk products labeled for food/feed uses that do not comply with the tolerance requirements in 40 CFR part 180, and have been challenged over this issue by

several registrants. The commenter stated this problem is exacerbated by poor guidance, conflicting messages received by registrants from direct contacts within EPA, and inconsistent regulation among states regarding the issue. The commenter stated that the proposed revisions will do little to alleviate the problems associated with meeting the requirements for residue tolerances or exemptions from the tolerance requirement.

Another state commenter stated that better clarification is needed regarding allowed ingredients that do not have tolerance exemptions for residues that may end up on food or feed. The commenter stated that the current minimum risk exemption language makes no mention that exemption of a product is conditional on limitations on food use sites for products containing active and/or inert ingredients without tolerance exemptions. With the language provided in the proposed rule, the commenter stated that if EPA's intent is that minimum risk products must restrict labeled use sites based on the status of tolerance or tolerance exemptions of the ingredients, then the Agency should clearly state that as a requirement of the exemption. The commenter did not believe that referring minimum risk pesticide manufacturers to guidance with the suggestion that they consult tolerance information would be sufficient.

The commenter also stated that even if EPA amended the exemption to add label restrictions for food crop use sites as a condition of the exemption, this still would not be enough. The commenter argued that since these products are exempt from FIFRA, the prohibition in FIFRA on use of pesticides inconsistent with label directions would not apply. The commenter stated that while some states such as theirs are able to enforce minimum risk pesticide labels, EPA and the states cannot require the user to adhere to directions on labels for exempted products. The commenter also stated that the general reference to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA) in the proposal is not sufficient authority for their state to deny registration applications or stop the distribution of a minimum risk exempt product that has food use sites but no tolerance exemption for one or more ingredients, and that the same is true for the guidance referenced in the proposed regulatory text. The commenter indicated that their state does not have the authority to enforce FFDCA. As a result, the commenter encouraged EPA to not include ingredients as allowable

active ingredients in minimum risk pesticides exempted from FIFRA if EPA does not have enough information to issue a broad tolerance exemption for use on food crops.

In response, this rule does not attempt to address when a tolerance or tolerance exemption may be required or to list existing tolerances or exemptions applicable to minimum risk pesticides. EPA understands that there can be confusion regarding whether a minimum risk pesticide ingredient is included in a pesticide tolerance or tolerance exemption, and regarding when a tolerance or tolerance exemption is necessary for use of a minimum risk pesticide product on food or feed. As noted in the NPRM, EPA proposed to address some of these issues by directing manufacturers to 40 CFR part 180 to find information about tolerance requirements. EPA is finalizing this change as proposed.

On its Web site, at <http://www2.epa.gov/minimum-risk-pesticides>, EPA recently provided additional guidance with clearer descriptions of where tolerance information can be found for those ingredients that are eligible for use on food or food-use sites. EPA believes the additional guidance will help manufacturers find the information they need to comply with pesticide tolerance requirements while alleviating some of the problems experienced by the commenter.

EPA is not attempting to enforce adherence to the labels of minimum risk pesticides, which as noted cannot be done for pesticides subject to 40 CFR 152.25(f). Rather, the Agency is assisting minimum risk pesticide producers in ensuring that the use directions on the product do not cause the label to be false or misleading. An exemption from FIFRA requirements under section 25(b) of the statute, including the minimum risk exemption at 40 CFR 152.25(f), cannot exempt pesticides from the requirements of a tolerance or tolerance exemption under FFDCA. Under FFDCA, any pesticide chemical residue to be used in or on foods in commerce in the United States must have either an established tolerance or tolerance exemption. When a minimum risk product explicitly states on its label that it can be used in or on food or food-use sites in commerce, but one or more of the ingredients does not have an established tolerance or tolerance exemption, the label is indicating that the product may be used in a way that would violate Federal law. Such a label is therefore false or misleading. One of the requirements for the exemption, contained in § 152.25(f)(3)(iii), is that

the product must not include any false and misleading labeling statements. A product bearing a label that is false and misleading would therefore not be eligible for the minimum risk exemption, and sale or distribution of that product would require FIFRA registration, including any needed label changes. If state law requires a pesticide to be compliant with FIFRA, the state can insist that the label not allow a food use without the necessary tolerance or tolerance exemption. This will help ensure that products labeled for food-uses are properly labeled, thus reducing the potential for improper use of the product.

In the regulatory text of the proposal, EPA stated in § 152.25(f)(1) that "all listed active ingredients may be used in non-food use products," but products intended to be used "on food and animal feed can only include active ingredients with applicable tolerances or tolerance exemptions in part 180" to comply with FFDCA. During development of the proposal, EPA considered adding tolerance information into the reformatted ingredients tables in 40 CFR 152.25(f) for reference purposes. However, EPA did not include this information because tolerances or tolerance exemptions can change frequently, meaning that any tolerance information in § 152.25(f) would also have to be revised via rulemaking, possibly leading to errors in the regulation.

To improve the clarity of the information about tolerances in the regulatory text, EPA is revising the explanatory text about tolerances in § 152.25(f)(1) for active ingredients, and is adding similar explanatory text for inert ingredients in § 152.25(f)(2). As specified in the final regulatory text, EPA is using its Web site to provide additional guidance on where tolerance information can be found. As needed, information on the Web site can be easily changed and can direct people where to find the tolerance information they need to comply with FFDCA. EPA believes that these approaches will make it clearer that manufacturers should review the tolerance information in 40 CFR part 180 before labeling their product for food uses to prevent their labels from potentially being false or misleading.

C. Other Modifications to the Regulatory Text

While responding to the comments regarding mint oil, EPA realized that additional clarity would be helpful for the descriptions of cedar oil in the active ingredients table. "Cedar oil" is a non-specific term, and the proposal

listed three separate CAS Nos. for it. While each CAS No. is associated with a specific type of cedar oil, the type of cedar oil was not indicated in the label display name or the chemical name. EPA is revising the label display names from “Cedar oil” to “Cedarwood oil” to improve clarity and the chemical names to more clearly reflect the differences among the three CAS Nos. for cedarwood oil. These revisions will also improve the clarity and transparency of the eligible ingredients for manufacturers and inspectors. This does not change the list of ingredients eligible for the exemption or impose any additional requirements on producers of minimum risk pesticides containing one of these ingredients. The chemical name changes for the three cedarwood oil ingredients are, as follows:

- CAS No. 85085–29–6 will have the chemical name, “Cedarwood oil (China).”
- CAS No. 68990–83–0 will have the chemical name, “Cedarwood oil (Texas).”
- CAS No. 8000–27–9 will have the chemical name, “Cedarwood oil (Virginia).”

Additionally, EPA determined to finalize only the first sentence of proposed § 152.25(f)(3)(v). EPA believes that a description of the information available on EPA’s Web site is not needed in regulatory text. Since this is not a condition of the exemption, EPA is finalizing the first sentence of proposed § 152.25(f)(3)(v) in a new § 152.25(f)(4) to be entitled “Providing guidance.”

Because these changes do not modify the list of eligible ingredients for the exemption or otherwise affect the scope of the exemption, EPA has determined that notice and comment are unnecessary in accordance with the good cause exemption contained in 5 U.S.C. 553(b)(B) of the Administrative Procedure Act.

III. The Final Rule

With the exception of the modifications discussed in Unit II.B. and II.C., EPA is finalizing the rule in essentially the same form as the proposed rule. The final rule continues to do the following:

- Redesign the format of the active ingredients list,
- Codify the list of permitted inert ingredients,
- Provide specific chemical identifiers, through the use of CAS Nos., for each eligible active and inert ingredient when available,
- Require that a common “label display name” for each ingredient be

used when listing ingredients on a product’s label, and

- Require company name and contact information on product labels.

EPA recently updated its guidance on minimum risk pesticides online at <http://www2.epa.gov/minimum-risk-pesticides>. This Web site now includes guidance on pesticide tolerances for minimum risk ingredients and provides alternative formats of the active and inert ingredient lists that may be more suitable for some users. Shortly after the effective date of this final rule, EPA intends to include additional guidance, as needed, such as labeling guidance for minimum risk pesticides and how to request additional ingredients to be added or removed from the minimum risk exemption.

IV. References

As indicated under **ADDRESSES**, a docket has been established for this final rule under docket ID number EPA–HQ–OPP–2010–0305. The following is a listing of the documents that are specifically referenced in this action. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. U.S. EPA. Pesticides; Revisions to Minimum Risk Exemption; Proposed Rule. *Federal Register* December 31, 2012 (77 FR 76979) (FRL–9339–1).
2. U.S. EPA. Office of Pesticide Programs (OPP). Cost and Small Business Analysis of Revisions to Minimum Risk Exemption (2014).
3. U.S. EPA, (OPP). Response to Public Comments on the Proposed Rule: “Pesticides; Revisions to Minimum Risk Exemption.” (2014).
4. U.S. EPA, (OPP). Decision Memorandum: Mint Oil (2008).
5. U.S. EPA, (OPP). Supporting Statement for an Information Collection Request (ICR): Labeling Change for Certain Minimum Risk Pesticides under FIFRA Section 25(b). EPA ICR No. 2475.02; OMB Control No. 2070–0187 (2015).

V. FIFRA Review Requirements

In accordance with FIFRA sections 21 and 25(a), the Agency submitted a draft of this final rule to the appropriate Congressional Committees, the Secretary of the Department of Agriculture (USDA), and the Secretary of the Department of Health and Human Services (HHS). HHS waived its review of this rule on June 19, 2015. On June 18, 2015, USDA reviewed this rule, and

did not have any comments related to policy. USDA provided a technical comment, which EPA has reviewed and accepted.

Under FIFRA section 25(d), EPA also submitted a draft of this final rule to the FIFRA Scientific Advisory Panel (SAP). The SAP waived its scientific review of the final rule on June 24, 2015, because the final rule does not contain scientific issues that warrant review by the Panel.

VI. Statutory and Executive Order Reviews

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866, October 4, 1993 (58 FR 51735) and 13563, January 21, 2011 (76 FR 3821).

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted to OMB for approval under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR), identified by EPA ICR No. 2475.02 (Ref. 5), is available in the docket for this rule, and it is briefly summarized here.

The information collection activities in this rule consist of changes to existing requirements that involve the one-time relabeling of products currently exempt under 40 CFR 152.25(f) in order to list chemical names in the format required by EPA and to include the producer’s contact information. The ICR accounts for the burden for a one time label change which provides important regulatory information for the Federal, state, and tribal authorities that regulate minimum risk pesticide products.

Respondent’s obligation to respond: Required to obtain or retain a benefit (40 CFR 152.25(f)).

Estimated number of respondents: 216.

Frequency of response: One-time for each product needing a label change.

Total estimated burden: 2,123 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$198,811.23 (per year). There are no capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA regulations in 40 CFR

are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are small businesses who manufacture minimum risk pesticide products. No small governmental jurisdictions or not-for-profit enterprises are known to produce minimum risk pesticide products. The Agency has determined that there are approximately 97 small firms (out of a total of 192), accounting for approximately 51% of the industry. These small firms may experience an impact of 0.1% of gross revenue given a 3-year compliance period. To account for the impacts on very small firms, *i.e.*, those with sales less than \$500K, EPA performed a refined analysis that divided each individual firm's relabeling cost by that firm's sales revenue. With a 3-year compliance period, 7 small firms (or approximately 7% of all small firms) are likely to experience an economic impact of 1% or more of gross sales, while no small firms will incur impacts greater than or equal to 3% of gross sales. Details of this analysis are presented in the analysis for this rule (Ref. 2).

The selection of the 3-year compliance period was based on information obtained in 2009 from a group of small manufacturers of minimum risk insect repellent products, as well as comments received during the public comment period for the proposed rule. EPA initially proposed a 2-year compliance period for companies to relabel their products since the companies indicated they needed at least 2 years in order to avoid significant costs (Ref. 2). This would allow most companies to incorporate the changes into their regularly planned label updates, and sell any products with older labels, thus reducing the cost and burden of the changes to the exemption. During the public comment period for the proposed rule, EPA received comments that expressed support for both the proposed 2-year compliance period and the longer 3-year compliance period. While several commenters felt that the 2-year period would provide sufficient time to comply with the new labeling requirements, some

commenters felt that a 3-year compliance period would benefit the smallest companies to incorporate the changes into regularly planned updates and to sell their existing stock, thus minimizing their costs and burden to comply with the new requirements. EPA is aware that most companies make regularly planned label updates every 3 years (Ref. 2). By going with a 3-year compliance period instead of the originally proposed 2-year timeframe, costs on industry would be reduced by almost 75% from the 2-year implementation period, thereby being more sensitive to the smallest of small firms.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. EPA has determined that this action imposes no enforceable duty on any state, local, or tribal governments because there are no known instances where such governments currently produce any pesticides such that they would be subject to this rulemaking. In addition, the potential costs for the private sector do not qualify as an unfunded mandate under UMRA.

E. Executive Order 13132: Federalism

This action does not have federalism implications, as specified in Executive Order 13132, August 10, 1999 (64 FR 43255). It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175, November 9, 2000 (65 FR 67249). There are no known instances where a tribal government is the producer of a minimum risk pesticide currently exempt from regulation. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045, April 23, 1997 (62 FR 19885) as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has

reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards that would require the consideration of voluntary consensus standards pursuant to NTTAA section 12(d), 12(d) (15 U.S.C. 272 note).

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

This action does not involve special consideration of environmental justice related issues as specified in Executive Order 12898, February 16, 1994 (59 FR 7629). EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations because it does not affect the level of protection provided to human health or the environment. To the contrary, this action will increase the level of environmental protection for all affected populations without having disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This action only involves minimum risk pesticide products, and may have positive impacts for all communities, since the rule provides increased information for consumers considering the use of pesticides. This action, which will improve clarity on product labels, will enable all users regardless of economic status to become more informed about the pesticide substances they may be interested in using.

VII. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and the EPA will submit a rule report to each House of Congress and the Comptroller of the

United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 152

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

Dated: December 16, 2015.

Gina McCarthy,
Administrator.

Therefore, 40 CFR chapter I is amended as follows:

PART 152—[AMENDED]

■ 1. The authority citation for part 152 continues to read as follows:

Authority: 7 U.S.C. 136–136y; subpart U is also issued under 31 U.S.C. 9701.

■ 2. Amend § 152.25 by revising paragraph (f) to read as follows:

§ 152.25 Exemptions for pesticides of a character not requiring FIFRA regulation.

* * * * *

(f) *Minimum risk pesticides*—(1) *Exempted products.* Products containing the following active ingredients, alone or in combination with other substances listed in table 1

of this paragraph, are exempt from the requirements of FIFRA provided that all of the criteria of this section are met. All listed active ingredients may be used in non-food use products. Under section 408 of the Federal Food, Drug, and Cosmetic Act and EPA (FFDCA) implementing regulations at part 180 of this chapter, food and animal feed in commerce can bear pesticide residues only for those ingredients that have tolerances or tolerance exemptions in part 180 of this chapter. Such tolerances or exemptions may be found, for example, in §§ 180.950, 180.1071, 180.1087, 180.1233, and 180.1251 of this chapter.

TABLE 1—ACTIVE INGREDIENTS PERMITTED IN EXEMPTED MINIMUM RISK PESTICIDE PRODUCTS

Label display name	Chemical name	Specifications	CAS No.
Castor oil	Castor oil	United States Pharmacopeia (U.S.P.) or equivalent.	8001–79–4
Cedarwood oil	Cedarwood oil (China)		85085–29–6
Cedarwood oil	Cedarwood oil (Texas)		68990–83–0
Cedarwood oil	Cedarwood oil (Virginia)		8000–27–9
Cinnamon	Cinnamon		N/A
Cinnamon oil	Cinnamon oil		8015–91–6
Citric acid	2-Hydroxypropane-1,2,3-tricarboxylic acid		77–92–9
Citronella	Citronella		N/A
Citronella oil	Citronella oil		8000–29–1
Cloves	Cloves		N/A
Clove oil	Clove oil		8000–34–8
Corn gluten meal	Corn gluten meal		66071–96–3
Corn oil	Corn oil		8001–30–7
Cornmint	Cornmint		N/A
Cornmint oil	Cornmint oil		68917–18–0
Cottonseed oil	Cottonseed oil		8001–29–4
Dried blood	Dried blood		68991–49–9
Eugenol	4-Allyl-2-methoxyphenol		97–53–0
Garlic	Garlic		N/A
Garlic oil	Garlic oil		8000–78–0
Geraniol	(2E)-3,7-Dimethylocta-2,6-dien-1-ol		106–24–1
Geranium oil	Geranium oil		8000–46–2
Lauryl sulfate	Lauryl sulfate		151–41–7
Lemongrass oil	Lemongrass oil		8007–02–1
Linseed oil	Linseed oil		8001–26–1
Malic acid	2-Hydroxybutanedioic acid		6915–15–7
Peppermint	Peppermint		N/A
Peppermint oil	Peppermint oil		8006–90–4
2-Phenylethyl propionate	2-Phenylethyl propionate		122–70–3
Potassium sorbate	Potassium (2E,4E)-hexa-2,4-dienoate		24634–61–5
Putrescent whole egg solids	Putrescent whole egg solids		51609–52–0
Rosemary	Rosemary		N/A
Rosemary oil	Rosemary oil		8000–25–7
Sesame	Sesame	Includes ground sesame plant	N/A
Sesame oil	Sesame oil		8008–74–0
Sodium chloride	Sodium chloride		7647–14–5
Sodium lauryl sulfate	Sulfuric acid monododecyl ester, sodium salt		151–21–3
Soybean oil	Soybean oil		8001–22–7
Spearmint	Spearmint		N/A
Spearmint oil	Spearmint oil		8008–79–5
Thyme	Thyme		N/A
Thyme oil	Thyme oil		8007–46–3
White pepper	White pepper		N/A
Zinc	Zinc	Zinc metal strips (consisting solely of zinc metal and impurities).	7440–66–6

(2) *Permitted inert ingredients.* A pesticide product exempt under

paragraph (f)(1) of this section may only include the inert ingredients listed in

paragraphs (f)(2)(i) through (iv) of this section. All listed inert ingredients may

be used in non-food use products. Under FFDC section 408 and EPA implementing regulations at part 180 of this chapter, food and animal feed in commerce can bear pesticide residues only for those ingredients that have tolerances or tolerance exemptions in

part 180 of this chapter. Such tolerances or exemptions may be found, for example, in §§ 180.910, 180.920, 180.930, 180.940, 180.950, and 180.1071 of this chapter.

(i) *Commonly consumed food commodities*, as described in § 180.950(a) of this chapter.

(ii) *Animal feed items*, as described in § 180.950(b) of this chapter.

(iii) *Edible fats and oils*, as described in § 180.950(c) of this chapter.

(iv) *Specific chemical substances*, as listed in the following table.

TABLE 2—INERT INGREDIENTS PERMITTED IN MINIMUM RISK PESTICIDE PRODUCTS

Label display name	Chemical name	CAS No.
Acetyl tributyl citrate	Citric acid, 2-(acetyloxy)-, tributyl ester	77-90-7
Agar	Agar	9002-18-0
Almond hulls	Almond hulls	N/A
Almond oil	Oils, almond	8007-69-0
Almond shells	Almond shells	N/A
alpha-Cyclodextrin	alpha-Cyclodextrin	10016-20-3
Aluminatesilicate	Aluminatesilicate	1327-36-2
Aluminum magnesium silicate	Silicic acid, aluminum magnesium salt	1327-43-1
Aluminum potassium sodium silicate	Silicic acid, aluminum potassium sodium salt	12736-96-8
Aluminum silicate	Aluminum silicate	1335-30-4
Aluminum sodium silicate	Silicic acid, aluminum sodium salt	1344-00-9
Aluminum sodium silicate	Silicic acid (H ₄ SiO ₄), aluminum sodium salt (1:1:1)	12003-51-9
Ammonium benzoate	Benzoic acid, ammonium salt	1863-63-4
Ammonium stearate	Octadecanoic acid, ammonium salt	1002-89-7
Amylopectin, acid-hydrolyzed, 1-octenylbutanedioate.	Amylopectin, acid-hydrolyzed, 1-octenylbutanedioate	113894-85-2
Amylopectin, hydrogen 1-octadecenylbutanedioate.	Amylopectin, hydrogen 1-octadecenylbutanedioate	125109-81-1
Animal glue	Animal glue	N/A
Ascorbyl palmitate	Ascorbyl palmitate	137-66-6
Attapulgit-type clay	Attapulgit-type clay	12174-11-7
Beeswax	Beeswax	8012-89-3
Bentonite	Bentonite	1302-78-9
Bentonite, sodian	Bentonite, sodian	85049-30-5
beta-Cyclodextrin	beta-Cyclodextrin	7585-39-9
Bone meal	Bone meal	68409-75-6
Bran	Bran	N/A
Bread crumbs	Bread crumbs	N/A
(+)-Butyl lactate	Lactic acid, n-butyl ester, (S)	34451-19-9
Butyl lactate	Lactic acid, n-butyl ester	138-22-7
Butyl stearate	Octadecanoic acid, butyl ester	123-95-5
Calcareous shale	Calcareous shale	N/A
Calcite	Calcite (Ca(CO ₃))	13397-26-7
Calcium acetate	Calcium acetate	62-54-4
Calcium acetate monohydrate	Acetic acid, calcium salt, monohydrate	5743-26-0
Calcium benzoate	Benzoic acid, calcium salt	2090-05-3
Calcium carbonate	Calcium carbonate	471-34-1
Calcium citrate	Citric acid, calcium salt	7693-13-2
Calcium octanoate	Calcium octanoate	6107-56-8
Calcium oxide silicate	Calcium oxide silicate (Ca ₃ O(SiO ₄))	12168-85-3
Calcium silicate	Silicic acid, calcium salt	1344-95-2
Calcium stearate	Octadecanoic acid, calcium salt	1592-23-0
Calcium sulfate	Calcium sulfate	7778-18-9
Calcium sulfate dihydrate	Calcium sulfate dihydrate	10101-41-4
Calcium sulfate hemihydrate	Calcium sulfate hemihydrate	10034-76-1
Canary seed	Canary seed	N/A
Carbon	Carbon	7440-44-0
Carbon dioxide	Carbon dioxide	124-38-9
Carboxymethyl cellulose	Cellulose, carboxymethyl ether	9000-11-7
Cardboard	Cardboard	N/A
Carnauba wax	Carnauba wax	8015-86-9
Carob gum	Locust bean gum	9000-40-2
Carrageenan	Carrageenan	9000-07-1
Caseins	Caseins	9000-71-9
Castor oil	Castor oil	8001-79-4
Castor oil, hydrogenated	Castor oil, hydrogenated	8001-78-3
Cat food	Cat food	N/A
Cellulose	Cellulose	9004-34-6
Cellulose acetate	Cellulose acetate	9004-35-7
Cellulose, mixture with cellulose carboxymethyl ether, sodium salt.	Cellulose, mixture with cellulose carboxymethyl ether, sodium salt	51395-75-6
Cellulose, pulp	Cellulose, pulp	65996-61-4

TABLE 2—INERT INGREDIENTS PERMITTED IN MINIMUM RISK PESTICIDE PRODUCTS—Continued

Label display name	Chemical name	CAS No.
Cellulose, regenerated	Cellulose, regenerated	68442-85-3
Cheese	Cheese	N/A
Chlorophyll a	Chlorophyll a	479-61-8
Chlorophyll b	Chlorophyll b	519-62-0
Citric acid	Citric acid	77-92-9
Citric acid, monohydrate	Citric acid, monohydrate	5949-29-1
Citrus meal	Citrus meal	N/A
Citrus pectin	Citrus pectin	9000-69-5
Citrus pulp	Citrus pulp	68514-76-1
Clam shells	Clam shells	N/A
Cocoa	Cocoa	8002-31-1
Cocoa shell flour	Cocoa shell flour	N/A
Cocoa shells	Cocoa shells	N/A
Cod-liver oil	Cod-liver oil	8001-69-2
Coffee grounds	Coffee grounds	68916-18-7
Cookies	Cookies	N/A
Cork	Cork	61789-98-8
Corn cobs	Corn cobs	N/A
Cotton	Cotton	N/A
Cottonseed meal	Cottonseed meal	68424-10-2
Cracked wheat	Cracked wheat	N/A
Decanoic acid, monoester with 1,2,3-propanetriol.	Decanoic acid, monoester with 1,2,3-propanetriol	26402-22-2
Dextrins	Dextrins	9004-53-9
Diglycerol monooleate	9-Octadecenoic acid, ester with 1,2,3-propanetriol	49553-76-6
Diglycerol monostearate	9-Octadecanoic acid, monoester with oxybis(propanediol)	12694-22-3
Dilaurin	Dodecanoic acid, diester with 1,2,3-propanetriol	27638-00-2
Dipalmitin	Hexadecanoic acid, diester with 1,2,3-propanetriol	26657-95-4
Dipotassium citrate	Citric acid, dipotassium salt	3609-96-9
Disodium citrate	Citric acid, disodium salt	144-33-2
Disodium sulfate decahydrate	Disodium sulfate decahydrate	7727-73-3
Diatomaceous earth	Kieselguhr; Diatomite (less than 1% crystalline silica)	61790-53-2
Dodecanoic acid, monoester with 1,2,3-propanetriol.	Dodecanoic acid, monoester with 1,2,3-propanetriol	27215-38-9
Dolomite	Dolomite	16389-88-1
Douglas fir bark	Douglas fir bark	N/A
Egg shells	Egg shells	N/A
Eggs	Eggs	N/A
(+)-Ethyl lactate	Lactic acid, ethyl ester, (S)	687-47-8
Ethyl lactate	Lactic acid, ethyl ester	97-64-3
Feldspar	Feldspar	68476-25-5
Ferric oxide	Iron oxide (Fe ₂ O ₃)	1309-37-1
Ferrous oxide	Iron oxide (FeO)	1345-25-1
Fish meal	Fish meal	N/A
Fish oil	Fish oil	8016-13-5
Fuller's earth	Fuller's earth	8031-18-3
Fumaric acid	Fumaric acid	110-17-8
gamma-Cyclodextrin	gamma-Cyclodextrin	17465-86-0
Gelatins	Gelatins	9000-70-8
Gellan gum	Gellan gum	71010-52-1
Glue	Glue (as depolymd. animal collagen)	68476-37-9
Glycerin	1,2,3-Propanetriol	56-81-5
Glycerol monooleate	9-Octadecenoic acid (Z)-, 2,3-dihydroxypropyl ester	111-03-5
Glycerol dicaprylate	Octanoic acid, diester with 1,2,3-propanetriol	36354-80-0
Glycerol dimyristate	Tetradecanoic acid, diester with 1,2,3-propanetriol	53563-63-6
Glycerol dioleate	9-Octadecenoic acid (9Z)-, diester with 1,2,3-propanetriol	25637-84-7
Glycerol distearate	Octadecanoic acid, diester with 1,2,3-propanetriol	1323-83-7
Glycerol monomyristate	Tetradecanoic acid, monoester with 1,2,3-propanetriol	27214-38-6
Glycerol monooleate	Octanoic acid, monoester with 1,2,3-propanetriol	26402-26-6
Glycerol monostearate	9-Octadecenoic acid (9Z)-, monoester with 1,2,3-propanetriol	25496-72-4
Glycerol stearate	Octadecanoic acid, monoester with 1,2,3-propanetriol	31566-31-1
Granite	Granite	11099-07-3
Graphite	Graphite	N/A
Guar gum	Guar gum	7782-42-5
Gum Arabic	Gum arabic	9000-30-0
Gum tragacanth	Gum tragacanth	9000-01-5
Gypsum	Gypsum	9000-65-1
Hematite	Hematite (Fe ₂ O ₃)	13397-24-5
Humic acid	Humic acid	1317-60-8
Hydrogenated cottonseed oil	Hydrogenated cottonseed oil	1415-93-6
Hydrogenated rapeseed oil	Hydrogenated rapeseed oil	68334-00-9
		84681-71-0

TABLE 2—INERT INGREDIENTS PERMITTED IN MINIMUM RISK PESTICIDE PRODUCTS—Continued

Label display name	Chemical name	CAS No.
Hydrogenated soybean oil	Hydrogenated soybean oil	8016-70-4
Hydroxyethyl cellulose	Cellulose, 2-hydroxyethyl ether	9004-62-0
Hydroxypropyl cellulose	Cellulose, 2-hydroxypropyl ether	9004-64-2
Hydroxypropyl methyl cellulose	Cellulose, 2-hydroxypropyl methyl ether	9004-65-3
Iron magnesium oxide	Iron magnesium oxide (Fe ₂ MgO ₄)	12068-86-9
Iron oxide, hydrate	Iron oxide (Fe ₂ O ₃), hydrate	12259-21-1
Iron oxide	Iron oxide (Fe ₃ O ₄)	1317-61-9
Isopropyl alcohol	2-Propanol	67-63-0
Isopropyl myristate	Isopropyl myristate	110-27-0
Kaolin	Kaolin	1332-58-7
Lactose	Lactose	63-42-3
Lactose monohydrate	Lactose monohydrate	64044-51-5
Lanolin	Lanolin	8006-54-0
Latex rubber	Latex rubber	N/A
Lauric acid	Lauric acid	143-07-7
Lecithins	Lecithins	8002-43-5
Licorice extract	Licorice extract	68916-91-6
Lime dolomitic	Lime (chemical) dolomitic	12001-27-3
Limestone	Limestone	1317-65-3
Linseed oil	Linseed oil	8001-26-1
Magnesium carbonate	Carbonic acid, magnesium salt (1:1)	546-93-0
Magnesium benzoate	Magnesium benzoate	553-70-8
Magnesium oxide	Magnesium oxide	1309-48-4
Magnesium oxide silicate	Magnesium oxide silicate (Mg ₃ O(Si ₂ O ₅) ₂), monohydrate	12207-97-5
Magnesium silicate	Magnesium silicate	1343-88-0
Magnesium silicate hydrate	Magnesium silicate hydrate	1343-90-4
Magnesium silicon oxide	Magnesium silicon oxide (Mg ₂ Si ₃ O ₈)	14987-04-3
Magnesium stearate	Octadecanoic acid, magnesium salt	557-04-0
Magnesium sulfate	Magnesium sulfate	7487-88-9
Magnesium sulfate heptahydrate	Magnesium sulfate heptahydrate	10034-99-8
Malic acid	Malic acid	6915-15-7
Malt extract	Malt extract	8002-48-0
Malt flavor	Malt flavor	N/A
Maltodextrin	Maltodextrin	9050-36-6
Methylcellulose	Cellulose, methyl ether	9004-67-5
Mica	Mica	12003-38-2
Mica-group minerals	Mica-group minerals	12001-26-2
Milk	Milk	8049-98-7
Millet seed	Millet seed	N/A
Mineral oil	Mineral oil (U.S.P.)	8012-95-1
1-Monolaurin	Dodecanoic acid, 2,3-dihydroxypropyl ester	142-18-7
1-Monomyristin	Tetradecanoic acid, 2,3-dihydroxypropyl ester	589-68-4
Monomyristin	Decanoic acid, diester with 1,2,3-propanetriol	53998-07-1
Monopalmitin	Hexadecanoic acid, monoester with 1,2,3-propanetriol	26657-96-5
Monopotassium citrate	Citric acid, monopotassium salt	866-83-1
Monosodium citrate	Citric acid, monosodium salt	18996-35-5
Montmorillonite	Montmorillonite	1318-93-0
Myristic acid	Myristic acid	544-63-8
Nepheline syenite	Nepheline syenite	37244-96-5
Nitrogen	Nitrogen	7727-37-9
Nutria meat	Nutria meat	N/A
Nylon	Nylon	N/A
Octanoic acid, potassium salt	Octanoic acid, potassium salt	764-71-6
Octanoic acid, sodium salt	Octanoic acid, sodium salt	1984-06-1
Oleic acid	Oleic acid	112-80-1
Oyster shells	Oyster shells	N/A
Palm oil	Palm oil	8002-75-3
Palm oil, hydrogenated	Palm oil, hydrogenated	68514-74-9
Palmitic acid	Hexadecanoic acid	57-10-3
Paper	Paper	N/A
Paraffin wax	Paraffin wax	8002-74-2
Peanut butter	Peanut butter	N/A
Peanut shells	Peanut shells	N/A
Peanuts	Peanuts	N/A
Peat moss	Peat moss	N/A
Pectin	Pectin	9000-69-5
Perlite	Perlite	130885-09-5
Perlite, expanded	Perlite, expanded	93763-70-3
Plaster of paris	Plaster of paris	26499-65-0
Polyethylene	Polyethylene	9002-88-4
Polyglyceryl oleate	Polyglyceryl oleate	9007-48-1
Polyglyceryl stearate	Polyglyceryl stearate	9009-32-9

TABLE 2—INERT INGREDIENTS PERMITTED IN MINIMUM RISK PESTICIDE PRODUCTS—Continued

Label display name	Chemical name	CAS No.
Potassium acetate	Acetic acid, potassium salt	127-08-2
Potassium aluminum silicate, anhydrous	Potassium aluminum silicate, anhydrous	1327-44-2
Potassium benzoate	Benzoic acid, potassium salt	582-25-2
Potassium bicarbonate	Carbonic acid, monopotassium salt	298-14-6
Potassium chloride	Potassium chloride	7447-40-7
Potassium citrate	Citric acid, potassium salt	7778-49-6
Potassium humate	Humic acids, potassium salts	68514-28-3
Potassium myristate	Tetradecanoic acid, potassium salt	13429-27-1
Potassium oleate	9-Octadecenoic acid (9Z)-, potassium salt	143-18-0
Potassium ricinoleate	9-Octadecenoic acid, 12-hydroxy-, monopotassium salt, (9Z, 12R)-	7492-30-0
Potassium sorbate	Sorbic acid, potassium salt	24634-61-5
Potassium stearate	Octadecanoic acid, potassium salt	593-29-3
Potassium sulfate	Potassium sulfate	7778-80-5
Potassium sulfite	Sulfuric acid, monopotassium salt	7646-93-7
1,2-Propylene carbonate	1,3-Dioxolan-2-one, 4-methyl-	108-32-7
Pumice	Pumice	1332-09-8
Red cabbage color	Red cabbage color (expressed from edible red cabbage heads via a pressing process using only acidified water).	N/A
Red cedar chips	Red cedar chips	N/A
Red dog flour	Red dog flour	N/A
Rubber	Rubber	9006-04-6
Sawdust	Sawdust	N/A
Shale	Shale	N/A
Silica, amorphous, fumed	Silica, amorphous, fumed (crystalline free)	112945-52-5
Silica, amorphous, precipitate and gel	Silica, amorphous, precipitate and gel	7699-41-4
Silica	Silica (crystalline free)	7631-86-9
Silica gel	Silica gel	63231-67-4
Silica gel, precipitated, crystalline-free	Silica gel, precipitated, crystalline-free	112926-00-8
Silica, hydrate	Silica, hydrate	10279-57-9
Silica, vitreous	Silica, vitreous	60676-86-0
Silicic acid, magnesium salt	Silicic acid (H ₂ SiO ₃), magnesium salt (1:1)	13776-74-4
Soap	Soap (The water soluble sodium or potassium salts of fatty acids produced by either the saponification of fats and oils, or the neutralization of fatty acid).	N/A
Soapbark	Quillaja saponin	1393-03-9
Soapstone	Soapstone	308076-02-0
Sodium acetate	Acetic acid, sodium salt	127-09-3
Sodium alginate	Sodium alginate	9005-38-3
Sodium benzoate	Benzoic acid, sodium salt	532-32-1
Sodium bicarbonate	Sodium bicarbonate	144-55-8
Sodium carboxymethyl cellulose	Cellulose, carboxymethyl ether, sodium salt	9004-32-4
Sodium chloride	Sodium chloride	7647-14-5
Sodium citrate	Sodium citrate	994-36-5
Sodium humate	Humic acids, sodium salts	68131-04-4
Sodium oleate	Sodium oleate	143-19-1
Sodium ricinoleate	9-Octadecenoic acid, 12-hydroxy-, monosodium salt, (9Z,12R)-	5323-95-5
Sodium stearate	Octadecanoic acid, sodium salt	822-16-2
Sodium sulfate	Sodium sulfate	7757-82-6
Sorbitol	D-glucitol	50-70-4
Soy protein	Soy protein	N/A
Soya lecithins	Lecithins, soya	8030-76-0
Soybean hulls	Soybean hulls	N/A
Soybean meal	Soybean meal	68308-36-1
Soybean, flour	Soybean, flour	68513-95-1
Stearic acid	Octadecanoic acid	57-11-4
Sulfur	Sulfur	7704-34-9
Syrups, hydrolyzed starch, hydrogenated	Syrups, hydrolyzed starch, hydrogenated	68425-17-2
Tetraglyceryl monooleate	9-Octadecenoic acid (9Z)-, monoester with tetraglycerol	71012-10-7
Tricalcium citrate	Citric acid, calcium salt (2:3)	813-94-5
Triethyl citrate	Citric acid, triethyl ester	77-93-0
Tripotassium citrate	Citric acid, tripotassium salt	866-84-2
Tripotassium citrate monohydrate	Citric acid, tripotassium salt, monohydrate	6100-05-6
Trisodium citrate	Citric acid, trisodium salt	68-04-2
Trisodium citrate dehydrate	Citric acid, trisodium salt, dehydrate	6132-04-3
Trisodium citrate pentahydrate	Citric acid, trisodium salt, pentahydrate	6858-44-2
Ultramarine blue	C.I. Pigment Blue 29	57455-37-5
Urea	Urea	57-13-6
Vanillin	Benzaldehyde, 4-hydroxy-3-methoxy-	121-33-5
Vermiculite	Vermiculite	1318-00-9
Vinegar	Vinegar (maximum 8% acetic acid in solution)	8028-52-2
Vitamin C	L-Ascorbic acid	50-81-7
Vitamin E	Vitamin E	1406-18-4
Walnut flour	Walnut flour	N/A

TABLE 2—INERT INGREDIENTS PERMITTED IN MINIMUM RISK PESTICIDE PRODUCTS—Continued

Label display name	Chemical name	CAS No.
Walnut shells	Walnut shells	N/A
Wheat	Wheat	N/A
Wheat flour	Wheat flour	N/A
Wheat germ oil	Wheat germ oil	8006–95–9
Wheat oil	Oils, wheat	68917–73–7
Whey	Whey	92129–90–3
White mineral oil	White mineral oil (petroleum)	8042–47–5
Wintergreen oil	Wintergreen oil	68917–75–9
Wollastonite	Wollastonite (Ca(SiO ₃))	13983–17–0
Wool	Wool	N/A
Xanthan gum	Xanthan gum	11138–66–2
Yeast	Yeast	68876–77–7
Zeolites	Zeolites (excluding erionite (CAS Reg. No. 66733–21–9))	1318–02–1
Zeolites, NaA	Zeolites, NaA	68989–22–0
Zinc iron oxide	Zinc iron oxide	12063–19–3
Zinc oxide	Zinc oxide (ZnO)	1314–13–2
Zinc stearate	Octadecanoic acid, zinc salt	557–05–1

(3) *Other conditions of exemption.* All of the following conditions must be met for products to be exempted under this section:

(i) Each product containing the substance must bear a label identifying the label display name and percentage (by weight) of each active ingredient as listed in table 1 in paragraph (f)(1) of this section. Each product must also list all inert ingredients by the label display name listed in table 2 in paragraph (f)(2)(iv) of this section.

(ii) The product must not bear claims either to control or mitigate microorganisms that pose a threat to human health, including but not limited to disease transmitting bacteria or viruses, or claims to control insects or rodents carrying specific diseases, including, but not limited to ticks that carry Lyme disease.

(iii) Company name and contact information.

(A) The name of the producer or the company for whom the product was produced must appear on the product label. If the company whose name appears on the label in accordance with this paragraph is not the producer, the company name must be qualified by appropriate wording such as “Packed for [insert name],” “Distributed by [insert name], or “Sold by [insert name]” to show that the name is not that of the producer.

(B) Contact information for the company specified in accordance with paragraph (f)(3)(iii)(A) of this section must appear on the product label including the street address plus ZIP code and the telephone number of the location at which the company may be reached.

(C) The company name and contact information must be displayed prominently on the product label.

(iv) The product must not include any false and misleading labeling statements, including those listed in 40 CFR 156.10(a)(5)(i) through (viii).

(4) *Providing guidance.* Guidance on minimum risk pesticides is available at <http://www2.epa.gov/minimum-risk-pesticides> or successor Web pages.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2013–0727; FRL–9933–41]

Spinosad; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of spinosad in or on multiple commodities that are identified and discussed later in this document. In addition, this regulation removes a number of existing tolerances for residues of spinosad that are superseded by tolerances being established in this action. Interregional Research Project #4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 28, 2015. Objections and requests for hearings must be received on or before February 26, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2013–0727, is

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

FOR FURTHER INFORMATION CONTACT:

Susan Lewis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: RDPRNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

- Pesticide manufacturing (NAICS code 32532).

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA-HQ-OPP-2013-0727 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 26, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA-HQ-OPP-2013-0727, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of December 30, 2013 (78 FR 79359) (FRL-9903-69), and November 4, 2015 (80 FR 68289) (FRL-9936-13), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing and subsequent filing of an amendment to pesticide petition (PP 3E8204) by IR-4, 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.495 be amended by establishing tolerances for residues of the insecticide spinosad, a fermentation product of *Saccharopolyspora spinosa*, consisting of two related active ingredients: Spinosyn A (Factor A; CAS Registry No. 131929-60-7) or 2-[[6-deoxy-2,3,4-tri-O-methyl- α -L-manno-pyranosyl]oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-14-methyl-1H-as-Indaceno[3,2-d]oxacyclododecin-7,15-dione; and Spinosyn D (Factor D; CAS Registry No. 131929-63-0) or 2-[[6-deoxy-2,3,4-tri-O-methyl- α -L-manno-pyranosyl]oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-4,14-methyl-1H-as-Indaceno[3,2-d]oxacyclododecin-7,15-dione, in or on the raw agricultural commodities: Coffee, green bean at 0.2 parts per million (ppm); coffee, instant at 0.4 ppm; coffee, roasted bean at 0.4 ppm; cottonseed subgroup 20C at 0.02 ppm; caneberry subgroup 13-07A at 0.7 ppm; bushberry subgroup 13-07B, except lingonberry at 0.25 ppm; fruit, small, vine climbing, except fuzzy kiwifruit subgroup 13-07F at 0.5 ppm; berry, low growing, subgroup 13-07G, except blueberry, lowbush, and cranberry at 1.0 ppm; fruit, pome group 11-10 at 0.2 ppm; vegetable, fruiting, group 8-10 at 0.4 ppm; fruit, citrus, group 10-10 at 0.3 ppm; fruit, stone, group 12-12 at 0.2 ppm; onion, bulb, subgroup 3-07A at 0.1 ppm; onion, green, subgroup 3-07B at 2.0 ppm; and nuts, tree, group 14-12 at 0.1 ppm. In addition, the petitioner proposes based upon establishment of the new tolerances above, to remove the following established tolerances that are superseded by this action: bushberry subgroup 13B at 0.25 ppm; caneberry subgroup 13A at 0.70 ppm; fruit, citrus, group 10 at 0.30 ppm; fruit, pome, group 12 at 0.20 ppm; grape at 0.50 ppm; Juneberry at 0.25 ppm; lingonberry at 0.25 ppm; nut tree, group 14 at 0.10 ppm; okra at 0.40 ppm; onion, green at 2.0 ppm;

pistachio at 0.10 ppm; quinoa, grain at 1.0 ppm; salal at 0.25 ppm; strawberry at 1.0 ppm; vegetable, bulb, group 3, except green onion at 0.10 ppm; vegetable, fruiting group 8 at 0.4 ppm; and cotton, undelinted seed at 0.02 ppm. That document referenced a summary of the petition prepared by Dow AgroSciences, the registrant, which is available in the docket, <http://www.regulations.gov>. Comments were received on the notice of filings. EPA's response to these comments is discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA has made certain modifications to the petitioned-for tolerances. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the

sensitivities of major identifiable subgroups of consumers, including infants and children.

Spinosad and spinetoram are considered by EPA to be toxicologically identical for human health risk assessment based on their very similar chemical structures and similarity of the toxicological databases for currently available studies. The primary toxic effect observed from exposure to spinosad or spinetoram was histopathological changes in multiple organs (specific target organs were not identified). Vacuolization of cells and/or macrophages was the most common histopathological finding noted across both toxicological databases with the dog being the most sensitive species. In addition to the numerous organs observed with histopathological changes, anemia was noted in several studies.

There was no evidence of increased quantitative or qualitative susceptibility from spinosad or spinetoram exposure. In developmental studies, no maternal or developmental effects were seen in rats or rabbits. In the rat reproduction toxicity studies, offspring toxicity was seen in the presence of parental toxicity at approximately the same dose for both chemicals (75–100 mg/kg/day). Parental toxicity was evidenced by increased organ weights, mortality, and histopathological findings in several organs. Offspring effects included decreased litter size, survival, and body weights with spinosad while an increased incidence of late resorptions and post-implantation loss was seen with spinetoram. Dystocia and/or other parturition abnormalities were observed with both chemicals.

Spinosad and spinetoram are classified as having low acute toxicity via the oral, dermal, and inhalation routes of exposure. Neither chemical is an eye or dermal irritant. Spinetoram was found to be a dermal sensitizer. No

hazard was identified for dermal exposure; therefore a quantitative dermal assessment is not needed. In acute and subchronic neurotoxicity studies, there was no evidence of neurotoxicity from exposure to spinosad or spinetoram. In an immunotoxicity study with spinosad, systemic effects (decreased body weights, increased liver weights, and abnormal hematology results) were seen at the highest dose tested (141 mg/kg/day); however, there was no evidence of immunotoxicity.

Spinosad and spinetoram are classified as “not likely to be carcinogenic to humans” based on lack of evidence of carcinogenicity in mice and rats and negative findings in mutagenicity assays.

Specific information on the studies received and the nature of the adverse effects caused by spinetoram as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at <http://www.regulations.gov> in documents including: (1) “Spinosad and Spinetoram—Human Health Risk Assessment to Support the Section 3 Registration Request for Application to Coffee and for Updates to Several Crop Group/Subgroup Commodity Definitions”, dated March 15, 2015 at page 31, and (2) “Spinosad/Spinetoram. Addendum to Human Health aggregate Risk assessment D415812 (T. Bloem *et al.*, March 10, 2015) to Support a New Use on Quinoa”, dated November 19, 2015 in docket ID number EPA–HQ–OPP–2013–0727.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide’s toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards

that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides>.

Spinosad and spinetoram should be considered toxicologically identical in the same manner that metabolites are generally considered toxicologically identical to the parent. Although, as stated above, the doses and endpoints for spinosad and spinetoram are similar, they are not identical due to variations in dosing levels used in the spinetoram and spinosad toxicological studies. EPA compared the spinosad and spinetoram doses and endpoints for each exposure scenario and selected the lower of the two doses for use in human risk assessment.

A summary of the toxicological endpoints for spinosad/spinetoram used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR SPINOSAD/SPINETORAM FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (All populations) ..	A dose and endpoint of concern attributable to a single dose was not observed.		
Chronic dietary (All populations)	NOAEL= 2.49 mg/kg/day. UF _A = 10x UF _H = 10x FQPA SF = 1x	Chronic RfD = 0.0249 mg/kg/day. cPAD = 0.0249 mg/kg/day	Chronic Toxicity—Dog Study (with spinetoram) LOAEL = 5.36/5.83 mg/kg/day (males/females) based on arteritis and necrosis of the arterial walls of the epididymides in males and of the thymus, thyroid, larynx, and urinary bladder in females.
Incidental oral short-term (1 to 30 days) and intermediate-term (1 to 6 months).	NOAEL= 4.9 mg/kg/day. UF _A = 10x UF _H = 10x FQPA SF = 1x	Residential LOC for MOE <100.	<i>Subchronic Oral Toxicity—Dog Study (with spinosad)</i> LOAEL = 9.73 mg/kg/day based on microscopic changes in multiple organs, clinical signs of toxicity, decreases in body weights and food consumption, and biochemical evidence of anemia and liver damage.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR SPINOSAD/SPINETORAM FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Inhalation short-term (1 to 30 days) and Intermediate-Term (1–6 months).	Inhalation (or oral) study NOAEL= 4.9 mg/kg/day (inhalation assumed equivalent to oral). UF _A = 10x UF _H = 10x FQPA SF = 1x	Residential LOC for MOE <100.	<i>Subchronic Oral Toxicity—Dog Study (with spinosad)</i> LOAEL = 9.73 mg/kg/day based on microscopic changes in multiple organs, clinical signs of toxicity, decreases in body weights and food consumption, and biochemical evidence of anemia and liver damage.
Cancer (Oral, dermal, inhalation).	Classified as “not likely to be carcinogenic to humans”.		

LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to spinosad and spinetoram, EPA considered exposure under the petitioned-for tolerances as well as all existing spinosad tolerances in 40 CFR 180.495 and existing spinetoram tolerances. EPA assessed dietary exposures from spinosad and spinetoram in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

No such effects were identified in the toxicological studies for spinosad or spinetoram; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* Spinosad is registered for application to all of the same crops as spinetoram, with similar pre-harvest and retreatment intervals, and application rates greater than or equal to spinetoram. Further, both products control the same pest species. For this reason, EPA has concluded it would overstate exposure to assume that residues of both spinosad and spinetoram would appear on the same food. Rather, EPA aggregated exposure by either assuming that all commodities contain spinosad residues (because side-by-side spinetoram and spinosad residue data indicated that spinetoram residues were less than or equal to spinosad residues).

In conducting the chronic dietary exposure assessment for spinetoram, EPA used the Dietary Exposure Evaluation Model—Food Consumption Intake Database (DEEM—FCID, ver. 3.16)

which incorporates food consumption data from the United States Department of Agriculture (USDA) National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA; 2003–2008). The chronic analysis assumed 100 percent crop treated (PCT), average field-trial residues or tolerance-level residues for crop commodities, average residues from the livestock feeding studies, residue estimates for fish/shellfish, experimental processing factors when available, and modeled drinking water estimates.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that spinosad does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and 100 percent crop treated (PCT) information were used.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water.* The Agency used screening level

water exposure models in the dietary exposure analysis and risk assessment for spinosad and spinetoram in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of spinosad. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide>.

Based on the Surface Water Concentration Calculator (SWCC) and Screening Concentration in Ground Water (SCIGROW) models, the estimated drinking water concentrations (EDWCs) of spinosad for acute exposures are estimated to be 25.0 ppb for surface water and 1.1 ppb for ground water. For chronic exposures for non-cancer assessments, EDWCs of spinosad are estimated to be 21.7 ppb for surface water and 1.1 ppb for ground water. EDWCs of spinetoram for acute exposures are estimated to be 8.6 parts per billion (ppb) for surface water and 0.072 ppb for ground water. For chronic exposures for non-cancer assessments, EDWCs of spinetoram are estimated to be 5.9 ppb for surface water and 0.072 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 21.7 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term “residential exposure” is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control,

indoor pest control, termiticides, and flea and tick control on pets).

Spinosad and spinetoram are currently registered for uses that could result in residential exposures including lawns, gardens, turfgrass, ornamentals, fire ant mounds, and spot-on pet applications. There is potential for residential handler and post-application exposures to both spinosad and spinetoram. Since spinosad and spinetoram control the same pests, EPA concludes that these products will not be used for the same uses in combination with each other and thus combining spinosad and spinetoram residential exposures would overstate exposure. EPA assessed residential exposure for both spinosad and spinetoram using the most conservative residential exposure scenarios for either chemical.

EPA assessed residential exposure using the following assumptions: Residential handler (short-term inhalation exposures) and post-application (short-term incidental oral) exposures are expected as a result of the following registered uses: (1) application of spinosad to gardens, turfgrass, ornamentals and fire ant mounds; (2) application of spinetoram to lawns, gardens, and ornamentals; and (3) spot-on application of spinetoram to cats and kittens. The Agency determined the "worst-case" scenarios for handler and post-application exposures as: (1) adult residential handler inhalation exposure from mixing/loading/applying liquid formulations to turf via backpack sprayer, and (2) child (1-<2 years) residential post-application incidental oral (hand-to-mouth) exposure from liquid formulation on turf/home gardens/ornamentals. These worst-case exposure estimates were used in the aggregate assessment of residential exposure to spinosad and spinetoram.

Aggregating exposure resulting from the turf and pet uses was not conducted as the products control different pests and, therefore, application on the same day is unlikely. Use survey data indicate that concurrent use of separate pesticide products that contain the same active ingredient to treat the same or different pests does not typically occur. Furthermore, a number of issues are considered when combining residential exposure scenarios, including whether aggregating additional uses is appropriate in light of the already conservative assumptions inherent in the assessment. When assessing individual short-term residential postapplication exposure scenarios, EPA assumes exposure occurs to zero-day residues (*i.e.*, day of application

residues) day after day. EPA also assumes that an individual performs the same postapplication activities, intended to represent high end exposures as described in the Residential SOPS, day after day for the same amount of time every day (*i.e.*, no day to day variation), although doing intense contact activities on the day of application subsequent to application for multiple chemicals would not be anticipated. Once calculated, these exposure estimates are then compared to points of departure that are typically based on weeks of dosing in test animals. For spinosad/spinetoram, the short-term risk assessment has the additional conservatism of basing the level of concern for short-term exposure (30-days) on a toxicity study involving continuous exposure over 90 days.

Current EPA policy requires assessment for residential post-application exposures of short- (1 to 30 days), intermediate- (1 to 6 months), and long-term (greater than 6 months) exposures from spot-on products due to the preventative nature of these products and the potential for extended usage in more temperate parts of the country. However, for spinetoram, there is no progression of toxicity with time; therefore, the short-term assessment is protective of intermediate- and long-term exposure.

Available turf transferable residue (TTR) data on spinosad in support of the turf uses and spinetoram data on dislodgeable residues from petting after topical administration to cats were incorporated into the exposure assessment. Spinosad and spinetoram dislodgeable-foliar residue (DFR) studies are unnecessary at this time as there is no hazard via the dermal route of exposure.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at <http://www2.epa.gov/pesticides-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide>.

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

EPA has not found spinosad or spinetoram to share a common mechanism of toxicity with any other substances, and neither spinosad nor spinetoram appear to produce a toxic

metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that spinosad and spinetoram do not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at <http://www2.epa.gov/pesticides-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides>.

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* There was no evidence of increased quantitative or qualitative susceptibility of rat and rabbit fetuses to *in-utero* exposure to spinetoram or spinosad. In developmental studies, no maternal or developmental effects were seen in rats or rabbits. In the rat reproduction toxicity studies, offspring toxicity was seen in association with parental toxicity at approximately the same dose for both spinetoram and spinosad. Therefore, there is no evidence of increased susceptibility and there are no concerns or residual uncertainties for pre-natal and/or post-natal toxicity.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for spinosad and spinetoram is complete. There is no evidence of neurotoxicity, developmental/reproductive toxicity, immunotoxicity, mutagenicity, or carcinogenicity from spinetoram or spinosad exposure. Therefore, no additional database uncertainty factor (UF) is needed.

ii. There is no indication of spinosad or spinetoram neurotoxicity from available acute and subchronic

neurotoxicity studies in rats and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that spinosad or spinetoram results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the spinosad and spinetoram exposure databases. The dietary exposure assessment is conservative as it assumes 100 PCT and residue estimates are based on field trial data and fish nature of the residue studies. Moreover, EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to spinosad and spinetoram in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by spinosad and spinetoram.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, spinosad and spinetoram are not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to spinosad and spinetoram from food and water will utilize 64% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of spinosad and spinetoram is not expected.

3. *Short- and Intermediate-term risks.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Spinosad and spinetoram are currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to spinosad and spinetoram.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 220 for children 1–2 years old and 1,000 for adults 20–49 years old. Because EPA's level of concern for spinosad and spinetoram is a MOE of 100 or below, these MOEs are not of concern.

EPA has concluded that the combined intermediate-term and long-term food, water, and residential exposures result in aggregate MOEs that will not fall below the short-term aggregate MOEs since there is no progression of spinetoram toxicity with time. Because EPA's level of concern for spinetoram and spinosad is a MOE of 100 or below, these MOEs are not of concern.

4. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, spinosad is not expected to pose a cancer risk to humans.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to spinosad residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (Method RES 94025 (GRM 94.02) is a high-performance liquid chromatography method with ultraviolet detection (HPLC/UV)) is available to enforce the tolerance expression. Additional methods have also been determined to be adequate for tolerance enforcement purposes.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: residuemethods@epa.gov.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

Codex maximum residue limits (MRLs) for spinosad are currently established in or on several of the relevant crops or crop groups or subgroups affected by this action. EPA harmonizes with existing Codex MRLs whenever feasible. The recommended fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F and raisin tolerances and the Codex MRLs are harmonized. But harmonization with the Codex MRLs for the following tolerances is inappropriate as doing so may result in exceedances of the tolerances when the pesticide is applied using the labeled instructions: Fruit, pome, group 11–10; nut, tree, group 14–12; and cottonseed, subgroup 20C. Harmonization with the currently established vegetable, fruiting, group 8–10 Codex MRL is inappropriate as the Codex MRL is too high to allow for enforcement of the labeled instructions.

C. Response to Comments

In response to the notice of filing, EPA received two (2) comments on December 4, 2015. One comment was received from a private citizen in support of EPA's regulatory initiatives to control potentially harmful substances in order to protect human health and the environment.

The other comment was from the Center for Biological Diversity and concerned endangered species, specifically stating that EPA cannot approve these new uses prior to completion of consultations with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (“the Services”). This comment is not relevant to the Agency's evaluation of the safety of the spinosad tolerances;

section 408 of the FFDCA focuses on potential harms to human health and does not permit consideration of effects on the environment.

D. Revisions to Petitioned-For Tolerances

Based on the available field-trial and processing data and the OECD tolerance calculation procedure, EPA: (1) concludes that proposed tolerances in or on coffee processed commodities are unnecessary; (2) made revisions to proposed tolerance values in order to harmonize with Canada and/or Codex MRLs where supporting data allowed; (3) made revisions to the commodity definitions to conform with current Agency practices, and (4) is reducing the requested tolerance for coffee, green bean from 0.2 ppm to 0.04 ppm. Also, although a spinosad tolerance in/on quinoa, grain was requested at 1.0 ppm for the purpose of harmonizing with the Codex cereal grain MRL, EPA is establishing a tolerance at 0.02 ppm. EPA considered the fact that the Codex MRL is based on post-harvest treatment and, therefore, is not reflective of the proposed foliar-only quinoa application scenario. Based on the available wheat grain data and adjusting these data for the proposed application rate, EPA concluded that a 0.02-ppm spinosad tolerance in/on quinoa grain is appropriate.

In addition, the Agency is updating the tolerance expression for spinosad as follows to reflect current EPA policies: Tolerances are established for residues of the insecticide spinosad, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of *spinosyn A* (Factor A; CAS # 131929–60–7; (2*R*,3*a*S,5*a*R,5*b*S,9*S*,13*S*,14*R*,16*a*S,16*b*R)-2-[(6-deoxy-2,3,4-tri-*O*-methyl- α -*L*-manno-pyranosyl)oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2*H*-pyran-2-yl]oxy]-9-ethyl-2,3,3*a*,5*a*,5*b*,6,9,10,11,12,13,14,16*a*,16*b*-tetradecahydro-14-methyl-1*H*-*as*-indaceno[3,2-*d*]oxacyclododecin-7,15-dione); and *spinosyn D* (Factor D; CAS # 131929–63–0; (2*S*,3*a*R,5*a*S,5*b*S,9*S*,13*S*,14*R*,16*a*S,16*b*S)-2-[(6-deoxy-2,3,4-tri-*O*-methyl- α -*L*-manno-pyranosyl)oxy]-13-[[5-(dimethyl-amino)-tetrahydro-6-methyl-2*H*-pyran-2-yl]oxy]-9-ethyl-2,3,3*a*,5*a*,5*b*,6,9,10,11,12,13,14,16*a*,16*b*-tetradecahydro-4,14-methyl-1*H*-*as*-indaceno[3,2-*d*]oxacyclododecin-7,15-dione), calculated as the stoichiometric equivalent of spinosad.

V. Conclusion

Therefore, EPA is establishing tolerances for residues of the insecticide spinosad, including its metabolites and degradates, in or on the following commodities. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of *spinosyn A* (Factor A; CAS # 131929–60–7; (2*R*,3*a*S,5*a*R,5*b*S,9*S*,13*S*,14*R*,16*a*S,16*b*R)-2-[(6-deoxy-2,3,4-tri-*O*-methyl- α -*L*-manno-pyranosyl)oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2*H*-pyran-2-yl]oxy]-9-ethyl-2,3,3*a*,5*a*,5*b*,6,9,10,11,12,13,14,16*a*,16*b*-tetradecahydro-14-methyl-1*H*-*as*-indaceno[3,2-*d*]oxacyclododecin-7,15-dione; and *spinosyn D* (Factor D; CAS # 131929–63–0; (2*S*,3*a*R,5*a*S,5*b*S,9*S*,13*S*,14*R*,16*a*S,16*b*S)-2-[(6-deoxy-2,3,4-tri-*O*-methyl- α -*L*-manno-pyranosyl)oxy]-13-[[5-(dimethyl-amino)-tetrahydro-6-methyl-2*H*-pyran-2-yl]oxy]-9-ethyl-2,3,3*a*,5*a*,5*b*,6,9,10,11,12,13,14,16*a*,16*b*-tetradecahydro-4,14-methyl-1*H*-*as*-indaceno[3,2-*d*]oxacyclododecin-7,15-dione, calculated as the stoichiometric equivalent of spinosad, in or on berry, low growing, subgroup 13–07G, except cranberry at 0.90 ppm; bushberry, subgroup 13–07B at 0.40 ppm; caneberry subgroup 13–07A at 1.0 ppm; coffee, green bean at 0.04 ppm; cottonseed subgroup 20C at 0.02 ppm; fruit, citrus, group 10–10 at 0.30 ppm; fruit, pome, group 11–10 at 0.20 ppm; fruit, small, vine climbing, subgroup 13–07F, except fuzzy kiwifruit at 0.50 ppm; fruit, stone 12–12 at 0.20 ppm; nut, tree, group 14–12 at 0.10 ppm; onion, bulb, subgroup 3–07A at 0.10 ppm; onion, green, subgroup 3–07B at 4.0 ppm; quinoa, grain at 0.02 ppm; and vegetable, fruiting, group 8–10 at 0.40 ppm. In addition, EPA is removing the following existing spinosad tolerances that are superseded by this action including: Bushberry subgroup 13B at 0.25 ppm; caneberry subgroup 13A at 0.70 ppm; fruit, citrus, group 10 at 0.30 ppm; fruit, pome, group 11 at 0.20 ppm; fruit, stone, group 12 at 0.20 ppm; grape at 0.50 ppm; Juneberry at 0.25 ppm; lingonberry at 0.25 ppm; nut tree, group 14 at 0.10 ppm; okra at 0.40 ppm; onion, green at 2.0 ppm; pistachio at 0.10 ppm; strawberry at 1.0 ppm; vegetable, bulb, group 3, except green onion at 0.10 ppm; vegetable, fruiting group 8 at 0.4 ppm; and cotton, undelinted seed at 0.02 ppm. In addition, EPA is increasing the existing tolerance for grape, raisin to 1.0 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in

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

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

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require

Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: December 15, 2015.

Susan Lewis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

- 1. The authority citation for part 180 continues to read as follows:
 Authority: 21 U.S.C. 321(q), 346a and 371.
- 2. In § 180.495, paragraph (a):
- a. Revise the introductory text.
- b. Remove the entries in the table for “Bushberry subgroup 13B”; “Caneberry subgroup 13A”; “Cotton, undelinted seed”; “Fruit, citrus, group 10”; “Fruit, pome, group 11”; “Fruit, stone, group 12”; “Grape”; “Juneberry”; “Lingonberry”; “Nut tree, group 14”; “Okra”; “Onion, green”; “Pistachio”; “Salal”; “Strawberry”; “Vegetable, bulb, group 3, except green onion”; and “Vegetable, fruiting, group 8”.
- c. Revise the entry in the table for “Grape, raisin”.
- d. Add alphabetically entries to the table for “Berry, low growing, subgroup 13–07G, except cranberry”; “Bushberry subgroup 13–07B”; “Caneberry subgroup 13–07A”; “Coffee, green bean”; “Cottonseed subgroup 20C”; “Fruit, citrus, group 10–10”; “Fruit, pome, group 11–10”; “Fruit, small, vine climbing, subgroup 13–07F, except fuzzy kiwifruit”; “Nut, tree, group 14–12”; “Onion, bulb, subgroup 3–07A”; “Onion, green, subgroup 3–07B”; “Quinoa, grain”; and “Vegetable, fruiting, group 8–10”.

The additions and revision read as follows:

§ 180.495 Spinosad; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide spinosad, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of *spinosyn A* (Factor A: CAS # 131929–60–7; (2*R*,3*aS*,5*aR*,5*bS*,9*S*,13*S*,14*R*,16*aS*,16*bR*)-2-[(6-deoxy-2,3,4-tri-*O*-methyl- α -*L*-manno-pyranosyl)oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2*H*-pyran-2-yl]oxy]-9-ethyl-, 3,3*a*,5*a*,5*b*,6,9,10,11,12,13,14,16*a*,16*b*-tetradecahydro-14-methyl-1*H*-*as*-indaceno[3,2-*d*]oxacyclododecin-7,15-dione; and *spinosyn D* (Factor D; CAS # 131929–63–0; (2*S*,3*aR*,5*aS*,5*bS*,9*S*,13*S*,14*R*,16*aS*,16*bS*)-2-[(6-deoxy-2,3,4-tri-*O*-methyl- α -*L*-manno-pyranosyl)oxy]-13-[[5-(dimethyl-amino)-tetrahydro-6-methyl-2*H*-pyran-2-yl]oxy]-9-ethyl-, 3,3*a*,5*a*,5*b*,6,9,10,11,12,13,14,16*a*,16*b*-tetradecahydro-4,14-methyl-1*H*-*as*-indaceno[3,2-*d*]oxacyclododecin-7,15-dione, calculated as the stoichiometric equivalent of spinosad.

Commodity	Parts per million
Berry, low growing, subgroup 13–07G, except cranberry	0.90
Bushberry subgroup 13–07B	0.40
Caneberry subgroup 13–07A	1.0
Coffee, green bean	0.04
Cottonseed subgroup 20C	0.02
Fruit, citrus, group 10–10	0.30
Fruit, pome, group 11–10	0.20
Fruit, small, vine climbing, subgroup 13–07F, except fuzzy kiwifruit	0.50
Fruit, stone 12–12	0.20
Grape, raisin	1.0
Nut, tree, group 14–12	0.10
Onion, bulb, subgroup 3–07A	0.10
Onion, green, subgroup 3–07B	4.0
Quinoa, grain	0.02
Vegetable, fruiting, group 8–10	0.40

Commodity	Parts per million
* * * * *	* * * * *

[FR Doc. 2015–32168 Filed 12–24–15; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 271 and 272

[EPA–R06–RCRA–2015–0110; FRL–9939–51–Region 6]

Texas: Final Authorization of State-Initiated Changes and Incorporation by Reference of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: During a review of Texas’ regulations, the Environmental Protection Agency (EPA) identified a variety of State-initiated changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). We have determined that these changes are minor and satisfy all requirements needed to qualify for Final authorization and are authorizing the State-initiated changes through this direct Final action. In addition, this document corrects technical errors made in the September 3, 2014, **Federal Register** authorization document for Texas.

The Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (RCRA), allows the Environmental Protection Agency (EPA) to authorize States to operate their hazardous waste management programs in lieu of the Federal program. The EPA uses the regulations entitled “Approved State Hazardous Waste Management Programs” to provide notice of the authorization status of State programs and to incorporate by reference those provisions of the State statutes and regulations that will be subject to the EPA’s inspection and enforcement. The rule codifies in the regulations the prior approval of Texas’ hazardous waste management program and incorporates by reference authorized provisions of the State’s statutes and regulations.

DATES: This regulation is effective February 26, 2016, unless the EPA receives adverse written comment on this regulation by the close of business January 27, 2016. If the EPA receives such comments, it will publish a timely

withdrawal of this direct final rule in the **Federal Register** informing the public that this rule will not take effect. The Director of the Federal Register approves this incorporation by reference as of February 26, 2016 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

2. *Email:* patterson.alima@epa.gov or banks.julia@epa.gov.

3. *Mail:* Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, State/Tribal Oversight Section (6PD-O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733.

4. *Hand Delivery or Courier:* Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, State/Tribal Oversight Section (6PD-O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733.

Instructions: Do not submit information that you consider to be Confidential Business Information (CBI) or otherwise protected through <http://www.regulations.gov>, or email. The Federal <http://www.regulations.gov> Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. (For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.)

You can view and copy the documents that form the basis for this authorization and codification and associated publicly available materials

from 8:30 a.m. to 4 p.m., Monday through Friday, at the following location: EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, phone number: (214) 665-8533 or (214) 665-8178. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT:

Alima Patterson, Region 6 Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, State/Tribal Oversight Section (6PD-O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, Phone number: (214) 665-8533 or (214) 665-8178, and Email address: patterson.alima@epa.gov or banks.julia@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Authorization of State-Initiated Changes

A. Why are revisions to State programs necessary?

States which have received Final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal hazardous waste program. As the Federal program changes, the States must change their programs and ask the EPA to authorize the changes. Changes to State hazardous waste programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273 and 279. States can also initiate their own changes to their hazardous waste program and these changes must then be authorized.

B. What decisions have we made in this rule?

We conclude that Texas' revisions to its authorized program meet all of the statutory and regulatory requirements established by RCRA. We found that the State-initiated changes make Texas' rules more clear or conform more closely to the Federal equivalents, and are so minor in nature that a formal application is unnecessary. Therefore, we grant Texas final authorization to operate its hazardous waste program with the changes described in the table at Section G below. Texas has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs)

within its borders (except in Indian Country) and for carrying out all authorized aspects of the RCRA program, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, the EPA will implement those requirements and prohibitions in Texas, including issuing permits, until the State is granted authorization to do so.

C. What is the effect of this authorization decision?

The effect of this decision is that a facility in Texas, subject to RCRA, will now have to comply with the authorized State requirements, instead of the equivalent Federal requirements, in order to comply with RCRA. Texas has enforcement responsibilities under its State hazardous waste program for violations of such program, but the EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Do inspections, and require monitoring, tests, analyses, or reports;
- Enforce RCRA requirements and suspend or revoke permits; and
- Take enforcement actions, regardless of whether the State has taken its own actions.

This action does not impose additional requirements on the regulated community because the statutes and regulations for which Texas is being authorized by this direct action are already effective and are not changed by this action.

D. Why wasn't there a proposed rule before this rule?

The EPA did not publish a proposal before this rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the Proposed Rules section of this **Federal Register**, we are publishing a separate document that proposes to authorize the State program changes.

E. What happens if EPA receives comments that oppose this action?

If the EPA receives comments that oppose the authorization of the State-initiated changes in this codification document, we will withdraw this rule by publishing a timely document in the **Federal Register** before the rule

becomes effective. The EPA will base any further decision on the authorization of the State program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. If you want to comment on this authorization, you must do so at this time. If we receive comments that oppose only the authorization of a particular change to the State hazardous waste program, we may withdraw only that part of this rule, but the authorization of the program changes that the comments do not oppose will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization of the State program will become effective and which part is being withdrawn.

The purpose of this **Federal Register** document is to codify Texas' base hazardous waste management program and its revisions to that program. The EPA has already provided notices and opportunity for comments on the Agency's decisions to codify the Texas program, and the EPA is not now

reopening the decisions, nor requesting comments, on the Texas authorization as published in the **Federal Register** notices specified in Section I.F. of this document.

F. For what has Texas previously been authorized?

Texas initially received final authorization on December 26, 1984 (49 FR 48300), to implement its Base Hazardous Waste Management Program. This authorization was clarified in a notice published March 26, 1985 (50 FR 11858). Texas received authorization for revisions to its program, effective October 4, 1985 (51 FR 3952), February 17, 1987 (51 FR 45320), March 15, 1990 (55 FR 7318), July 23, 1990 (55 FR 21383), October 21, 1991 (56 FR 41626), December 4, 1992 (57 FR 45719), June 27, 1994 (59 FR 16987), June 27, 1994 (59 FR 17273), November 26, 1997 (62 FR 47947), December 3, 1997 (62 FR 49163), October 18, 1999 (64 FR 44836), November 15, 1999 (64 FR 49673), September 11, 2000 (65 FR 43246), June 14, 2005 (70 FR 34371), December 29, 2008, (73 FR 64252), July 13, 2009 (74 FR 22469), May 6, 2011 (76 FR 12283),

May 7, 2012 (77 FR 13200), January 9, 2013 (77 FR 71344) and November 3, 2014 (79 FR 52220).

G. What changes are we authorizing with this action?

The State has made amendments to the provisions listed in the table which follows. These amendments clarify the State's regulations, and make the State's regulations more internally consistent. The State's laws and regulations, as amended by these provisions, provide authority which remains equivalent to, no less stringent than, and not broader in scope than the Federal laws and regulations. These State-initiated changes satisfy the requirements of 40 CFR 271.21(a). We are granting Texas final authorization to carry out the following provisions of the State's program, in lieu of the Federal program. These provisions are analogous to the indicated RCRA regulations found at 40 CFR, as of July 1, 2010. The Texas provisions are from the Texas Administrative Code (TAC), Title 30, amended to be effective February 21, 2013 (except as noted below).

State requirement	Analogous federal requirement
30 TAC 305.64(g)	40 CFR 270.40(b).
30 TAC 305.69(d)(2)(A)	40 CFR 270.42(c)(2)(i).
30 TAC 305.69(k), except A.8, A.9, A.10, A.11, B, D.3.g, H.6&7, J.7 & 8, I.6, L.5, L.9, L.10, M, and N.	40 CFR 270.42, appendix I, except A.8, B, C7, D.3.g, H, J, I.6, L.5, L.9, L.10, M, and N.
30 TAC 305.176	40 CFR 270.235.
30 TAC 324.2 introductory paragraph	40 CFR 279.1 related.
30 TAC 324.2(3)	40 CFR 279.1 related.
30 TAC 324.2(5)	40 CFR 279.1 related.
30 TAC 324.2(8)	40 CFR 279.1 related.
30 TAC 324.4	40 CFR 279.12.
30 TAC 324.6	40 CFR 279.20 through 279.24 (subpart C).
30 TAC 324.7	40 CFR 279.30 through 279.32 (subpart D).
30 TAC 324.15	40 CFR 279 related.
30 TAC 324.16	40 CFR 279.11 Table 1, Note.
30 TAC 324.22(d)(3)	40 CFR 279 related.
30 TAC 335.1(59)	40 CFR 260.10 "Facility".
30 TAC 335.1(142)	40 CFR 124.2(a) "Standardized permit".
30 TAC 335.2(g)	40 CFR 261.4(e) and (f).
30 TAC 335.2(o) (December 31, 2012)	40 CFR 270.255 related.
30 TAC 335.19(b)	40 CFR 260.31(b).
30 TAC 335.69(f)(4)(C)	40 CFR 262.34(d)(4) related.
30 TAC 335.112(a)(14)	40 CFR 265.340–265.352 (subpart O).
30 TAC 335.112(b)(7)	40 CFR 265 related.
30 TAC 335.152(a)(9)	40 CFR 264.220–264.232 (subpart K), except 264.221 & 264.228.
30 TAC 335.152(c)(5) and (c)(6) [December 31, 2012]	40 CFR 264 related.
30 TAC 335.152(c)(7)	40 CFR 264 related.
30 TAC 335.168(c)	40 CFR 264.221(c).
30 TAC 335.170(c)	40 CFR 264.251(c).

H. Who handles permits after the authorization takes effect?

This authorization does not affect the status of State permits and those permits issued by the EPA, because no new substantive requirements are a part of these revisions.

I. How does this action affect Indian Country (18 U.S.C. 1151) in Texas?

Texas is not authorized to carry out its Hazardous Waste Program in Indian Country within the State. This authority remains with EPA. Therefore, this action has no effect in Indian Country.

II. Technical Corrections

The following technical corrections are made to the September 3, 2014, Texas authorization **Federal Register** document (79 FR 52220; effective November 3, 2014). There are two types of corrections being made. The first type includes additions or corrections to the

list of citations for checklist entries that were actually included in the published **Federal Register** document. These are presented in order of the entry number and associated checklist, followed by a brief description of the correction being made. The second type of correction is the addition of the checklist entry for the authorization of the 40 CFR part 279 portions of the Corrections to Errors in the Code of Federal Regulations Rule (Checklist 214), a Federal rule which was inadvertently omitted from the original authorization table.

1. For all the checklist entries, the word "Chapter" is corrected to read "Section".
2. For Checklist 203, the following corrections should be made:
 - a. The citation "224.1" is corrected to read "324.1".
 - b. The citation "324.3" is corrected to read "334.3 (except 324.3(5))".
3. For Checklist 207, the following corrections should be made:
 - a. The citation "335.41(f)(2)(iii)" is corrected to read "335.41(f)(2)(A)(iii)".
 - b. The citations "335.69" and 335.67" are removed.
4. For Checklist 208, the following corrections should be made:
 - a. The text "4 as amended" is removed.

- b. The citations "335.152(a)(17)(c)", "335.152(a)(21)", "335.152(a)(9)" and "335.152(19)" are removed.
- c. Add citation "335.112(a)(9)" before "335.125(d)".
- d. Add citation "335.112(a)(19)—(a)(21)" before "335.221(a)(1)".
- e. Add citation "324.3 (except 324.3(5))" before "324.11".
- f. The citation "305.172(2)(a)(iii)—(iv)" is corrected to read "305.172(2)(A)(iii)—(iv)".
- g. The language "amended and effective February 21, 2013" is corrected to read "as amended January 29, 2013 and effective February 21, 2013".
5. For Checklist 220, the following corrections should be made:
 - a. The language "335.61(i)" and "335.79, 335.61(i)(1)–(2), 335.61(i)(2)" is removed.
6. For Checklist 222, the following corrections should be made:
 - a. The citation "335.11(e)" is removed.
 - b. The citations "335.76(a), 335.76(f), 335.76(h)" are removed.
 - c. Add citation "335.251(a) and 335.251(c)" after "335.112(a)(1)".
 - d. The citation "335.71(d)" is removed.
 - e. The citation "335.112(a)(4)" is corrected to read "335.12".
 - f. Add the following text to the end of the Checklist 222 entry: "Note: While

- Texas has adopted the Federal changes addressed by this January 8, 2010 final rule, the State has appropriately left the authority with the EPA for the non-delegable export functions and is not being authorized to enforce these requirements in lieu of the EPA."
7. For Checklist 223, the following corrections should be made:
 - a. The citation "335.1(138(D)(iv))" is corrected to read "335.1(138)(D)(iv) Table 1".
 - b. Add citation "335.71" after "335.69(f)(4)(C)".
 - c. The citation "335.69(f)(4)(C)" is corrected to read "335.69(f)(4)(D)".
 - d. The citations "335.10(a)" and "335.2(o)" are removed.
 - e. The citation "324.94" is corrected to read "335.94(a)".
 - f. The citations "335.12(e)" and "335.12(c)" are removed.
 - g. The duplicate citation "335.211(b)" after "335.112(a)(3)" is removed.
 - h. The citation "335.222(e)(1)(E)" is corrected to read "335.222(c)(1)(E)".
 8. For Checklist 226, the following correction should be made:
 - a. Insert "30" before "Texas Administrative Code".
 9. Add the following new entry to the Table:

Description of federal requirement (include checklist #, if relevant)	Federal Register date and page (and/or RCRA statutory authority)	Analogous state authority
40 CFR part 279 portions of the Corrections to Errors in the Code of Federal Regulations. (Checklist 214).	71 FR 40254–40280 July 14, 2006.	Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Section 361.017 and 361.024; 30 Texas Administrative Code, Sections 324.1, 324.3 (except 324.3(5)), 324.11, 324.12, 324.13, and 324.14, as amended January 29, 2013 and effective February 21, 2013.

III. Incorporation-by-Reference

A. What is codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's authorized hazardous waste management program into the Code of Federal Regulations (CFR). Section 3006(b) of RCRA, as amended, allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in lieu of the Federal hazardous waste management regulatory program. The EPA codifies its authorization of State programs in 40 CFR part 272, and incorporates by reference State statutes and regulations that the EPA will enforce under sections 3007 and 3008 of RCRA and any other applicable statutory provisions.

The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the authorized State program and State requirements that can be Federally enforced. This effort provides clear notice to the public of the scope of the authorized program in each State.

B. What is the history of the codification of Texas' hazardous waste management program?

The EPA incorporated by reference Texas' then authorized hazardous waste program effective December 3, 1997 (62 FR 49163), November 15, 1999 (64 FR 49673), December 29, 2008 (73 FR 64252), May 6, 2011 (76 FR 12283), and January 9, 2013 (77 FR 71344). In this document, EPA is revising Subpart SS of 40 CFR part 272 to include the recent

authorization revision actions effective November 3, 2014 (79 FR 52220).

C. What codification decisions have we made in this rule?

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Texas rules described in the amendments to 40 CFR part 272 set forth below. The EPA has made, and will continue to make, these documents available electronically through www.regulations.gov and in hard copy at the appropriate EPA office (see the ADDRESSES section of this preamble for more information).

The purpose of this **Federal Register** document is to codify Texas' base hazardous waste management program

and its revisions to that program. This document incorporates by reference Texas' hazardous waste statutes and regulations, and clarifies which of these provisions are included in the authorized and Federally enforceable program. By codifying Texas' authorized program and by amending the Code of Federal Regulations, the public will be more easily able to discern the status of Federally approved requirements of the Texas hazardous waste management program.

The EPA is incorporating by reference the Texas authorized hazardous waste program in subpart SS of 40 CFR part 272. Section 272.2201 incorporates by reference Texas' authorized hazardous waste statutes and regulations. Section 272.2201 also references the statutory provisions (including procedural and enforcement provisions), which provide the legal basis for the State's implementation of the hazardous waste management program, the Memorandum of Agreement, the Attorney General's Statements and the Program Description, which are approved as part of the hazardous waste management program under Subtitle C of RCRA.

D. What is the effect of Texas' codification on enforcement?

The EPA retains its authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013, and 7003, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions, and to issue orders in authorized States. With respect to these actions, the EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures, rather than any authorized State analogues to these provisions. Therefore, the EPA is not incorporating by reference such particular, approved Texas procedural and enforcement authorities. Section 272.2201(c)(2) of 40 CFR lists the statutory and regulatory provisions which provide the legal basis for the State's implementation of the hazardous waste management program, as well as, those procedural and enforcement authorities that are part of the States approved program, but these are not incorporated by reference.

E. What State provisions are not part of the codification?

The public needs to be aware that some provisions of Texas' hazardous waste management program are not part of the Federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA Subtitle C program because they are "broader in scope" than RCRA Subtitle C (see 40 CFR 271.1(i));

(2) Federal rules for which Texas is not authorized, but which have been incorporated into the State regulations because of the way the State adopted Federal regulations by reference;

(3) Unauthorized amendments to authorized State provisions;

(4) New unauthorized State requirements; and

(5) Federal rules for which Texas is authorized, but which were vacated by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 98-1379 and 98-1379; June 27, 2014).

State provisions that are "broader in scope" than the Federal program are not part of the RCRA authorized program, and the EPA will not enforce them. Therefore, they are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.2201(c)(3) lists the Texas regulatory provisions which are "broader in scope" than the Federal program and which are not part of the authorized program being incorporated by reference. "Broader in scope" provisions cannot be enforced by the EPA; the State, however, may enforce such provisions under State law.

Additionally, Texas' hazardous waste regulations include amendments which have not been authorized by the EPA. Since the EPA cannot enforce a State's requirements which have not been reviewed and authorized in accordance with RCRA section 3006 and 40 CFR part 271, it is important to be precise in delineating the scope of a State's authorized hazardous waste program. Regulatory provisions that have not been authorized by the EPA include amendments to previously authorized State regulations, as well as, certain Federal rules and new State requirements.

Texas has adopted but is not authorized for the following Federal rules published in the **Federal Register** on April 12, 1996 (61 FR 16290); December 5, 1997 (62 FR 64504); June 8, 2000 (65 FR 36365); and January 8, 2010 (75 FR 1236). Therefore, these Federal amendments included in Texas' adoption by reference at 30 Texas Administrative Code (TAC) sections 335.112(a)(1) and (a)(4), 335.152(a)(1) and (a)(4), and 335.431(c)(1) and (c)(3), are not part of the State's authorized program and are not part of the incorporation by reference addressed by this **Federal Register** document.

Texas has adopted and was authorized for the following Federal rules, which have since been vacated by

the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 98-1379 and 08-1144, respectively, June 27, 2014): (1) the Comparable Fuels Exclusion at 40 CFR 261.4(a)(16) and 261.38 published in the **Federal Register** on June 19, 1998 (63 FR 33782), as amended on June 15, 2010 (75 FR 33712); and (2) the Gasification Exclusion Rule published on January 2, 2008 (73 FR 57).

In those instances where Texas has made unauthorized amendments to previously authorized sections of State code, the EPA is identifying in 40 CFR 272.2201(c)(4)(i) any regulations which, while adopted by the State and incorporated by reference, include language not authorized by the EPA. Those unauthorized portions of the State regulations are not Federally enforceable. Thus, notwithstanding the language in Texas hazardous waste regulations incorporated by reference at 40 CFR 272.2201(c)(1), the EPA will only enforce those portions of the State regulations that are actually authorized by the EPA. For the convenience of the regulated community, the actual State regulatory text authorized by the EPA for the citations listed at § 272.2201(c)(4) (*i.e.* without the unauthorized amendments) is compiled as a separate document, *Addendum to the EPA Approved Texas Regulatory Requirements Applicable to the Hazardous Waste Management Program, November 2014*. This document is available from EPA Region 6, EPA Region 6 Library, 12th Floor, 1445 Ross Avenue, Dallas, Texas 75202-2733, Phone number: (214) 665-6444.

State regulations that are not incorporated by reference in this rule at 40 CFR 272.2201(c)(1), or that are not listed in 40 CFR 272.2201(c)(2) ("legal basis for the State's implementation of the hazardous waste management program"), 40 CFR 272.2201(c)(3) ("broader in scope") or 40 CFR 272.2201(c)(4) ("unauthorized State amendments"), are considered new unauthorized State requirements. These requirements are not Federally enforceable.

With respect to any requirement pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized, the EPA will continue to enforce the Federal HSWA standards until the State is authorized for these provisions.

F. What will be the effect of Federal HSWA requirements on the codification?

The EPA is not amending 40 CFR part 272 to include HSWA requirements and

prohibitions that are implemented by EPA. Section 3006(g) of RCRA provides that any HSWA requirement or prohibition (including implementing regulations) takes effect in authorized and not authorized States at the same time. A HSWA requirement or prohibition supersedes any less stringent or inconsistent State provision which may have been previously authorized by the EPA (50 FR 28702, July 15, 1985). The EPA has the authority to implement HSWA requirements in all States, including authorized States, until the States become authorized for such requirement or prohibition. Authorized States are required to revise their programs to adopt the HSWA requirements and prohibitions, and then to seek authorization for those revisions pursuant to 40 CFR part 271.

Instead of amending the 40 CFR part 272 every time a new HSWA provision takes effect under the authority of RCRA section 3006(g), the EPA will wait until the State receives authorization for its analog to the new HSWA provision before amending the State's 40 CFR part 272 incorporation by reference. Until then, persons wanting to know whether a HSWA requirement or prohibition is in effect should refer to 40 CFR 271.1(j), as amended, which lists each such provision.

Some existing State requirements may be similar to the HSWA requirement implemented by the EPA. However, until the EPA authorizes those State requirements, the EPA can only enforce the HSWA requirements and not the State analogs. The EPA will not codify those State requirements until the State receives authorization for those requirements.

Statutory and Executive Order Reviews

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore, this action is not subject to review by OMB. This rule incorporated by reference Texas' authorized hazardous waste management regulations, and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule merely incorporates by reference certain existing State hazardous waste management program requirements which the EPA already approved under 40 CFR part 271, and with which regulated entities must already comply,

it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely incorporates by reference existing State hazardous waste management program requirements without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also does not have Tribal implications within the meaning of Executive Order 13175 (65 FR 67249, November 6, 2000).

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant, and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply Distribution or Use" (66 FR 28344, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

The requirements being codified are the result of Texas' voluntary participation in the EPA's State program authorization process under RCRA Subtitle C. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988), by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

40 CFR Part 272

Hazardous materials transportation, Hazardous waste, Incorporation by reference, Intergovernmental relations, Water pollution control, Water supply.

Authority: This document is issued under the authority of Sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: October 1, 2015.

Ron Curry,

Regional Administrator, Region 6.

For the reasons set forth in the preamble, under the authority at 42 U.S.C. 6912(a), 6926, and 6974(b), the EPA is granting final authorization under part 271 to the State of Texas for revisions to its hazardous waste program under the Resource Conservation and Recovery Act and is amending 40 CFR part 272 as follows:

PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

■ 1. The authority citation for part 272 continues to read as follows:

Authority: Sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

■ 2. Revise § 272.2201 to read as follows:

§ 272.2201 Texas State-administered program: Final authorization.

(a) Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), the EPA granted Texas final authorization for the following elements, as submitted to EPA in Texas' Base program application for final authorization which was approved

by EPA effective on December 26, 1984. Subsequent program revision applications were approved effective on October 4, 1985, February 17, 1987, March 15, 1990, July 23, 1990, October 21, 1991, December 4, 1992, June 27, 1994, November 26, 1997, December 3, 1997, October 18, 1999, November 15, 1999, September 11, 2000, June 14, 2005, December 29, 2008, July 13, 2009, May 6, 2011 (76 FR 12283), and May 7, 2012 (77 FR 13200), January 9, 2013 (77 FR 71344), November 3, 2014 (79 FR 52220), and February 26, 2016.

(b) The State of Texas has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

(c) *State statutes and regulations.* (1) The Texas statutes and regulations cited in paragraph (c)(1)(i) of this section are incorporated by reference as part of the hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* This incorporation by reference is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the Texas regulations that are incorporated by reference in this paragraph are available from West Group Publishing, 610 Opperman Drive, Eagan, 55123, ATTENTION: Order Entry; Phone: 1-800-328-9352; Web site: <http://west.thomson.com>. You may inspect a copy at EPA Region 6 Library, 12th Floor, 1445 Ross Avenue, Dallas, Texas 75202-2733, Phone number: (214) 665-8533, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

(i) The Binder entitled "EPA-Approved Texas Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program", dated November 2014.

(ii) [Reserved]

(2) The following provisions provide the legal basis for the State's implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal authorities:

(i) Texas Health and Safety Code (THSC) Annotated, (Vernon, 2010, as amended by the 2012 Cumulative

Annual Pocket Part, effective September 1, 2011); Chapter 361, The Texas Solid Waste Disposal Act, sections 361.002, 361.016, 361.017, 361.018, 361.0215(b)(2) and (b)(3), 361.023, 361.024, 361.029, 361.032, 361.033, 361.035, 361.036, 361.037(a), 361.061, 361.063, 361.0635, 361.064, 361.0641, 361.066(b) and (c), 361.0666, 361.067, 361.068, 361.069, 361.078, 361.079, 361.0791, 361.080, 361.081, 361.082 (except 361.082(a) and (f)), 361.083, 361.0833, 361.084, 361.085, 361.0861(c), 361.0871(b), 361.088, 361.0885, 361.089 (except 361.089(a), (e), and (f)), 361.0891(a), (e), and (f) (2012 Cumulative Annual Pocket Part), 361.090, 361.095(b)-(f), 361.096, 361.097, 361.098, 361.099(a), 361.100, 361.101, 361.102 through 361.109, 361.113, 361.114, 361.116, 361.271 (2012 Cumulative Annual Pocket Part), 361.272 through 361.275, 361.278, 361.301, 361.321(a) and (b), 361.321(c) (except the phrase "Except as provided by Section 361.322(a)"), 361.321(d), 361.321(e) (except the phrase "Except as provided by Section 361.322(e)"), 361.451, 361.501 through 361.506, and 361.509(a) introductory paragraph, (a)(11), (b), (c) introductory paragraph, and (c)(2); Chapter 371, Texas Oil Collection, Management, and Recycling Act, sections 371.0025(b) and (c), 371.024(a), (c), and (d), 371.026(a) and (b), and 371.028.

(ii) Texas Water Code (TWC), Texas Codes Annotated, as amended effective September 1, 2011: Chapter 5, sections 5.102 through 5.105, 5.112, 5.177, 5.351, 5.501 through 5.505, 5.509 through 5.512, 5.515, and 5.551 through 5.557; Chapter 7, sections 7.031, 7.032, 7.051(a), 7.052(a), 7.052(c) and (d), 7.053 through 7.062, 7.064 through 7.069, 7.075, 7.101, 7.102, 7.104, 7.105, 7.107, 7.110, 7.162, 7.163, 7.176, 7.187(a), 7.189, 7.190, 7.252(1), 7.351, 7.353; Chapter 26, sections 26.001(13), 26.011, 26.020 through 26.022, 26.039, and 26.341 through 26.367; and Chapter 27, sections 27.003, 27.017(a), 27.018(a)-(d), and 27.019.

(iii) Texas Government Code as amended effective September 1, 2011, section 311.027.

(iv) Texas Rules of Civil Procedure, as amended effective September 1, 2011, Rule 60.

(v) Texas Administrative Code (TAC), Title 30, Environmental Quality, 2013, as amended, effective through December 31, 2012: Chapter 10; Chapter 39, sections 39.5(g) and (h), 39.11, 39.13 (except (10)), 39.103 (except (f) and (h)), 39.105, 39.107, 39.109, 39.403(b)(1), 39.405(f)(1), 39.411 (except (b)(4)(B), (b)(10), (b)(11), and (b)(13)), 39.413 (except (10)), 39.420 (except (c) and (d)),

39.503 (except the reference to 39.405(h) in (d) introductory paragraph and (g)), and 39.801 through 39.810; Chapter 50, sections 50.13, 50.19, 50.39, 50.113 (except (d)), 50.117(f), 50.119, 50.133, and 50.139; Chapter 55, sections 55.25(a) and (b), 55.27 (except (b)), 55.152(a)(3), 55.152(b), 55.154, 55.156 (except (d) through (g)), 55.201 (except as applicable to contested case hearings), and 55.211 (except as applicable to contested case hearings); Chapter 70, section 70.10; Chapter 281, sections 281.1 (except the clause "except as provided by . . . Prioritization Process"), 281.2 introductory paragraph and (4), 281.3(a) and (b), 281.5 (except the clause "Except as provided by . . . Discharge Permits"), the phrase "radioactive material", and the phrase "subsurface area drip dispersal systems"), 281.17(d) (except the references to radioactive material licenses), 281.17(e) and (f), 281.18(a) (except for the sentence "For applications for radioactive . . . within 30 days.", 281.19(a) (except the last sentence), 281.19(b) (except the phrase "Except as provided in subsection (c) of this section,"), 281.20, 281.21(a) (except the phrase "and the Texas Radiation Control Act . . . Chapter 401.", the acronym "TRCA", and the phrase "subsurface area drip dispersal systems"), 281.21(b), 281.21(c) (except the phrase "radioactive materials," in 281.21(c)(2)), 281.21(d), 281.22(a) (except the phrase "For applications for radioactive . . . to deny the license."), 281.22(b) (except the phrase "or an injection well," in the first sentence and the phrase "For underground injection wells . . . the same facility or activity."), 281.23(a), and 281.24; Chapter 305, sections 305.29, 305.30, 305.64(d) and (f), 305.66(c), 305.66(e) (except for the last sentence), 305.66(f) through (l), 305.123 (except the phrases "and 401 . . . regulation" and "and 32"), 305.125(1) and (3), 305.125(20), 305.127(1)(B)(i), 305.127(4)(A) and (C), and (6), 305.401 (except the text "§ 55.21 of this title (relating to Requests for Contested Case Hearings, Public Comment)" at (b), and 305.401(c)); and Chapter 335, sections 335.2(b), 335.43(b), 335.206, 335.391 through 335.393.

(3) The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, and are not incorporated by reference:

(i) Texas Health and Safety Code (THSC) Annotated, (Vernon, 2010): Chapter 361, The Texas Solid Waste Disposal Act, sections 361.131 through 361.140; Chapter 371, Texas Oil Collection, Management, and Recycling

Act, sections 371.021, 371.022, 371.024(e), 371.0245, 371.0246, 371.025, and 371.026(c).

(ii) Texas Administrative Code (TAC), Title 30, Environmental Quality, 2013, as amended, effective through December 31, 2012: Chapter 305, sections 305.53, 305.64(b)(4), and 305.69(b)(1)(A) (as it relates to the Application Fee); Chapter 335, sections 335.321 through 335.332, Appendices I and II, and 335.401 through 335.412.

(4) *Unauthorized State amendments and provisions.* (i) The following

authorized provisions of the Texas regulations include amendments published in the Texas Register that are not approved by EPA. Such unauthorized amendments are not part of the State's authorized program and are, therefore, not Federally enforceable. Thus, notwithstanding the language in the Texas hazardous waste regulations incorporated by reference at paragraph (c)(1)(i) of this section, EPA will enforce the State provisions that are actually authorized by EPA. The effective dates

of the State's authorized provisions are listed in the table in this paragraph (c)(4)(i). The actual State regulatory text authorized by EPA (*i.e.*, without the unauthorized amendments) is available as a separate document, *Addendum to the EPA-Approved Texas Regulatory and Statutory Requirements Applicable to the Hazardous Waste Management Program, November, 2014*. Copies of the document can be obtained from U.S. EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202.

State provision (December 31, 2012)	Effective date of authorized provision	Unauthorized State amendments	
		Texas register reference	Effective date
335.6(a)	7/29/92	18 TexReg 2799	5/12/93
		22 TexReg 12060	12/15/97
		23 TexReg 10878	10/19/98
335.6(c) introductory paragraph	7/29/92	17 TexReg 8010	11/27/92
		20 TexReg 2709	4/24/95
		20 TexReg 3722	5/30/95
		21 TexReg 1425	3/1/96
		21 TexReg 2400	3/6/96
		22 TexReg 12060	12/15/97
		23 TexReg 10878	10/19/98
		26 TexReg 9135	11/15/01
335.6(g)	7/29/92	18 TexReg 3814	6/28/93
		22 TexReg 12060	12/15/97
		23 TexReg 10878	10/19/98
335.24(b) introductory paragraph	3/1/96	21 TexReg 10983	11/20/96
		23 TexReg 10878	10/19/98
		38 TexReg 970	2/21/13
335.24(c) introductory paragraph	3/1/96	21 TexReg 10983	11/20/96
		23 TexReg 10878	10/19/98
		38 TexReg 970	2/21/13
335.45(b)	9/1/86	17 TexReg 5017	7/29/92
335.204(a)(1)	5/28/86	16 TexReg 6065	11/7/91
335.204(b)(1)	5/28/86	16 TexReg 6065	11/7/91
335.204(b)(6)	5/28/86	16 TexReg 6065	11/7/91
335.204(c)(1)	5/28/86	16 TexReg 6065	11/7/91
335.204(d)(1)	5/28/86	16 TexReg 6065	11/7/91
335.204(e)(6)	5/28/86	16 TexReg 6065	11/7/91

(ii) Texas has partially or fully adopted, but is not authorized to implement, the Federal rules that are listed in the table in this paragraph (c)(4)(ii). The EPA will continue to implement the Federal HSWA

requirements for which Texas is not authorized until the State receives specific authorization for those requirements. The EPA will not enforce the non-HSWA Federal rules although they may be enforceable under State

law. For those Federal rules that contain both HSWA and non-HSWA requirements, the EPA will enforce only the HSWA portions of the rules.

Federal requirement	Federal Register reference	Publication date
Clarification of Standards for Hazardous Waste LDR Treatment Variances (SWA) (Checklist 162).	62 FR 64504	December 5, 1997.
Organobromine Production Wastes; Petroleum Refining Wastes; Identification and Listing of Hazardous Waste; Land Disposal Restrictions (HSWA) (Checklist 187).	64 FR 36365	June 8, 2000.
Zinc Fertilizers Made from Recycled Hazardous Secondary Materials (HSWA and Non-HSWA) (Checklist 200).	67 FR 48393	July 24, 2002.

(iii) The Federal rules listed in the table in this paragraph (c)(4)(iii) are not

delegable to States. Texas has adopted these provisions and left the authority to

the EPA for implementation and enforcement.

Federal requirement	Federal Register reference	Publication date
Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision (HSWA) (Checklist 152).	61 FR 16290	April 12, 1996.
OECD Requirements; Export Shipments of Spent Lead-Acid Batteries (Non-HSWA) (Checklist 222).	75 FR 1236	January 8, 2010.

(iv) Texas has chosen not to adopt, and is not authorized to implement, the following optional Federal rules:

Federal requirement	Federal Register reference	Publication date
NESHAPS Second Technical Correction, Vacatur (Non-HSWA) (Checklist Rule 188.1).	66 FR 24270	May 14, 2001.
Storage, Treatment, Transportation and Disposal of Mixed Waste (Non-HSWA) (Checklist 191).	66 FR 27218	May 16, 2001.
Inorganic Chemical Manufacturing Waste Identification and Listing (HSWA/Non-HSWA) (Checklist Rule 195.1).	67 FR 17119	April 9, 2002.
Land Disposal Restrictions: National Treatment Variance to Designate New Treatment Subcategories for Radioactively Contaminated Cadmium, Mercury-Containing Batteries and Silver-Containing Batteries (HSWA) (Checklist 201).	67 FR 62618	October 7, 2002.
NESHAP: Surface Coating of Automobiles and Light-Duty Trucks (Non-HSWA) (Checklist 205).	69 FR 22601	April 26, 2004.
Revisions to the Definition of Solid Waste (Non-HSWA) (Checklist 219).	73 FR 64668	October 30, 2008.
Expansion of RCRA Comparable Fuel Exclusion (Non-HSWA) (Checklist 221).	73 FR 77954	December 19, 2008.
Withdrawal of the Emission Comparable Fuel Exclusion (Non-HSWA) (Checklist 224).	73 FR 33712	June 15, 2010.
Removal of Saccharin and Its Salts from the Lists of Hazardous Constituents (Non-HSWA) (Checklist Rule 225).	75 FR 78918	December 17, 2010.

(5) *Vacated Federal rules.* Texas adopted and was authorized for the following Federal rules which have

since been vacated by the U.S. Court of Appeals for the District of Columbia

Circuit (D.C. Cir. No. 98–1379 and 08–1144, respectively; June 27, 2014):

Federal requirement	Federal Register reference	Publication date
Hazardous Waste Combustors; Revised Standards (HSWA) (Checklist 168—40 CFR 261.4(a)(16) and 261.38 only).	63 FR 33782	June 19, 1998.
Exclusion of Oil-Bearing Secondary Materials Processed in a Gasification System to Produce Synthesis Gas (Checklist 216—Definition of “Gasification” at 40 CFR 260.10 and amendment to 40 CFR 261.4(a)(12)(i)).	73 FR 57	January 2, 2008.
Withdrawal of the Emission Comparable Fuel Exclusion under RCRA (Checklist 224—amendments to 40 CFR 261.4(a)(16) and 261.38).	7 FR 33712	June 15, 2010.

(6) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region VI and the State of Texas, signed by the Executive Director of the Texas Commission on Environmental Quality (TCEQ) on December 20, 2011, and by the EPA Regional Administrator on February 17, 2012, is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(7) *Statement of legal authority.* “Attorney General’s Statement for Final Authorization”, signed by the Attorney General of Texas on May 22, 1984 and revisions, supplements, and addenda to that Statement dated November 21, 1986, July 21, 1988, December 4, 1989,

April 11, 1990, July 31, 1991, February 25, 1992, November 30, 1992, March 8, 1993, January 7, 1994, August 9, 1996, October 16, 1996, as amended February 7, 1997, March 11, 1997, January 5, 1999, November 2, 1999, March 1, 2002, July 16, 2008, December 6, 2011, and February 22, 2013, are referenced as part of the authorized hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(8) *Program Description.* The Program Description and any other materials submitted as part of the original application or as supplements thereto are referenced as part of the authorized hazardous waste management program

under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

■ 3. Appendix A to part 272 is amended by revising the listing for “Texas” to read as follows:

Appendix A to Part 272—State Requirements

* * * * *

Texas

The statutory provisions include: Texas Health and Safety Code (THSC) Annotated, (Vernon, 2010): Chapter 361, The Texas Solid Waste Disposal Act, sections 361.003 (except (3), (4), (19), (27), (35), and (39)), 361.019(a), 361.0235, 361.066(a), 361.082(a) and (f), 361.086, 361.087, 361.0871(a), 361.094, 361.095(a), 361.099(b),

and 361.110; Chapter 371, The Texas Oil Collection, Management, and Recycling Act, sections 371.003, 371.024(b), 371.026(d), and 371.041.

Copies of the Texas statutes that are incorporated by reference are available from West Group Publishing, 610 Opperman Drive, Eagan, 55123, ATTENTION: Order Entry; Phone: 1-800-328-9352; Web site: <http://west.thomson.com>.

The regulatory provisions include:

Texas Administrative Code (TAC), Title 30, Environmental Quality, 2013, as amended, effective through December 31, 2012, and where indicated, amendments effective February 21, 2013, as published in the Texas Register on February 15, 2013 (38 TexReg 970; based on the proposed rule published October 5, 2012, 37 TexReg 7871). Please note that for some provisions, the authorized versions are found in the TAC, Title 30, Environmental Quality, as amended effective January 1, 1994, January 1, 1997, December 31, 1999, or December 31, 2001. Texas made subsequent changes to these provisions but these changes have not been authorized by EPA. Where the provisions are taken from regulations other than those dated December 31, 2012, notations are made below.

Chapter 3, Section 3.2(25) "Person"; Chapter 20, Section 20.15; Chapter 35, Section 35.402(e); Chapter 37, Sections 37.1, 37.11 through 37.81, 37.100 through 37.161, 37.200 through 37.281, 37.301 through 37.381, 37.400 through 37.411, 37.501 through 37.551, 36.601 through 37.671, and 37.6001 through 37.6041; Chapter 281, Section 281.3(c);

Chapter 305, Subchapter A—General Provisions, Sections 305.1(a) (except the reference to Chapter 401, relative to Radioactive Materials); 305.2 introductory paragraph (except the references to Chapter 401, relative to Radioactive Materials and the reference to TWC 32.002); 305.2(1), (6), (11), (12), (14), (15), (19), (20), (24), (26), (27), (28), (31), and (40)—(42); 305.3;

Chapter 305, Subchapter C—Application for Permit, Sections 305.41 (except the reference to Chapter 401, relative to Radioactive Materials and the reference to TWC Chapter 32); 305.42(a), (b), (d), and (f); 305.43(b); 305.44 (except (d)); 305.45 (except (a)(I) and (J)); 305.47; 305.50(a) introductory paragraph—(a)(8) (except the last two sentences in 305.50(a)(2)); 305.50(a)(13); 305.50(a)(14) (38 TexReg 970, effective February 21, 2013); 305.50(a)(15) and (16); 305.50(b); 305.51;

Chapter 305, Subchapter D—Amendments, Modifications, Renewals, Transfers, Corrections, Revocations, and Suspension of Permits, Sections 305.61; 305.62(a) (except the phrase in the first sentence "§ 305.70 of this title . . . Solid Waste Class I Modifications" and the phrase in the fifth sentence "If the permittee requests a modification of a municipal solid waste permit . . . § 305.70 of this title."); 305.62(b); 305.62(c) introductory paragraph (except the phrase "other than . . . subsection (i) of this section"); 305.62(c)(1); 305.62(c)(2) introductory paragraph; 305.62(c)(2)(A) (except the phrase "except for Texas Pollutant Discharge Elimination System (TPDES) permits,"); 305.62(c)(2)(B) (except

the phrase "except for TPDES permits,"); 305.62(d) (except (d)(6)); 305.62(e)—(h); 305.63(a) (except the last sentence of (a)(3) and (a)(7)); 305.64(a); 305.64(b) (except (b)(4) and (b)(5)); 305.64(c); 305.64(e); 305.64(g) (38 TexReg 970, effective February 21, 2013); 305.65; 305.66(a) (except (a)(7)—(a)(9)); 305.66(d); 305.67(a) and (b); 305.69(a); 305.69(b) (except for "Additional Contents of Application for an Injection Well Permit" and "Waste Containing Radioactive Materials; and Application Fee" at (b)(1)(A)); 305.69(c); 305.69(d) (except (d)(2)(A)); 305.69(d)(2)(A) (38 TexReg 970, effective February 21, 2013); 305.69(e)—(j); 305.69(k) (except (k) A.8–A.10) (38 TexReg 970, effective February 21, 2013);

Chapter 305, Subchapter F—Permit Characteristics and Conditions, Sections 305.121 (except the phrases "radioactive material disposal" and "subsurface area drip dispersal systems"); 305.122(a); 305.122(b)—(d) (38 TexReg 970, effective February 21, 2013); 305.124; 305.125 introductory paragraph; 305.125(2) and (4); 305.125(5) (except the last two sentences); 305.125(6)—(8); 305.125(9) (except (9)(C)); 305.125(10) (except the phrase "and 32"); 305.125(11) (except the phrase "as otherwise required by Chapter 336 of this title" relative to Radioactive Substances in (11)(B)); 305.125(12)—(19), and (21); 305.127 introductory paragraph; 305.127(1)(B)(iii); 305.127(1)(E) and (F); 305.127(2); 305.127(3)(A) (except the last two sentences); 305.127(3)(B) and (C); 305.127(4)(B); 305.127(5)(C); 305.128;

Chapter 305, Subchapter G—Additional Conditions for Hazardous and Industrial Solid Waste Storage, Processing, or Disposal Permits, Sections 305.141 through 305.145; 305.150;

Chapter 305, Subchapter I—Hazardous Waste Incinerator Permits, Sections 305.171 through 305.175; 305.176 (38 TexReg 970, effective February 21, 2013);

Chapter 305, Subchapter J—Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses, Sections 305.181 through 305.184;

Chapter 305, Subchapter K—Research, Development and Demonstration Permits, Sections 305.191 through 305.194;

Chapter 305, Subchapter L—Groundwater Compliance Plan, Section 305.401(c);

Chapter 305, Subchapter Q—Permits for Boilers and Industrial Furnaces Burning Hazardous Waste, Sections 305.571 through 305.573;

Chapter 305, Subchapter R—Resource Conservation And Recovery Act Standard Permits For Storage And Treatment Units, Sections 305.650 through 305.661;

Chapter 324—Used Oil, Sections 324.1 (38 TexReg 970, effective February 21, 2013), 324.2 (except 324.2(2)) (38 TexReg 970, effective February 21, 2013); 324.3 (except 324.3(5)) (38 TexReg 970, effective February 21, 2013); 324.4 (38 TexReg 970, effective February 21, 2013); 324.6 and 324.7 (38 TexReg 970, effective February 21, 2013); 324.11 through 324.16 (38 TexReg 970, effective February 21, 2013); 324.21; 324.22(d)(3);

Chapter 335, Subchapter A—Industrial Solid Waste and Municipal Hazardous Waste

in General, Sections 335.1 introductory paragraph; 335.1(1)—(4), (6)—(12), (16)—(18), (22), (23), (25)—(29), (32), (34)—(37); 335.1(39) "Designated facility" (38 TexReg 970, effective February 21, 2013); 335.1(40)—(46), (47) (except for the phrase "or is used for neutralizing the pH of non-hazardous industrial solid waste"), (48)—(50), (52)—(57), (59) (38 TexReg 970, effective February 21, 2013), (60)—(63), (65), (66), (69)—(78), (80)—(87), (88)—(91) (except the phrase "solid waste or" in each subsection), (92), (93)—(94) (except the phrase "solid waste or" in both subsections); 335.1(95) "Manifest" and (96) "Manifest document number" (38 TexReg 970, effective February 21, 2013); 335.1(97), (98), (99) (except the phrase "solid waste or"), (100)—(113), (115) (except the phrase "solid waste or"), (116), (117), (121), (122) (except the phrase "solid waste or"), (123)—(126), (128), (130)—(134), (136), (137), (138)(A) introductory paragraph through (138)(A)(iii), (138)(A)(iv) introductory paragraph (except the last sentence) (38 TexReg 970, effective February 21, 2013), (138)(B), (138)(C), (138)(D) (except the phrase "Except for materials described in subparagraph (H) of this paragraph." at (138)(D) introductory paragraph; and (D)(iv) Table 1), (138)(D)(iv) Table 1 (38 TexReg 970, effective February 21, 2013), (138)(E), (138)(F), and (138)(G) (except the phrase "Except for materials described in subparagraph (H) of this paragraph." at (138)(G) introductory paragraph), (138)(I) and (J), (139), (141), (142) (38 TexReg 970, effective February 21, 2013), (143), (144)—(151) (except the phrase "solid waste or" at (144), (147) and (149)), (152) (except the phrase "or industrial solid"), (153)—(156) (except the phrase "or industrial solid" at (155) and (156)), (158)—(160), (161) (except the phrase "solid waste or"), (162)—(167), (168) (except the phrase "or industrial solid"), (169), (170), and (171) (except the phrase "solid waste or"); 335.2(a) and (c); 335.2(e) and (f); 335.2(g) (38 TexReg 970, effective February 21, 2013); 335.2(i), (j), (l), (m), and (o); 335.4; 335.5 (except (d)); 335.6(a); 335.6(b) (January 1, 1997); 335.6(c); 335.6(d) (except the last sentence) (January 1, 1994); 335.6(e) (January 1, 1994); 335.6(f)—(j); 335.7; 335.8(a)(1) and (2); 335.9(a) (except (a)(2) and (3)); 335.9(a)(2) and (3) (January 1, 1997); 335.9(b) (January 1, 1994); 335.10(a) and (b) (38 TexReg 970, effective February 21, 2013); 335.11(a) (38 TexReg 970, effective February 21, 2013); 335.12(a) (38 TexReg 970, effective February 21, 2013); 335.13(a) (January 1, 1997); 335.13(c) and (d) (January 1, 1994); 335.13(e) and (f) (January 1, 1997); 335.13(g) (January 1, 1994); 335.13(k); 335.14; 335.15 introductory paragraph (January 1, 1994); 335.15(1); 335.15(3); 335.17(a); 335.18(a); 335.19 (except 335.19(d)) (38 TexReg 970, effective February 21, 2013); 335.20 through 335.22; 335.23 (except (2)); 335.23(2) (January 1, 1994); 335.24(a) and (b) introductory paragraph; 335.24(b)(1)—(4) (38 TexReg 970, effective February 21, 2013); 335.24(c) (except (c)(1)(A)); 335.24(c)(1)(A) (38 TexReg 970, effective February 21, 2013); 335.24(d) (38 TexReg 970, effective February 21, 2013); 335.24(e); 335.24(f) (38 TexReg 970, effective February 21, 2013); 335.24(m) and (n); 335.29 through 335.31;

Chapter 335, Subchapter B—Hazardous Waste Management General Provisions, Sections 335.41(a)–(c); 335.41(d) (except (d)(1) and (d)(5)–(8)); 335.41(d)(1) (December 31, 2001); 335.41(e)–(j); 335.43(a); 335.44; 335.45; 335.47 (except 335.47(b) and the second sentence in (c)(3)); 335.47(b) (December 31, 1999);

Chapter 335, Subchapter C—Standards Applicable to Generators of Hazardous Waste, Sections 335.61(a) and (b) (38 TexReg 970, effective February 21, 2013); 335.61(c); 335.61(d) (38 TexReg 970, effective February 21, 2013); 335.61(e), (g), and (h); 335.61(i) (38 TexReg 970, effective February 21, 2013); 335.62 (38 TexReg 970, effective February 21, 2013); 335.63; 335.65 through 335.68; 335.69(a) (except “and (n)” in the introductory paragraph; (a)(4)(B) and (a)(4)(C)); 335.69(a)(4)(B) and (C) (38 TexReg 970, effective February 21, 2013); 335.69(b) (38 TexReg 970, effective February 21, 2013); 335.69(c), 335.69(d) and (e) (38 TexReg 970, effective February 21, 2013); 335.69(f) (except (f)(4)(C)); 335.69(f)(4)(C) and (D) (38 TexReg 970, effective February 21, 2013); 335.69(g), (h), and (j)–(l); 335.69(m) (38 TexReg 970, effective February 21, 2013); 335.70; 335.71; 335.73 through 335.75; 335.76(a) (38 TexReg 970, effective February 21, 2013); 335.76(b); 335.76(c) and (d) (38 TexReg 970, effective February 21, 2013); 335.76(e); 335.76(f) (38 TexReg 970, effective February 21, 2013); 335.76(g); 335.77; 335.78(a); 335.78(b) (January 1, 1997); 335.78(c) (38 TexReg 970, effective February 21, 2013); 335.78(d) (except (d)(2)); 335.78(e) introductory paragraph (January 1, 1997); 335.78(e)(1) and (2); 335.78(f) introductory paragraph and (f)(1) (38 TexReg 970, effective February 21, 2013); 335.78(f)(2) (January 1, 1997); 335.78(f)(3) (except 335.78(f)(3)(A)); 335.78(f)(3)(A) (38 TexReg 970, effective February 21, 2013); 335.78(g) (except (g)(2)); 335.78(g)(2) (January 1, 1997); 335.78(h) and (i); 335.78(j) (38 TexReg 970, effective February 21, 2013); 335.79 (38 TexReg 970, effective February 21, 2013);

Chapter 335, Subchapter D—Standards Applicable to Transporters of Hazardous Waste, Sections 335.91 (except (e)); 335.92; 335.93 (except (e)); 335.93(e) (December 31, 1999); 335.94 (except the phrase “owned or operated by a registered transporter” in (a) introductory paragraph);

Chapter 335, Subchapter E—Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities, Sections 335.111(a) and (b) (38 TexReg 970, effective February 21, 2013); 335.111(c)–(e); 335.112(a) introductory paragraph; 335.112(a)(1) (38 TexReg 970, effective February 21, 2013); 335.112(a)(2); 335.112(a)(3) and (4) (38 TexReg 970, effective February 21, 2013); 335.112(a)(5)–(12); 335.112(a)(13) and (14) (38 TexReg 970, effective February 21, 2013); 335.112(a)(15) and (16); 335.112(a)(18)–(24); 335.112(b) (except (b)(4)(K) and (b)(7)); 335.112(b)(4)(K) and (b)(7) (38 TexReg 970, effective February 21, 2013); 335.112(c); 335.113; 335.115 through 335.128;

Chapter 335, Subchapter F—Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities, Sections 335.151(a) (38

TexReg 970, effective February 21, 2013); 335.151(b); 335.151(c) (38 TexReg 970, effective February 21, 2013); 335.151(d); 335.151(e) (38 TexReg 970, effective February 21, 2013); 335.151(f); 335.152(a) introductory paragraph; 335.152(a)(1) (38 TexReg 970, effective February 21, 2013); 335.152(a)(2); 335.152(a)(3) and (4) (38 TexReg 970, effective February 21, 2013); 335.152(a)(5)–(8); 335.152(a)(9) (38 TexReg 970, effective February 21, 2013); 335.152(a)(10) and (11); 335.152(a)(12) (38 TexReg 970, effective February 21, 2013); 335.152(a)(13); 335.152(a)(14) (38 TexReg 970, effective February 21, 2013); 335.152(a)(15)–(22); 335.152(b); 335.152(c) (except (c)(7)); 335.152(c)(7) (38 TexReg 970, effective February 21, 2013); 335.152(d); 335.153; 335.155 introductory paragraph (38 TexReg 970, effective February 21, 2013); 335.155(1) and (2); 335.155(3) (38 TexReg 970, effective February 21, 2013); 335.156 through 335.167; 335.168 (except (c)); 335.168(c) (38 TexReg 970, effective February 21, 2013); 335.169; 335.170 (except (c)); 335.170(c) (38 TexReg 970, effective February 21, 2013); 335.171 through 335.179;

Chapter 335, Subchapter G—Location Standards for Hazardous Waste Storage, Processing, or Disposal, Sections 335.201(a) (except (a)(3)); 335.201(c); 335.202 introductory paragraph; 335.202(2), (4), (9)–(11), (13), (15)–(18); 335.203; 335.204(a) introductory paragraph–(a)(5); 335.204(b)(1)–(6); 335.204(c)(1)–(5); 335.204(d)(1)–(5); 335.204(e) introductory paragraph; 335.204(e)(1) introductory paragraph (except the phrase “Except as . . . (B) of this paragraph,” and the word “event” at the end of the paragraph); 335.204(e)(2)–(7); 335.204(f); 335.205(a) introductory paragraph–(a)(2) and (e);

Chapter 335, Subchapter H—Standards for the Management of Specific Wastes and Specific Types of Facilities, Sections 335.211; 335.212; 335.213 (38 TexReg 970, effective February 21, 2013); 335.214; 335.221; 335.222(except (c)(1)); 335.222(c)(1) (38 TexReg 970, effective February 21, 2013); 335.223 through 335.225; 335.241(except (b)(4)); 335.251 (38 TexReg 970, effective February 21, 2013); 335.261 (except (e)); 335.271; 335.272;

Chapter 335, Subchapter O—Land Disposal Restrictions, Section 335.431 (except (c)(1)); 335.431(c)(1) (38 TexReg 970, effective February 21, 2013);

Chapter 335, Subchapter R—Waste Classification, Sections 335.504 introductory paragraph; 335.504(1)–(3) (38 TexReg 970, effective February 21, 2013);

Subchapter U, Standards For Owners And Operators Of Hazardous Waste Facilities Operating Under A Standard Permit, Sections 601 and 602.

Copies of the Texas regulations that are incorporated by reference are available from West Group Publishing, 610 Opperman Drive, Eagan, 55123, ATTENTION: Order Entry; Phone: 1–800–328–9352; Web site: <http://west.thomson.com>.

* * * * *

[FR Doc. 2015–31881 Filed 12–24–15; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA–2001–11213, Notice No. 20]

Alcohol and Drug Testing: Determination of Minimum Random Testing Rates for 2016

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of determination.

SUMMARY: This notice of determination provides the FRA Administrator’s minimum annual random drug and alcohol testing rates for calendar year 2016.

DATES: This notice of determination is effective December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Jerry Powers, FRA Drug and Alcohol Program Manager, W33–310, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, (telephone 202–493–6313); or Sam Noe, FRA Drug and Alcohol Program Specialist, (telephone 615–719–2951).

SUPPLEMENTARY INFORMATION: FRA determines the minimum annual random drug testing rate and minimum random alcohol testing rate for the next calendar year based on railroad industry data available for two previous calendar years (for this Notice, calendar years 2013 and 2014). Railroad industry data submitted to FRA’s Management Information System shows the rail industry’s random drug testing positive rate remained below 1.0 percent for the applicable two calendar years. FRA’s Administrator has therefore determined the minimum annual random drug testing rate for the period January 1, 2016, through December 31, 2016, will remain at 25 percent of covered railroad employees under 49 CFR 219.602. In addition, because the industry-wide random alcohol testing violation rate remained below 0.5 percent for the applicable two calendar years, the Administrator has determined the minimum random alcohol testing rate will remain at 10 percent of covered railroad employees for the period January 1, 2016, through December 31, 2016 under 49 CFR 219.608. Because these rates represent minimums, railroads may conduct FRA random testing at higher rates.

Issued in Washington, DC on December 21, 2015.

Sarah Feinberg,
Administrator.

[FR Doc. 2015-32544 Filed 12-24-15; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 225

[FRA-2008-0136, Notice No. 8]

RIN 2130-ZA13

Monetary Threshold for Reporting Rail Equipment Accidents/Incidents for Calendar Year 2016

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This rule maintains the rail equipment accident/incident monetary reporting threshold at \$10,500 for railroad accidents/incidents involving property damage that occur during calendar year (CY) 2016 that FRA's accident/incident reporting regulations require to be reported to the agency. FRA is maintaining the reporting threshold at the same level it did in CY 2015, and CY 2014, because, in part, the wage and equipment data for the second-quarter of 2015 (*i.e.*, the data used to calculate the threshold) changed only slightly (about 1 percent) from second-quarter 2014 values. In addition, FRA is maintaining the monetary threshold for CY 2016 at the CY 2015 level while it reexamines the method for calculating the monetary threshold.

DATES: This final rule is effective January 1, 2016.

FOR FURTHER INFORMATION CONTACT:

Kebo Chen, Staff Director, U.S. Department of Transportation, Federal Railroad Administration, Office of Safety Analysis, RRS-22, Mail Stop 25, West Building 3rd Floor, Room W33-314, 1200 New Jersey Ave. SE., Washington, DC 20590 (telephone 202-493-6079); or Sara Mahmoud-Davis, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC-10, Mail Stop 10, West Building 3rd Floor, Room W33-435, 1200 New Jersey Ave. SE., Washington, DC 20590 (telephone 202-366-1118).

SUPPLEMENTARY INFORMATION:

Background

A "rail equipment accident/incident" is a collision, derailment, fire,

explosion, act of God, or other event involving the operation of railroad on-track equipment (standing or moving) that results in damages to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and the costs for acquiring new equipment and material, greater than the reporting threshold for the year in which the event occurs. 49 CFR 225.19(c). Each rail equipment accident/incident must be reported to FRA using the Rail Equipment Accident/Incident Report (Form FRA F 6180.54). See 49 CFR 225.19(b), (c) and 225.21(a). Paragraphs (c) and (e) of 49 CFR 225.19 further provide that FRA will adjust the dollar figure that constitutes the reporting threshold for rail equipment accidents/incidents, if necessary, every year under the procedures in appendix B to 49 CFR part 225 (Appendix B) to reflect any cost increases or decreases.

In this rule, FRA is keeping the monetary threshold for CY 2016, at \$10,500, the same as the monetary threshold for CY 2014 and CY 2015. FRA is maintaining the reporting threshold at the same level as CY 2015 because, in part, the wage and equipment data for the second-quarter of 2015 (*i.e.*, the data used to calculate the threshold) changed only slightly (about 1 percent) from second-quarter 2014 values. FRA believes that the wage and equipment data support keeping the reporting threshold the same for CY 2016. Also, FRA anticipates making changes to the methodology for calculating the reporting threshold in the coming year.

In addition to periodically reviewing and adjusting the annual threshold under Appendix B, FRA periodically amends its method for calculating the threshold. In 49 U.S.C. 20901(b), Congress requires that FRA base the threshold on publicly available information obtained from the Bureau of Labor Statistics (BLS), other objective government source, or be subject to notice and comment. In 1996, FRA adopted a new method for calculating the monetary reporting threshold for accidents/incidents. See 61 FR 60632, Nov. 29, 1996. In 2005, FRA again amended its method for calculating the reporting threshold because the BLS ceased collecting and publishing the railroad wage data FRA used in the calculation. Consequently, FRA substituted railroad employee wage data the Surface Transportation Board (STB) collects for the data BLS ceased to collect. See 70 FR 75414, Dec. 20, 2005. In 2016, FRA intends to evaluate and amend, if appropriate, its method for calculating the monetary threshold for accident/incident reporting and, as a

result, the formula utilized to calculate the threshold may change. FRA intends to reexamine its method for calculating the reporting threshold because new methodologies for calculating the threshold are available. FRA believes updating its methodology to include these advances will ensure the reporting threshold reflects changes in equipment and labor costs as accurately as possible.

Maintaining Current Reporting Threshold

Approximately one year has passed since FRA reviewed the rail equipment accident/incident reporting threshold. See 79 FR 77397, Dec. 24, 2014. Consequently, FRA reviewed the threshold as 49 CFR 225.19(c) requires, and found that costs for labor remained the same and costs for equipment increased only slightly relative to approximately one year ago.

In reviewing the threshold, FRA gathered wage and equipment data from the STB and BLS respectively. Under the procedure in Appendix B, FRA averaged the wages for Group No. 300 (Maintenance of Way and Structures) and Group No. 400 (Maintenance of Equipment and Stores employees). FRA averaged the monthly equipment indices from the Producer Price Index (PPI) to produce a quarterly average. Consistent with Appendix B, FRA utilized data from the second-quarter of 2014 to the second-quarter of 2015.

To determine the changes in wages and prices over this time period, FRA calculated the quarter-to-quarter changes (*i.e.*, changes between each consecutive quarter from the second-quarter of 2014 to the second-quarter of 2015). In addition, FRA calculated the quarter-over-quarter change (*i.e.*, the change using only the beginning and ending quarters of the selected time period). The results are illustrated in the table below.

Considering the wage input to the threshold first, the average quarter-to-quarter change in wages is 0 percent, although individual quarter-to-quarter changes ranged from negative 3 percent to 5 percent. The quarter-over-quarter change in wages is negative 0.1 percent (rounded to 0 percent in the table). Based on no overall change in wages, the reporting threshold would not change for 2016.

Examining the change in equipment PPI over the same time period shows an average quarter-to-quarter increase of 0.5 percent. The quarter-over-quarter change is about 2 percent. The 2 percent change, when applied to the current \$10,500 reporting threshold, would indicate an increase of about \$200. However, the formula for calculating the

reporting threshold weights the wage input to the formula by 40 percent and the equipment input by 60 percent. The weights in the formula cause the impact of the equipment index to be reduced to 1.2 percent, or about one-half the 2 percent quarter-to-quarter increase. The 1.2 percent change applied to the current threshold would yield a new reporting threshold of \$10,600, a relatively small change. Considering

that such a change would only affect accidents/incidents with damages near this reporting threshold amount, FRA expects the number of affected accidents/incidents to be small. Only accidents/incidents that occurred in 2015 which were slightly below the current \$10,500 reporting threshold may become reportable in 2016.¹ Given FRA's intent to reexamine its method for calculating the reporting threshold

in 2016, the small changes in wages and equipment during the current analysis period, and the and the resulting minimal effect on the reporting threshold for CY 2016, FRA is maintaining the current reporting threshold of \$10,500 for reporting rail equipment accidents/incidents that occur in CY 2016.

TABLE—SMALL CHANGES IN WAGES AND EQUIPMENT INDICES

Quarter	Wage*	Percent change	Equipment index*	Percent change
Q2 2014	\$29.65	.....	196.6	.....
Q3 2014	28.76	-3	198.0	1
Q4 2014	29.78	0	199.6	1
Q1 2015	30.31	5	200.3	0
Q2 2015	29.60	-2	200.6	0
Average Change Quarter-to-Quarter		0	.....	0.5
Percent Change Quarter-over-Quarter (Q2 2014 to Q2 2015)		0	.....	2

*Source for wage is STB. Source for equipment index is BLS.

Notice and Comment Procedures

In this rule, FRA is maintaining the current monetary reporting threshold for the reasons explained above, and, under the final rule published December 20, 2005. See 70 FR 75414. FRA finds this rule imposes no additional burden on any person, but rather is intended to provide a benefit by permitting the valid comparison of accident data over time. Accordingly, finding that notice and comment procedures are either impracticable, unnecessary, or contrary to the public interest, FRA is proceeding directly to a final rule.

As appropriate, FRA regularly recalculates the monetary reporting threshold using the formula published in Appendix B near the end of each calendar year. FRA attempts to use the most recent data available to calculate the updated reporting threshold prior to the next calendar year. FRA believes that issuing this rule no later than December of each calendar year and making the rule effective on January 1, of the next year, allows FRA to use the most up-to-date data to calculate the reporting threshold and to compile data that accurately reflects rising wages and equipment costs. As such, FRA finds that it has good cause to make this final rule effective January 1, 2016.

Regulatory Impact

Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

FRA evaluated this rule under existing policies and procedures, and determined it to be non-significant under both Executive Orders 12866 and 13563 in addition to DOT policies and procedures. See 44 FR 11034, Feb. 26, 1979.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities. Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), FRA issued a final policy statement that formally establishes “small entities” are railroads that meet the line-haulage revenue requirements of a Class III railroad. 49 CFR part 209, app. C. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity. *Id.*

FRA considers about 730 of the approximately 779 railroads in the United States small entities. FRA certifies this final rule will have no significant economic impact on a

substantial number of small entities. To the extent that this rule has any impact on small entities, the impact will be neutral or insignificant. The frequency of rail equipment accidents/incidents and required reporting, is generally proportional to the size of the railroad. A railroad that employs thousands of employees and operates trains millions of miles is exposed to greater risks than one whose operation is substantially smaller. Small railroads may go for months at a time without having a reportable occurrence of any type, and even longer without having a rail equipment accident/incident. For example, current FRA data indicate that railroads reported 1,902 rail equipment accidents/incidents in 2010, with small railroads reporting 303 of them. Data for 2011 show that railroads reported 2,022 rail equipment accidents/incidents, with small railroads reporting 307 of them. In 2012, railroads reported 1,760 rail equipment accidents/incidents, with small railroads reporting 292 of them. In 2013, railroads reported 1,824 rail equipment accidents/incidents, with small railroads reporting 299 of them. In 2014, railroads reported 1,758 rail equipment accidents/incidents, with small railroads reporting 247 of them. On average over those five calendar years, small railroads reported about 16 percent of the total number of rail equipment accidents/incidents,

¹ For example, if an accident/incident occurred in 2015 that resulted in damages of \$10,450, it would not be reportable. Given a potential increase in equipment and wages of 1.2 percent (weighted),

reported damages for that same accident if it occurred in 2016 would be \$10,575 (\$10,450 * 1.012 = \$10,575). If FRA increased the threshold to \$10,600 for 2016, that accident/incident would still

not be reportable. However, if FRA keeps the threshold at \$10,500, that accident will be reportable in 2016.

ranging from 14 percent to 16 percent annually. FRA notes that this data is accurate as of the date of issuance of this final rule, and is subject to minor changes due to additional reporting.

This rulemaking maintains the monetary reporting threshold at the CY 2014 and CY 2015 level of \$10,500. Increasing the reporting threshold would have potentially slightly decreased the reporting burden for railroads in 2016. However, only accidents/incidents with reportable damages near the reporting threshold will be affected. In any case, railroads still maintain records of accountable accidents/incidents that are below the reporting threshold, thus minimizing any potential additional burden to report these accidents to FRA caused by keeping the threshold the same in CY 2016. Railroads would potentially incur a small reporting burden, but not the burden to gather this accident/incident information. Also, overall wage rates have not increased, and equipment costs have increased only about 1 percent from the second-quarter of CY 2015 compared to the second-quarter of CY 2014, according to the average PPI Series WPU144 for group transportation equipment and item railroad equipment the BLS published for April, May, and June 2015. Therefore, the overall effect of this rule likely will be neutral or minimal. Any change in recordkeeping burden will not be significant and will affect the large railroads more than the small entities, due to the higher proportion of reportable rail equipment accidents/incidents experienced by large entities.

Paperwork Reduction Act

There are no new or additional information collection requirements associated with this final rule. FRA's collection of accident/incident reporting and recordkeeping information is currently approved under OMB No. 2130-0500. Therefore, FRA is not required to provide an estimate of a public reporting burden in this document.

Federalism Implications

Executive Order 13132, entitled, "Federalism," signed on August 4, 1999, requires that each agency in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provide[] to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the

regulation, and a statement of the extent to which the concerns of the State and local officials have been met.

FRA analyzed this final rule under the principles and criteria in Executive Order 13132. This rule will not have a substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and the responsibilities among the various levels of government, as specified in the Executive Order 13132. Accordingly, FRA determined this rule will not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism assessment. Therefore, FRA did not prepare a federalism assessment.

Environmental Impact

FRA evaluated this rule under its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulations require. FRA determined this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review under section 4(c)(20) of FRA's Procedures. See 64 FR 28545, 28547, May 26, 1999. Under section 4(c) and (e) of FRA's Procedures, FRA further concluded that no extraordinary circumstances exist with respect to this rule that might trigger the need for a more detailed environmental review. Accordingly, FRA finds this rule is not a major Federal action significantly affecting the quality of the human environment.

Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in 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 1 year, and

before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. When adjusted for inflation using BLS' Consumer Price Index for All Urban Consumers, the equivalent value of \$100,000,000 in year 2014 dollars is \$155,000,000.² The final rule will not result in the expenditure, in the aggregate, of \$155,000,000 or more in any one year, and thus preparation of such a statement is not required.

Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355, May 22, 2001. Under the Executive Order, a "significant energy action" is defined as

[a]ny action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

FRA has evaluated this final rule under Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

Privacy Act

Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

² See U.S. Department of Transportation guidance at, "2015 Threshold of Significant Regulatory Actions Under the Unfunded Mandates Reform Act of 1995," May 6, 2015 (update), <http://www.transportation.gov/office-policy/transportation-policy/2015-threshold-significant-regulatory-actions-under-unfunded>.

The Rule

In consideration of the foregoing, FRA amends part 225 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 225—[AMENDED]

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–02, 21301, 21302, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. Amend § 225.19 by revising the first sentence of paragraph (c) and revising paragraph (e) to read as follows:

§ 225.19 Primary groups of accidents/incidents.

* * * * *

(c) *Group II—Rail equipment.* Rail equipment accidents/incidents are collisions, derailments, fires, explosions, acts of God, and other events involving the operation of on-track equipment (standing or moving) that result in damages higher than the current reporting threshold (*i.e.*, \$6,700 for calendar years 2002 through 2005, \$7,700 for calendar year 2006, \$8,200 for calendar year 2007, \$8,500 for calendar year 2008, \$8,900 for calendar year 2009, \$9,200 for calendar year 2010, \$9,400 for calendar year 2011, \$9,500 for calendar year 2012, \$9,900 for calendar year 2013, \$10,500 for calendar year 2014, \$10,500 for calendar year 2015, and \$10,500 for calendar year 2016) to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and the costs for acquiring new equipment and material. * * *

* * * * *

(e) The reporting threshold is \$6,700 for calendar years 2002 through 2005, \$7,700 for calendar year 2006, \$8,200 for calendar year 2007, \$8,500 for calendar year 2008, \$8,900 for calendar year 2009, \$9,200 for calendar year 2010, \$9,400 for calendar year 2011, \$9,500 for calendar year 2012, \$9,900 for calendar year 2013, \$10,500 for calendar year 2014, \$10,500 for calendar year 2015, and \$10,500 for calendar year 2016. The procedure for determining the reporting threshold for calendar years 2006 and beyond appears as paragraphs 1–8 of appendix B to part 225.

* * * * *

Issued in Washington, DC, on December 21, 2015.

Sarah Feinberg,
Administrator.

[FR Doc. 2015–32545 Filed 12–24–15; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 622**

[Docket No. 15060302–5999–02]

RIN 0648–BF14

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region; Framework Amendment 3*Correction*

In notice document 2015–31708 beginning on page 78670 in the issue of Thursday, December 17, 2015, make the following corrections:

1. On page 78671, in the third column, in the eleventh line, “February 16, 2015” should read “February 16, 2016”.

§ 622.372 Limited access system for king mackerel gillnet permits applicable in the southern Florida west coast subzone.

2. On page 78675, in the first column, in the eighth line, “February 16, 2015” should read “February 16, 2016”.

[FR Doc. C1–2015–31708 Filed 12–24–15; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 622**

[Docket No. 131108946–5999–02]

RIN 0648–BD76

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Dolphin and Wahoo Fishery Off the Atlantic States and Snapper-Grouper Fishery of the South Atlantic Region; Amendments 7/33

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement Amendment 7 to the Fishery Management Plan (FMP) for the Dolphin and Wahoo Fishery off the Atlantic States (Dolphin and Wahoo FMP) and Amendment 33 to the FMP for the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP) (Amendments 7/33), as prepared and submitted by the South Atlantic Fishery Management Council (Council). This

final rule revises the landing fish intact provisions for vessels that lawfully harvest dolphin, wahoo, or snapper-grouper in or from Bahamian waters and return to the U.S. exclusive economic zone (EEZ). The U.S. EEZ as described in this final rule refers to the Atlantic EEZ for dolphin and wahoo and the South Atlantic EEZ for snapper-grouper species. The purpose of this final rule is to improve the consistency and enforceability of Federal regulations with regards to landing fish intact provisions for vessels transiting from Bahamian waters through the U.S. EEZ and to increase the social and economic benefits related to the recreational harvest of these species.

DATES: This final rule is effective January 27, 2016.

ADDRESSES: Electronic copies of Amendments 7/33, which includes an environmental assessment, regulatory impact review, and Regulatory Flexibility Act analysis, may be obtained from the Southeast Regional Office Web site at http://sero.nmfs.noaa.gov/sustainable_fisheries/s_atl/generic/2015/dw7_sg33/index.html.

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

SUPPLEMENTARY INFORMATION: The dolphin and wahoo fishery is managed under the Dolphin and Wahoo FMP and the snapper-grouper fishery is managed under the Snapper-Grouper FMP. The FMPs were prepared by the Council and are implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On September 17, 2015, NMFS published a notice of availability for Amendments 7/33 and requested public comment (80 FR 55819). On October 7, 2015, NMFS published a proposed rule for Amendments 7/33 and requested public comment (80 FR 60601). The proposed rule and Amendments 7/33 outline the rationale for the actions contained in this final rule. A summary of the actions implemented by Amendments 7/33 and this final rule is provided below.

Current Federal regulations require that dolphin or wahoo or snapper-grouper species onboard a vessel traveling through the U.S. EEZ be maintained with the heads and fins intact and not be in fillet form. However, as implemented through Amendment 8 to the Snapper-Grouper FMP, an exemption applies to snapper-grouper species that are lawfully harvested in Bahamian waters and are

onboard a vessel returning to the U.S. through the U.S. EEZ (63 FR 38298, July 16, 1998). That exemption allows that in the South Atlantic EEZ, snapper-grouper lawfully harvested in Bahamian waters are exempt from the requirement that they be maintained with head and fins intact, provided valid Bahamian fishing and cruising permits are on board the vessel and the vessel remains in transit through the South Atlantic EEZ.

The Bahamas does not allow for the commercial harvest of dolphin, wahoo, or snapper-grouper by U.S. vessels in Bahamian waters. Therefore, the measures in this final rule only apply to the recreational harvest of these species by vessels returning from The Bahamas to the U.S. EEZ. This final rule will not change potential liability under the Lacey Act, which makes it unlawful to import, export, sell, receive, acquire, or purchase fish that are taken, possessed, transported or sold in violation of any foreign law.

Management Measures Contained in This Final Rule

This final rule revises the landing fish intact provisions for vessels that lawfully harvest dolphin, wahoo, or snapper-grouper in Bahamian waters and return to the U.S. EEZ. This final rule allows for dolphin and wahoo fillets to enter the U.S. EEZ after lawful harvest in The Bahamas; specifies the condition of any dolphin, wahoo, and snapper-grouper fillets; describes how the recreational bag limit is determined for any fillets; explicitly prohibits the sale or purchase of any dolphin, wahoo, or snapper-grouper recreationally harvested in The Bahamas; specifies the required documentation to be onboard any vessels that have these fillets, and specifies transit and stowage provisions for any vessels with fillets.

Landing Fish Intact

Currently, all dolphin or wahoo in or from Atlantic EEZ are required to be maintained with head and fins intact. This final rule allows for dolphin or wahoo lawfully harvested in Bahamian waters to be exempt from this provision when returning through the Atlantic EEZ under certain circumstances. Allowing these vessels to be exempt from the landing fish intact regulations increases the social and economic benefits for recreational fishers returning to the U.S. EEZ from Bahamian waters. This final rule also provides increased consistency between the dolphin and wahoo and snapper-grouper regulations for vessels possessing fillets of these species and

transiting from Bahamian waters through the U.S. EEZ.

Snapper-grouper possessed in the South Atlantic EEZ are currently exempt from the landing fish intact requirement under certain conditions if the vessel lawfully harvested the snapper-grouper in The Bahamas. Amendments 7/33 and this final rule retain this exemption and revise it to include additional requirements.

The Council and NMFS note that this exemption only applies to the landing fish intact provisions for fish in the U.S. EEZ, and does not exempt fishers from any other Federal fishing regulations such as fishing seasons, recreational bag limits, and size limits.

Condition of Fillets

To better allow for identification of the species of any fillets in the U.S. EEZ, this final rule requires that the skin be left intact on the entire fillet of any dolphin, wahoo, or snapper-grouper carcass on a vessel in transit from Bahamian waters through the U.S. EEZ. This requirement is intended to assist law enforcement in identifying fillets to determine whether they are the species lawfully exempted by this final rule.

Recreational Bag Limits

Currently, all dolphin, wahoo, and snapper-grouper species harvested or possessed in or from the U.S. EEZ are required to adhere to the U.S. bag and possession limits. This final rule does not revise the bag and possession limits, but specifies how fillets are counted with respect to determining the number of fish onboard a vessel in transit from Bahamian waters through the U.S. EEZ and ensuring compliance with U.S. bag and possession limits. This final rule specifies that for any dolphin, wahoo, or snapper-grouper species lawfully harvested in Bahamian waters and onboard a vessel in the U.S. EEZ in fillet form, two fillets of the respective species of fish, regardless of the length of each fillet, are equivalent to one fish. This measure will assist law enforcement in enforcing the relevant U.S. bag and possession limits.

Sale and Purchase Restrictions of Recreationally Harvested Dolphin, Wahoo or Snapper-Grouper

This final rule explicitly prohibits the sale or purchase of any dolphin, wahoo, or snapper-grouper species recreationally harvested in Bahamian waters and returned to the U.S. through the U.S. EEZ. The Council determined that establishing a specific prohibition on the sale or purchase of any of these species from The Bahamas was necessary to ensure consistency with

the current Federal regulations that prohibit recreational bag limit sales of these species.

Required Documentation

This final rule revises the documentation requirements for snapper-grouper species and implements documentation requirements for dolphin and wahoo harvested in Bahamian waters and onboard a vessel in transit through the U.S. EEZ. For dolphin, wahoo, or snapper-grouper fillets lawfully harvested in Bahamian waters and on a vessel transiting through the U.S. EEZ, this final rule requires that valid Bahamian fishing and cruising permits are onboard and additionally requires that all vessel passengers have valid government passports with current stamps and dates. Requiring valid Bahamian fishing and cruising permits on the vessel and requiring each vessel passenger to have a valid government passport with current stamps and dates from The Bahamas increases the likelihood that the vessel and passengers were lawfully fishing in The Bahamas, and thereby increases the likelihood that any dolphin, wahoo, or snapper-grouper fillets on the vessel were lawfully harvested in Bahamian waters and not in the U.S. EEZ.

Transit and Stowage Provisions

This final rule revises the snapper-grouper transit provisions, applies the transit provisions to vessels operating under the exemption for dolphin and wahoo, and requires fishing gear to be appropriately stowed on a vessel transiting through the U.S. EEZ with fillets of these species. The definition for "fishing gear appropriately stowed" means that "terminal gear (*i.e.*, hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. Sinkers must be disconnected from the down rigger and stowed separately." The Council determined that specifying criteria for transit and fishing gear stowage for vessels returning from The Bahamas with fillets of dolphin, wahoo, or snapper-grouper species would assist with the enforceability of the regulations and increase consistency with the state of Florida's gear stowage regulations.

Comments and Responses

A total of three comment submissions were received on Amendments 7/33 and the proposed rule from individuals and a state agency. The state agency stated that it strongly supported the actions in

Amendments 7/33 and the proposed rule. Specific comments in the two other comment submissions related to the actions contained in Amendments 7/33 and the proposed rule, and NMFS' respective responses, are summarized below.

Comment 1: Large-sized dolphin may be filleted into more than two pieces per fish. The average size of dolphin fillets is large, and therefore, these large fillets cannot be transported properly from The Bahamas without destroying the quality of the meat.

Response: NMFS agrees that dolphin and wahoo can grow to large sizes, that it is possible to fillet a dolphin into more than two pieces per fish, and that cooler space may be limited on small boats. At its March 2014 meeting, the Council's Dolphin Wahoo Advisory Panel indicated that the quality of dolphin and wahoo caught on trips in The Bahamas and brought through U.S. Federal waters as fillets would be improved, because whole fish would not have to be stored with head and fins intact. In addition, allowing fillets of these species would make it easier for fishers in small boats to transport dolphin and wahoo back through the U.S. EEZ from Bahamian waters. The Council also determined that specifying two fillets as one fish for the purposes of determining the recreational bag and possession limits will assist law enforcement in enforcing these limits when applied to fishers with fillets of dolphin onboard that were harvested in The Bahamas and transiting through U.S. Federal waters.

Comment 2: Non-compliance with the landing fish intact exemption will be an issue unless different recreational bag limit options are considered, such as setting the bag limit by weight of fillets. For example, a 20 lb (9 kg) per species per person would be a reasonable bag limit well within the Bahamian recreational catch limits.

Response: NMFS disagrees. In developing Amendments 7/33, the Council considered using weight of fillets for determining the bag limit, but testimony from law enforcement officials and the U.S. Coast Guard established that it is not practical to weigh fish at sea. The Council discussed the issues of fish size and number of fillets obtainable from a dolphin, and, given the overall positive public support for allowing fillets, and balancing the needs for an effective law enforcement program, the Council determined that the most appropriate and enforceable means of determining compliance with recreational bag limits was to count two fillets of dolphin as one fish.

Comment 3: NMFS is violating the rights of U.S. flagged vessels by not allowing fishing in U.S. Federal waters while in transit from The Bahamas.

Response: NMFS disagrees. The final rule implementing Amendments 7/33 provides an exemption to the existing requirement that dolphin and wahoo and snapper-grouper species be maintained with the heads and fins intact in the U.S. EEZ and not be in fillet form. If fishers on U.S. flagged vessels transiting through the U.S. EEZ from The Bahamas choose to be exempted from the requirement to maintain those species with heads and fins intact, they must comply with the conditions of that exemption, which include a prohibition on fishing in the U.S. EEZ. The prohibition on fishing in the EEZ being implemented in this final rule for fishers transiting from The Bahamas and in possession of dolphin and wahoo fillets will make the regulations for these species consistent with the existing transit provisions for snapper-grouper species implemented by the final rule for Amendment 8 to the Snapper-Grouper FMP (63 FR 38298, July 16, 1998). Additionally, the NMFS Office of Law Enforcement has stated that it would be difficult to determine if a U.S. flagged vessel with fillets of dolphin and wahoo on board, and then fishing in the U.S. EEZ on return from The Bahamas, caught the fish in The Bahamas.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined that this final rule is necessary for the conservation and management of South Atlantic snapper-grouper and Atlantic dolphin and wahoo and is consistent with the Amendments 7/33, the FMPs, the Magnuson-Stevens Act, and other applicable law.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination was published in the proposed rule and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. As a result, a final regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Atlantic, Dolphin, Fillets, Fisheries, Fishing, Snapper-Grouper, Wahoo.

Dated: December 21, 2015.

Eileen Sobeck,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.186, revise paragraph (b) to read as follows:

§ 622.186 Landing fish intact.

* * * * *

(b) In the South Atlantic EEZ, snapper-grouper lawfully harvested in Bahamian waters are exempt from the requirement that they be maintained with head and fins intact, provided that the skin remains intact on the entire fillet of any snapper-grouper carcasses, valid Bahamian fishing and cruising permits are on board the vessel, each person on the vessel has a valid government passport with current stamps and dates from The Bahamas, and the vessel is in transit through the South Atlantic EEZ with fishing gear appropriately stowed. For the purpose of this paragraph, a vessel is in transit through the South Atlantic EEZ when it is on a direct and continuous course through the South Atlantic EEZ and no one aboard the vessel fishes in the EEZ. For the purpose of this paragraph, fishing gear appropriately stowed means that terminal gear (*i.e.*, hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. Sinkers must be disconnected from the down rigger and stowed separately. See § 622.187(a)(3) for the limit of snapper-grouper fillets lawfully harvested from Bahamian waters that may transit through the South Atlantic EEZ.

■ 3. In § 622.187, add paragraph (a)(3) to read as follows:

§ 622.187 Bag and possession limits.

(a) * * *

(3) In the South Atlantic EEZ, a vessel that lawfully harvests snapper-grouper in Bahamian waters, as per § 622.186 (b), must comply with the bag and possession limits specified in this section. For determining how many

snapper-grouper are on board a vessel in fillet form when harvested lawfully in Bahamian waters, two fillets of snapper-grouper, regardless of the length of each fillet, is equivalent to one snapper-grouper. The skin must remain intact on the entire fillet of any snapper-grouper carcass.

* * * * *

■ 4. In § 622.192, add paragraph (k) to read as follows:

§ 622.192 Restrictions on sale/purchase.

* * * * *

(k) Snapper-grouper possessed pursuant to the bag and possession limits specified in § 622.187(a)(3) may not be sold or purchased.

■ 5. Revise § 622.276 to read as follows:

§ 622.276 Landing fish intact.

(a) Dolphin or wahoo in or from the Atlantic EEZ must be maintained with head and fins intact, except as specified in paragraph (b) of this section. Such fish may be eviscerated, gilled, and scaled, but must otherwise be maintained in a whole condition. The operator of a vessel that fishes in the EEZ is responsible for ensuring that fish on that vessel in the EEZ are maintained intact and, if taken from the EEZ, are maintained intact through offloading ashore, as specified in this section.

(b) In the Atlantic EEZ, dolphin or wahoo lawfully harvested in Bahamian waters are exempt from the requirement that they be maintained with head and fins intact, provided that the skin remains intact on the entire fillet of any dolphin or wahoo carcasses, valid Bahamian fishing and cruising permits are on board the vessel, each person on the vessel has a valid government passport with current stamps and dates from The Bahamas, and the vessel is in transit through the Atlantic EEZ with fishing gear appropriately stowed. For the purpose of this paragraph, a vessel is in transit through the Atlantic EEZ when it is on a direct and continuous course through the Atlantic EEZ and no one aboard the vessel fishes in the EEZ. For the purpose of this paragraph, fishing gear appropriately stowed means that terminal gear (*i.e.*, hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. Sinkers must be disconnected from the down rigger and stowed separately.

■ 6. In § 622.277, revise paragraphs (a)(1) and (2) to read as follows:

§ 622.277 Bag and possession limits.

* * * * *

(a) * * *

(1) *Dolphin.* (i) In the Atlantic EEZ—10, not to exceed 60 per vessel, whichever is less, except on board a headboat, 10 per paying passenger.

(ii) In the Atlantic EEZ and lawfully harvested in Bahamian waters (as per § 622.276(b))—10, not to exceed 60 per vessel, whichever is less, except on board a headboat, 10 per paying passenger. For the purposes of this paragraph, for determining how many dolphin are on board a vessel in fillet form when harvested lawfully in Bahamian waters, two fillets of dolphin, regardless of the length of each fillet, is equivalent to one dolphin. The skin must remain intact on the entire fillet of any dolphin carcass.

(2) *Wahoo.* (i) In the Atlantic EEZ—2.

(ii) In the Atlantic EEZ and lawfully harvested in Bahamian waters (as per § 622.276(b))—2. For the purposes of this paragraph, for determining how many wahoo are on board a vessel in fillet form when harvested lawfully in Bahamian waters, two fillets of wahoo, regardless of the length of each fillet, is equivalent to one wahoo. The skin must remain intact on the entire fillet of any wahoo carcass.

* * * * *

■ 7. In § 622.279, add paragraph (d) to read as follows:

§ 622.279 Restrictions on sale/purchase.

* * * * *

(d) Dolphin or wahoo possessed pursuant to the bag and possession limits specified in § 622.277(a)(1)(ii) and (a)(2)(ii) may not be sold or purchased.

[FR Doc. 2015–32555 Filed 12–24–15; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 150903814–5999–02]

RIN 0648–XE171

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2016–2018 Summer Flounder, Scup, and Black Sea Bass Specifications

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

ACTION: Final rule.

SUMMARY: NMFS issues final specifications for the 2016–2018

summer flounder and scup fisheries, and the 2016 and 2017 black sea bass fishery. This final rule specifies allowed harvest limits for both commercial and recreational fisheries. This action prohibits federally permitted commercial fishing vessels from landing summer flounder in Delaware in 2016 due to continued quota repayment from previous years' overages. This action also reduces the 2016 black sea bass commercial quota to account for a catch overage in 2014. These actions are necessary to comply with regulations implementing the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, and to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act. The intent of this action is to establish harvest levels and other management measures to ensure that these species are not overfished or subject to overfishing in 2016–2018.

DATES: Effective January 1, 2016, through December 31, 2018.

ADDRESSES: Copies of the specifications document, consisting of an Environmental Assessment (EA), Initial Regulatory Flexibility Analysis (IRFA), and other supporting documents used by the Summer Flounder, Scup, and Black Sea Bass Monitoring Committees and Scientific and Statistical Committee (SSC), are available from Dr. Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. The specifications document is also accessible via the Internet at <http://www.greateratlantic.fisheries.noaa.gov>. The Final Regulatory Flexibility Analysis (FRFA) consists of the IRFA, public comments and responses contained in this final rule, and the summary of impacts and alternatives contained in this final rule. Copies of the small entity compliance guide are available from John K. Bullard, Regional Administrator, Greater Atlantic Region, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930–2298.

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Fishery Policy Analyst, (978) 281–9218.

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission cooperatively manage the summer flounder, scup, and black sea bass fisheries under the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP). Fishery

specifications in these fisheries include various catch and landing subdivisions, such as the species-specific acceptable biological catch (ABC), commercial and recreational sector annual catch limits (ACLs), annual catch targets (ACTs), and the sector-specific landing limits (*i.e.*, the commercial fishery quota and recreational harvest limit) established for the up to three fishing years at a time. The FMP and its implementing regulations establish the Council’s process for establishing specifications. Requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), including

the 10 national standards, also apply to specifications. The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina northward to the U.S./Canada border, scup (*Stenotomus chrysops*), and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35° 13.3’ N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, NC) northward to the U.S./Canada border. Detailed background information regarding the status of the summer flounder, scup, and black sea bass

stocks and the development of the 2016–2018 specifications for these fisheries was provided in the proposed specifications (November 9, 2015; 80 FR 69179) and is not repeated here.

NMFS will establish the 2016 recreational management measures (*i.e.*, minimum fish size, possession limits, and fishing seasons) for summer flounder, scup, and black sea bass by publishing proposed and final rules in the **Federal Register** at a later date.

2016–2018 Specifications

This action establishes the following specifications:

TABLE 1—SUMMARY OF THE 2016–2018 SUMMER FLOUNDER AND SCUP SPECIFICATIONS AND 2016–2017 BLACK SEA BASS SPECIFICATIONS

		Summer flounder			Scup			Black Sea Bass	
		2016	2017	2018	2016	2017	2018	2016	2017
Overfishing Limit (OFL)	million lb	18.06	19.82	22.40	35.80	32.09	29.68	n/a	n/a
	mt	8,194	8,991	10,159	16,238	14,556	13,464	a	n/a
ABC	million lb	16.26	15.86	15.68	31.11	28.40	27.05	6.67	6.67
	mt	7,375	7,193	7,111	14,110	12,881	12,270	3,024	3,024
Commercial ACL/ACT	million lb	9.42	9.19	9.10	24.26	22.15	21.10	3.15	3.15
	mt	4,275	4,168	4,127	11,006	10,047	9,571	1,428	1,428
Recreational ACL/ACT	million lb	6.83	6.67	6.56	6.84	6.25	5.95	3.52	3.52
	mt	3,100	3,025	2,984	3,104	2,834	2,699	1,597	1,597
Commercial Quota	million lb	8.12	7.91	7.89	20.47	18.38	17.34	2.70	2.71
	mt	3,685	3,590	3,581	9,284	8,337	7,866	1,226	1,226
Recreational Harvest Limit	million lb	5.42	5.28	5.26	6.09	5.50	5.21	2.82	2.82
	mt	2,457	2,393	2,387	2,763	2,495	2,361	1,280	1,280

The process describing the calculation of the commercial and recreational ACLs, commercial quotas, and recreational harvest limits was presented in the November 9, 2015, proposed rule, and is not repeated here. The specific discard values projected for each fishery and sector are described in more detail below.

Summer Flounder

This rule implements the Council’s ABC recommendation and the commercial and recreational catch limits associated with that ABC for fishing years 2016–2018.

As described in the proposed rule, these specifications are based on a

deviation from the Council’s normal procedures. Had the standard Risk Policy been followed, the drastic reduction in available catch could have had substantial economic impacts. The 2016 and 2017 ABCs have a higher risk of overfishing than would be allowed under the Council’s Risk Policy, but the 2018 ABC has a lower risk of overfishing than the Risk Policy requires. Each of the ABCs established in this rule have a less than 50-percent probability of resulting in overfishing. Further, the projected biomass is the same under either the standard Risk Policy or the deviation from the Risk Policy used in these specifications.

Because the OFLs are projected to increase modestly over the next three years, the specifications established in this rule are relatively stable. The SSC has requested a stock assessment update for next summer and intends to evaluate the available information to determine if the 2017 and 2018 ABCs remain appropriate. Fishing under these catch limits for 2016 through 2018 is not expected to compromise the summer flounder stock, nor will fishing at this level present an unacceptably high likelihood of overfishing.

This action makes no other changes to the Federal commercial summer flounder management measures.

TABLE 2—2016–2018 SUMMER FLOUNDER SPECIFICATIONS AND CALCULATIONS

	2016		2017		2018	
	million lb	mt	million lb	mt	million lb	mt
OFL	18.06	8,194	19.82	8,991	22.4	10,159
ABC	16.26	7,375	15.86	7,193	15.7	7,111
ABC Landings Portion	13.54	6,142	13.19	5,983	13.2	5,968
ABC Discards Portion	2.72	1,233	2.67	1,210	2.52	1,143
Commercial ACL	9.43	4,275	9.19	4,168	9.1	4,127
Commercial ACT	9.43	4,275	9.19	4,168	9.1	4,127
Projected Commercial Discards	1.30	590	1.28	579	1.21	547
Commercial Quota	8.12	3,685	7.91	3,590	7.89	3,581

TABLE 2—2016–2018 SUMMER FLOUNDER SPECIFICATIONS AND CALCULATIONS—Continued

	2016		2017		2018	
	million lb	mt	million lb	mt	million lb	mt
Recreational ACL	6.84	3,100	6.67	3,025	6.58	2,984
Recreational ACT	6.84	3,100	6.67	3,025	6.58	2,984
Projected Recreational Discards	1.42	643	1.39	631	1.32	596
Recreational Harvest Limit	5.42	2,457	5.28	2,393	5.26	2,387

Table 3 presents the 2016 summer flounder allocations for each state. Consistent with the quota-setting procedures for the FMP, summer flounder overages are determined based upon landings for the period January-October 2015, plus any previously unaccounted for overages. Table 3 summarizes the commercial summer flounder percent shares as outlined in § 648.102 (c)(1)(i), the resultant 2016

commercial quotas, the quota overages as described above, and the final adjusted 2016 commercial quotas. The 2015 quota overage is determined by comparing landings for January through October 2015, plus any landings in 2014 in excess of the 2014 quota, that were not previously addressed in the 2015 specifications, for each state. For Delaware, this includes continued repayment of overharvest from previous

years. Table 4 presents the initial 2017 and 2018 allocations by state. The 2017 and 2018 state quota allocations are preliminary and are subject to change if there are overages of states' quotas carried over from a previous fishing year. Notice of any commercial quota adjustments to account for overages will be published in the **Federal Register** prior to the start of the respective fishing year.

TABLE 3—FINAL STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER ALLOCATIONS FOR 2016

State	FMP Percent share	2016 Initial quota		Overages through October 31, 2015		Adjusted 2016 quota, less overages	
		lb	kg	lb	kg	lb	kg
Maine	0.04756	3,864	1,753	0	0	3,864	1,753
New Hampshire	0.00046	37	17	0	0	37	17
Massachusetts	6.82046	554,097	251,334	0	0	554,097	251,334
Rhode Island	15.68298	1,274,091	577,917	0	0	1,274,091	577,918
Connecticut	2.25708	183,366	83,173	0	0	183,366	83,173
New York	7.64699	621,244	281,791	0	0	621,244	281,792
New Jersey	16.72499	1,358,744	616,315	0	0	1,358,744	616,316
Delaware	0.01779	1,445	656	-48,846	-22,156	-47,401	-21,501
Maryland	2.0391	165,657	75,141	0	0	165,657	75,141
Virginia	21.31676	1,731,781	785,522	0	0	1,731,781	785,523
North Carolina	27.44584	2,229,709	1,011,378	0	0	2,229,709	1,011,379
Total	100	8,124,035	3,684,997	0	0	8,122,590	1,753

Notes: Kilograms are as converted from pounds and may not necessarily add due to rounding. Total quota is the sum for all states with an allocation. A state with a negative number has a 2015 allocation of zero (0). Total adjusted 2016 quota, less overages, does not include negative allocations.

TABLE 4—2016–2018 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS

State	FMP Percent share	2017 Quota		2018 Quota	
		lb	kg	lb	kg
Maine	0.04756	3,764	1,707	3,755	1,703
New Hampshire	0.00046	36	17	36	16
Massachusetts	6.82046	539,812	244,854	538,459	244,240
Rhode Island	15.68298	1,241,244	563,019	1,238,133	561,607
Connecticut	2.25708	178,639	81,029	178,191	80,826
New York	7.64699	605,228	274,527	603,711	273,838
New Jersey	16.72499	1,323,715	600,427	1,320,397	598,921
Delaware	0.01779	1,408	639	1,404	637
Maryland	2.0391	161,387	73,204	160,982	73,020
Virginia	21.31676	1,687,135	765,271	1,682,906	763,353
North Carolina	27.44584	2,172,227	985,305	2,166,781	982,835
Total	100	7,914,596	3,589,997	7,894,754	3,580,997

Delaware Summer Flounder Closure

Table 3 shows that, for Delaware, the amount of overharvest from previous

years is greater than the amount of commercial quota allocated to Delaware for 2016. As a result, there is no quota

available for 2016 in Delaware. The regulations at § 648.4(b) provide that Federal permit holders, as a condition of

their permit, must not land summer flounder in any state that the Administrator, Greater Atlantic Region, NMFS, has determined no longer has commercial quota available for harvest. Therefore, landings of summer flounder in Delaware by vessels holding commercial Federal summer flounder permits are prohibited for the 2016 calendar year, unless additional quota becomes available through a quota transfer and is announced in the

Federal Register. Federally permitted dealers are advised that they may not purchase summer flounder from federally permitted vessels that land in Delaware for the 2016 calendar year, unless additional quota becomes available through a transfer, as mentioned above.

Scup

This rule implements the Council's ABC recommendation and the

commercial and recreational catch limits associated with that ABC for fishing years 2016–2018. The scup management measures specify that the ABC is equal to the sum of the commercial and recreational sector ACLs. As described in the proposed rule, the ACLs and ACTs are set equal to each other for both sectors, sector-specific projected discards are removed, and the specifications for 2016–2018 are as shown in Table 5.

TABLE 5—2016–2018 SCUP SPECIFICATIONS

	2016		2017		2018	
	million lb	mt	million lb	mt	million lb	mt
OFL	35.8	16,238	32.09	14,556	29.7	13,464
ABC	31.11	14,110	28.4	12,881	27.1	12,270
ABC Landings Portion	26.56	12,047	23.88	10,832	22.6	10,227
ABC Discards Portion	4.55	2,063	4.52	2,049	4.5	2,043
Commercial ACL	24.26	11,006	22.15	10,047	21.1	9,571
Commercial ACT	24.26	11,006	22.15	10,047	21.1	9,571
Projected Commercial Discards	3.8	1,721	3.77	1,710	3.76	1,705
Commercial Quota	20.47	9,284	18.38	8,337	17.3	7,866
Recreational ACL	6.84	3,104	6.25	2,834	5.95	2,699
Recreational ACT	6.84	3,104	6.25	2,834	5.95	2,699
Projected Recreational Discards	0.75	342	0.75	339	0.75	338
Recreational Harvest Limit	6.09	2,763	5.5	2,495	5.21	2,361

If there is a commercial overage applicable to the scup commercial quota, notice will be published prior to the start of the each fishing year. No

commercial quota overage is applicable to 2016; therefore, no adjustment to the 2016 quota is necessary.

The scup commercial quota is divided into three commercial fishery quota periods. The period quotas are detailed in Table 6.

TABLE 6—COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2016–2018 BY QUOTA PERIOD

Quota period	Percent share	2016 Quota		2017 Initial quota		2018 Initial quota	
		lb	mt	lb	mt	lb	mt
Winter I	45.11	9,232,987	4,188	8,291,190	3,761	7,822,778	3,548
Summer	38.95	7,972,176	3,616	7,158,986	3,247	6,754,538	3,064
Winter II	15.94	3,262,554	1,480	2,929,762	1,329	2,764,245	1,254
Total	100.0	20,467,716	9,284	18,379,939	8,337	17,341,562	7,866

Note: Metric tons are as converted from pounds and may not necessarily total due to rounding.

The quota period possession limits are shown in Table 7. The Winter I possession limit will drop to 1,000 lb (454 kg) upon attainment of 80 percent of that period's allocation. If the Winter

I quota is not fully harvested, the remaining quota is transferred to Winter II. The Winter II possession limit may be adjusted (in association with a transfer of unused Winter I quota to the Winter

II period) via notification in the **Federal Register**. The regulations specify that the Winter II possession limit increases consistent with the increase in the quota, as described in Table 8.

TABLE 7—COMMERCIAL SCUP POSSESSION LIMITS BY QUOTA PERIOD

Quota period	Percent share	Federal possession limits (per trip)	
		lb	kg
Winter I	45.11	50,000	22,680
Summer	38.95	N/A	N/A
Winter II	15.94	12,000	5,443
Total	100.0	N/A	N/A

TABLE 8—POTENTIAL INCREASE IN 2016–2018 WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF UNUSED SCUP ROLLED OVER FROM WINTER I TO WINTER II

Initial Winter II possession limit		Rollover from Winter I to Winter II		Increase in initial Winter II possession limit		Final Winter II possession limit after rollover from Winter I to Winter II	
lb	kg	lb	kg	lb	kg	lb	kg
12,000	5,443	0–499,999	0–226,796	0	0	12,000	5,443
12,000	5,443	500,000–999,999	226,796–453,592	1,500	680	13,500	6,123
12,000	5,443	1,000,000–1,499,999	453,592–680,388	3,000	1,361	15,000	6,804
12,000	5,443	1,500,000–1,999,999	680,389–907,184	4,500	2,041	16,500	7,484
12,000	5,443	2,000,000–2,500,000	907,185–1,133,981	6,000	2,722	18,000	8,165

Black Sea Bass

This rule implements the Council’s revised ABC recommendation and the commercial and recreational catch limits associated with that ABC for fishing years 2016 and 2017. As described in the proposed rule for this action, the Council’s SSC revised its recommendation for the 2016 and 2017 black sea bass ABC in September 2015 based on additional analysis that relies more on measures of current abundance

than the prior constant catch approach. The Council and the Commission’s Black Sea Bass Board have also revised their recommendations for 2016 and 2017, as outlined in the proposed rule to this action. Specifications for 2018 will be made following the completion of a new stock assessment in late 2016. A commercial quota overage from fishing year 2014 is applicable to the 2016 black sea bass commercial quota. As a result, the regulations at 684.143(a)(2) require that the exact

amount of the overage, in pounds, be deducted from a subsequent single year’s commercial quota. The 2016 commercial quota is reduced by 8,896 lb (4,035 kg) from 2,711,686 lb (1,230 mt) to 2,702,867 lb (1,226 mt). The 2016 commercial quota values in Table 9 include this deduction. Should a commercial quota or ACL accountability measure be necessary in 2017, notification will be published in the **Federal Register** prior to the start of the fishing year.

TABLE 9—BLACK SEA BASS 2016–2017 SPECIFICATIONS

	2016		2017	
	million lb	mt	million lb	mt
ABC	6.67	3,024	6.67	3,024
ABC Landings Portion	5.53	2,510	5.53	2,510
ABC Discards Portion	1.13	514	1.13	514
Commercial ACL	3.15	1,428	3.15	1,428
Commercial ACT	3.15	1,428	3.15	1,428
Projected Commercial Discards	0.44	198	0.44	198
Commercial Quota	2.70	1,226	2.71	1,230
Recreational ACL	3.52	1,597	3.52	1,597
Recreational ACT	3.52	1,597	3.52	1,597
Projected Recreational Discards	0.70	317	0.70	317
Recreational Harvest Limit	2.82	1,280	2.82	1,280

Comments and Responses

On November 9, 2015, NMFS published proposed specifications for Summer Flounder, Scup and Sea Bass for public notice and comment, and four comments were received. Generally, the four comments each stated that the proposed specifications were overly conservative for all three species, particularly for black sea bass and scup. One commenter asserted that the SSC’s scup recommendation should not be considered the best available scientific information because it is based on a scientific uncertainty buffer that is double what the Stock Assessment Working Group recommended. Two other commenters noted that the increase in the black sea bass population in southern New England is negatively impacting the lobster fishery

and that the quotas should be increased or measures should be set so that the recreational season can last longer into the fall. A recreational fishing group commented that NMFS should set the summer flounder ABC equal to the OFL in each year, despite the SSC’s recommendation, because precaution is applied “excessively” throughout the stock assessment and SSC process. The group also stated that there should be no quota reductions for summer flounder until a sex-specific stock assessment can be conducted. This comment also asserted that the scup catch limits are overly conservative, but spoke in support of the revised black sea bass ABC recommendation. No changes to the proposed specifications were made as a result of these comments. The specifications are based on the SSC’s advice and the best

available scientific information. The Council applied its Risk Policy to derive the scup and black sea bass specifications. The summer flounder specifications deviate from that Risk Policy, but are less conservative than the Risk Policy and closer to the commenter’s request than had the Council used the Policy. However, as stated previously, the summer flounder specifications will not result in an unacceptably high likelihood of overfishing. For scup, the SSC deliberated on the stock assessment working group’s advice, but determined additional scientific uncertainty had not been adequately incorporated, as is their purview. NMFS does not disagree with the SSC’s recommendation and we are implementing the specifications as recommended by the Council.

Classification

The Administrator, Greater Atlantic Region, NMFS, determined that this final rule is necessary for the conservation and management of the summer flounder, scup, and black sea bass fisheries and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay of effectiveness period for this rule, to ensure that the final specifications are in place on January 1, 2016. This action establishes specifications (*i.e.*, annual quotas) for the summer flounder, scup, and black sea bass fisheries.

This rule is being issued at the earliest possible date. Preparation of the proposed rule was dependent on the submission of the EA/IRFA in support of the specifications that is developed by the Council. A complete document was received by NMFS in early October 2015. Documentation in support of the Council's recommended specifications is required for NMFS to provide the public with information from the environmental and economic analyses as required in rulemaking. The proposed rule published on November 9, 2015, with a 15-day comment period ending November 24, 2015. Publication of the adjusted summer flounder quota at the start of the fishing year that begins January 1, 2015, is required by the order of Judge Robert Doumar in *North Carolina Fisheries Association v. Daley*.

If the 30-day delay in effectiveness is not waived, there will be no quota specifications for the affected fisheries on January 1, 2016, which would significantly confuse the public and substantially complicate the cooperative management regime governing these fisheries. The summer flounder, scup, and black sea bass fisheries are all expected, based on historic participation and harvest patterns, to be very active at the start of the fishing season in 2016. Without these specifications in place on January 1, 2016, individual states will be unable to set commercial possession and/or trip limits, which apportion the catch over the entirety of the calendar year. NMFS will be unable to control harvest in any way, as there will be no quotas in place for any of the three species until the regulations are effective. NMFS will be unable to control harvest or close the fishery, should landings exceed the quotas. All of these factors could result in a race for fish, wherein uncontrolled landings could occur.

Disproportionately large harvest

occurring within the first weeks of 2016 could have distributional effects on other quota periods, and would disadvantage some gear sectors or owners and operators of smaller vessels that typically fish later in the fishing season. There is no historic precedent by which to gauge the magnitude of harvest that might occur, should quotas for these three species not be in place during the first weeks of 2016. It is reasonable to conclude that the commercial fishing fleet possesses sufficient capacity to exceed the established quotas for these three species before the regulations would become effective, should quotas not be in place on January 1, 2016. Should this occur, the fishing mortality objectives for all three species would be compromised, thus undermining the intent of the rule.

For these reasons, a 30-day delay in effectiveness would be contrary to the public interest, and NMFS is waiving the requirement.

These specifications are exempt from the procedures of Executive Order 12866.

This final rule does not duplicate, conflict, or overlap with any existing Federal rules.

A FRFA was prepared pursuant to 5 U.S.C. 604(a), and incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses completed to support the action. A copy of the EA/IRFA is available from the Council (see **ADDRESSES**).

The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here.

Final Regulatory Flexibility Analysis

A Summary of Significant Issues Raised by the Public in Response to the Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result

No changes to the proposed rule were required to be made as a result of public comments. None of the comments received raised specific issues regarding the economic analyses summarized in the IRFA or the economic impacts of the rule more generally. A summary of the comments received, and our responses, can be found above in the "Comments and Responses" section of this rule's preamble.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

The Small Business Administration defines a small business in the commercial harvesting sector as a firm with receipts (gross revenues) of up to \$5.5 and \$20.5 million for shellfish and for finfish business, respectively. A small business in the recreational fishery is a firm with receipts of up to \$7.5 million. The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal permit for summer flounder, scup, or black sea bass, as well as owners of vessels that fish for any of these species in state waters. The Council estimates that the 2016–2018 specifications could affect 952 small entities and 8 large entities, assuming average revenues for the 2012–2014 period.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

Specification of commercial quotas and possession limits is constrained by the conservation objectives set forth in the FMP and implemented at 50 CFR part 648 under the authority of the Magnuson-Stevens Act. Economic impacts of changes in year-to-year quota specifications may be offset by adjustments to such measures as commercial fish sizes, changes to mesh sizes, gear restrictions, or possession and trip limits that may increase efficiency or value of the fishery. The Council recommended no such measures, and so none are implemented in this final rule. Therefore, the economic impact analysis of the action is evaluated on the different levels of quota specified in the alternatives. The ability of NMFS to minimize economic impacts for this action is constrained by quota levels that provide the maximum availability of fish while still ensuring that the required objectives and directives of the FMP, its implementing regulations, and the Magnuson-Stevens Act are met. In particular, the Council's SSC has made recommendations for the 2016–2017 ABC level for all three stocks, and the 2018 ABC level for scup

and black sea bass. NMFS considers these recommendations to be consistent with National Standard 2 of the Magnuson-Stevens Act, which requires that the best available scientific information be used in fishery decision making.

The economic analysis for the 2016–2018 specifications assessed the impacts for quota alternatives that achieve the aforementioned objectives. The Council analyzed four sets of combined catch limit alternatives for the 2016–2018 summer flounder, scup, and black sea bass fisheries. Please see the EA and IRFA for a detailed discussion on each alternative.

Through this final rule, NMFS implements Alternative 1 (the Council's preferred alternative), as modified by the Council's revised recommendation for black sea bass. This alternative consists of the quota levels that pair the lowest economic impacts to small entities and meet the required objectives of the FMP and the Magnuson-Stevens Act. The respective specifications contained in this final rule for all three species were selected because they satisfy NMFS' obligation to implement specifications that are consistent with the goals, objectives, and requirements of the FMP, its implementing regulations, and the Magnuson-Stevens Act. The fishing mortality rates associated with the catch limits for all three species all have acceptable likelihoods of preventing overfishing in any of the next three years.

Alternative 3 for each species, contained the most restrictive options (*i.e.*, lowest total landing levels) for each fishery have the highest potential adverse economic impacts on small entities in the form of potential foregone fishing opportunities. Some of the catch limits associated with Alternatives 3 pre-date the ABC framework, thus the information for these alternatives is presented in terms of landing levels. Alternative 3 was not preferred by the Council of NMFS because the other alternatives considered are expected have lower adverse impacts on small entities while achieving the stated objectives of sustaining the summer flounder, scup, and black sea bass stocks, consistent with the FMP and Magnuson-Stevens Act.

Alternative 4 contained the least restrictive catch limits for each fishery and would have the lowest economic impacts on small entities. This alternative is not consistent with the goals and objectives of the FMP and the Magnuson-Stevens Act because it would implement catch limits much higher than the recommendations of the Council's SSC. This could result in

overfishing of the resources and substantially compromise the mortality and/or stock rebuilding objectives for each species, contrary to laws and regulations.

Alternative 2 (status quo), would maintain the current 2015 ABCs for each fishery, and would, in the short-term, have negligible economic impacts on small entities. For summer flounder and scup, this alternative is not consistent with the goals and objectives of the FMP and the Magnuson-Stevens Act because it would leave in place ABCs higher than the recommendations of the Council's SSC. This could result in overfishing of the resources and substantially compromise the mortality and/or stock rebuilding objectives for each species, contrary to laws and regulations. For black sea bass, this alternative is more restrictive than is necessary and would have unnecessary negative economic impacts.

Likewise, a "true" no action alternative, wherein no quotas are established for the coming fishing year, was excluded from analysis because it is not consistent with the goals and objectives of the FMP and the Magnuson-Stevens Act.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the summer flounder, scup, and black sea bass fisheries. In addition, copies of this final rule and guide (*i.e.*, permit holder letter) are available from NMFS (see **ADDRESSES**) and at the following Web site: <http://www.greateratlantic.fisheries.noaa.gov>.

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

Dated: December 21, 2015.

Eileen Sobeck,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 150126078–5999–02]

RIN 0648–BE85

Fisheries of the Exclusive Economic Zone Off Alaska; Revise Maximum Retainable Amounts for Skates in the Gulf of Alaska

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to reduce the maximum retainable amount (MRA) of skates using groundfish and halibut as basis species in the Gulf of Alaska (GOA) from 20 percent to 5 percent. Reducing skate MRAs is necessary to decrease the incentive for fishermen to target skates and slow the catch rate of skates in these fisheries. This final rule will enhance conservation and management of skates and minimize skate discards in GOA groundfish and halibut fisheries. This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP), and other applicable laws.

DATES: Effective January 27, 2016.

ADDRESSES: Electronic copies of the following documents may be obtained from <http://www.regulations.gov> or from the NMFS Alaska Region Web site at <http://alaskafisheries.noaa.gov>:

- The Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action (collectively referred to as the "Analysis");
- The Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (Harvest Specifications EIS);
- The Harvest Specifications Supplementary Information Report (SIR) prepared for the final 2015 and 2016 harvest specifications; and
- The IRFA for the Gulf of Alaska Groundfish Harvest Specifications for 2015 and 2016 (Harvest Specifications IRFA).

FOR FURTHER INFORMATION CONTACT: Peggy Murphy, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS published a proposed rule in the

Federal Register on July 10, 2015 (80 FR 39734), and public comments were accepted through August 10, 2015. NMFS received two comment letters with 10 unique comments.

Background

This final rule amends regulations that specify the MRA for skates in the GOA. This final rule also implements several minor clarifications to MRA regulations applicable to the Central GOA Rockfish Program, makes minor corrections to incorrect cross references, and adds skate species inadvertently removed by a previous rule making. This final rule preamble provides a brief description of skate management in the GOA, the purpose of this rule, the affected fisheries, and the regulations implemented by this rule.

A detailed review of the management of GOA skates, the affected fisheries, the rationale for these regulations, and the proposed regulations are provided in the preamble to the proposed rule (80 FR 39734, July 10, 2015) and are not repeated here. The proposed rule is available from the NMFS Alaska Region Web site (see **ADDRESSES**).

Management of Skates in the GOA

NMFS manages skates (*Bathyraja* and *Raja* species) in the exclusive economic zone of the GOA as a groundfish species under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations governing groundfish fishing in the GOA and implementing the FMP are found at 50 CFR parts 600 and 679. The Council and NMFS manage big skate (*Raja binoculata*) and longnose skate (*Raja rhina*) as single species, and all other skate species (*Bathyraja* and *Raja spp.*) are managed together in the “other skates” species group.

GOA skate catches are managed subject to annual limits on the amounts of each species of skate, or group of skate species, that may be taken. The overfishing limits (OFLs), acceptable biological catch (ABCs), and total allowable catch (TACs) for skates are defined in the FMP and specified through the annual “harvest specification process.” A detailed description of the annual harvest specification process is provided in the Final EIS, the SIR, and the final 2015 and 2016 harvest specifications for groundfish of the GOA (80 FR 10250, February 25, 2015). Section 3.2 of the FMP specifies that the ABC is set below the OFL and the TAC must be set lower than or equal to the ABC. NMFS ensures that OFLs, ABCs, and TACs are not

exceeded by requiring vessel operators participating in groundfish fisheries in the GOA to comply with a range of restrictions, such as area, time, gear, and operation-specific fishery closures.

The harvest specification process sets annual skate catch limits in the GOA by area. Big skate and longnose skate have OFLs and ABCs defined for the GOA management area. Section 3.2 of the FMP clarifies that TACs can be apportioned by regulatory area. There are three regulatory areas specified in the GOA management area: Western GOA, Central GOA, and Eastern GOA. Accordingly, the ABCs for big skate and longnose skate are apportioned to each of the regulatory areas in the GOA management area based on the proportion of the biomass estimated in each regulatory area. NMFS specifies TACs for big skate and longnose skate for the Western GOA, Central GOA, and Eastern GOA equal to the ABC for each of these regulatory areas. The other skates species group has an OFL, ABC, and TAC specified for the GOA management area (*i.e.*, NMFS does not establish separate ABCs or TACs for the Western GOA, Central GOA, and Eastern GOA). NMFS does not apportion other skates species ABCs or TACs to specific regulatory areas because harvest of these species is usually broadly dispersed throughout the entire GOA, and they are not generally retained. All retained and discarded catch of skates accrues to the TACs, ABCs, and OFLs specified for the species or species group.

NMFS, through the annual harvest specification process, implements regulations at § 679.20(d) to establish a directed fishing allowance (DFA) for a species or species group when any fishery allocation or apportionment of that species or species group will be reached and the fishery closed. Once the fishery is closed, these species are referred to as incidental catch species. When establishing a DFA, NMFS must consider the amount of a species or species group closed to directed fishing that will be taken as incidental catch in directed fishing for other species. NMFS accounts for this amount by subtracting the estimated amount of incidental catch of a species or species group taken in directed fishing for other species from the TAC of that species or species group. If an insufficient amount of TAC is available for a directed fishery for that species or species group, NMFS establishes the DFA for that species or species group as zero metric tons (mt) and prohibits directed fishing for that species or species group.

Directed fishing for groundfish in the GOA is defined at § 679.2 as any fishing

activity that results in the retention of an amount of a species or species group onboard a vessel that is greater than the MRA for that species or species group. Therefore, when directed fishing for a species or species group is prohibited, retention of the species or species group is limited to an MRA. NMFS established MRAs to allow vessel operators fishing for species or species groups open to directed fishing to retain a specified amount of incidental catch species.

An MRA is the maximum amount of a species closed to directed fishing (*i.e.*, skate species) that may be retained onboard a vessel. MRAs are calculated as a percentage of the weight of catch of each species or species group open to directed fishing (basis species) that is retained onboard the vessel. The percentage of a species or species group closed to directed fishing retained in relation to the basis species must not exceed the MRA.

MRAs assist in limiting catch of a species within its annual TAC. NMFS closes a species to directed fishing before the entire TAC is taken to leave sufficient amounts of the TAC available for incidental catch. The amount of the TAC remaining available for incidental catch is typically managed by a species-specific MRA. An MRA applies at all times and to all areas for the duration of a fishing trip (see § 679.20(e)(3)). Vessel operators may retain incidental catch species while directed fishing for groundfish species up to the MRA percentage of the basis species retained catch until the TAC for the incidental catch species is met.

Regulations at § 679.20(d)(2) and § 679.21(b) specify that if the TAC for a species is reached, then retention of that species becomes prohibited and all catch of that species must be discarded with a minimum of injury, regardless of its condition, for the remainder of the year. Therefore, when NMFS prohibits retention of an incidental catch species, such as skates, vessel operators must discard all catch of that species. Discards that are required by regulation are known as regulatory discards. The primary purpose of requiring discards is to remove any incentive for vessel operators to increase incidental catch of the species as a portion of other fisheries and to minimize the catch of that species.

MRAs are a management tool to slow down the rate of harvest and reduce the incentive for targeting a species closed to directed fishing. Although MRAs limit the incentive to target on an incidental catch species, fishermen can “top off” their retained groundfish and halibut catch with incidental catch species up to the maximum permitted

under the MRA. Fishermen are top-off fishing when they deliberately target and retain incidental catch species up to the MRA instead of harvesting the species incidentally. Thus, MRAs reflect a balance between NMFS' need to limit the harvest catch rate of skates and minimize regulatory discards of the incidental catch of skates, while providing fishermen an opportunity to harvest the available skate TAC through limited retention.

NMFS has determined that the TACs specified for all skate species in the GOA are needed to support incidental catch of skates in directed fisheries for other groundfish and halibut (*Hippoglossus stenolepis*). As a result, there are insufficient TACs for skate species to support directed skate fisheries, the DFA for skates is set to zero mt, and directed fishing for skates is prohibited at the beginning of the fishing year. When directed fishing for skates is prohibited, the catch of skates is limited by an MRA.

The skate MRA is specified by basis species in Table 10 and Table 30 to 50 CFR part 679. The skate MRA is not specified by skate species. Instead, the skate MRA is based on the combined round weight of all skate species retained onboard a vessel. A single MRA for all skates was established because it was determined that fishermen and processors could have difficulty identifying skate species and may not be able to easily determine if they have reached an MRA for a specific skate species. Therefore, a separate MRA for each species would be difficult to manage and enforce. Additional detail on the designation of a single skate MRA is provided in Section 1.2 of the Analysis.

Currently, the skate MRA for all basis species in the GOA is 20 percent of the basis species round weight retained onboard a vessel. This means the maximum amount of skates (*i.e.*, big, longnose, and other skates species) that may be retained onboard a vessel must not exceed 20 percent of the round weight of other groundfish species and halibut retained onboard a vessel. Amounts of a skate species onboard the vessel that are below or equal to the MRA may be retained. Amounts of a skate species in excess of the MRA must be discarded.

The incidental catch of skates varies by species and by fishing gear. NMFS data show that from 2008 through 2014, skates were caught in the GOA primarily by vessels directed fishing for groundfish with non-pelagic trawl gear and by vessels directed fishing for groundfish and halibut with hook-and-line gear. Very limited amounts of

skates were also caught by vessels using pelagic trawl, pot, and jig gear. Big skate catch occurs primarily in the Central GOA. Less than one tenth of the catch comes from the Western GOA or the Eastern GOA. NMFS' catch accounting data show the proportion of big skate catch by vessels using non-pelagic trawl is slightly higher than the proportion caught by vessels using hook-and-line gear. Longnose skate are caught predominantly in the Central GOA, with more limited catch in the Eastern GOA, and the least amount of catch in the Western GOA. NMFS data show that in recent years the proportion of longnose skate catch by vessels using hook-and-line gear is greater than the proportion caught by vessels using non-pelagic trawl gear. Other skate species are caught primarily in the Central GOA. NMFS data show the proportion of other skate species catch by vessels using hook-and-line gear is much greater than the proportion caught by vessels using non-pelagic trawl gear.

In December 2013, the Council received public testimony that the current MRA for skates in the GOA allows fishermen to deliberately target skates while ostensibly directed fishing for other groundfish or halibut. NMFS observed this top-off fishing behavior based on information from recent years of incidental skate catch of skate species in directed groundfish and halibut fisheries. Some fishermen maximize their retention of skates and retain skates up to the MRA limit of 20 percent of the basis species onboard a vessel early in the year by deliberately targeting them while directed fishing for other species. This top-off fishing pattern has increased the harvest rate of skates. Over a period of years, skate catch has exceeded the TAC in some areas. The estimated catch of big skate exceeded the TAC in the Central GOA in 2010, 2011, 2012, and 2013, and the estimated catch of longnose skate exceeded the TAC in the Western GOA in 2009, 2010, and 2013. The catch of other skate species has not exceeded the TACs established for the GOA management area; however, in 2013 and 2014, the catch of other skate species was estimated at 93 percent and 98 percent of the 2013 and 2014 TACs, respectively.

When fishery managers estimated the big or longnose skate TACs in a regulatory area would be exceeded, NMFS prohibited retention of big or longnose skates in the directed fisheries for groundfish and halibut and required discard of all big or longnose skate catch in the regulatory area for the remainder of the calendar year. The earlier in the year that NMFS prohibits the retention

of big or longnose skates in the directed fisheries for groundfish and halibut, the greater the total amount of regulatory discards of skates, because skates are caught in other groundfish and halibut fisheries throughout the entire year.

Purpose of This Final Rule

This final rule reduces the MRA for skates in the GOA from 20 percent to 5 percent. By reducing the MRA, this final rule further limits the amount of skates that could be retained while directed fishing for other groundfish and halibut. Under this final rule, the round weight of a retained skate species could be no more than 5 percent of the round weight of the basis species. Reducing the skate MRA decreases the incentive for fishermen to engage in top-off fishing for skates so that the catch rate of skates more accurately reflects the rate of incidental catch of skates in the directed groundfish and halibut fisheries in the GOA. The reduction in the MRA will slow accrual of skate catch against the TAC and enhance NMFS' ability to limit the catch of skates to the skate TACs. This final rule is expected to minimize discards of skates by reducing the likelihood that NMFS would need to prohibit retention of a skate species in a GOA management area during the year to maintain skate catch at or below its TAC. This final rule will help NMFS to ensure that skate catch in the future does not exceed a TAC, ABC, or OFL.

Regulations Implemented by This Final Rule

This final rule makes five amendments to regulations. First, this final rule revises skate MRAs in Table 10 to 50 CFR part 679, Gulf of Alaska Retainable Percentages, and in Table 30 to 50 CFR part 679, Rockfish Program Retainable Percentages. Table 10 establishes the MRAs applicable to vessels fishing groundfish in the GOA, except for vessels fishing under the authority of the Central GOA Rockfish Program. Table 30 establishes MRAs that are applicable to vessels participating in the Central GOA Rockfish Program. NMFS reduces the incidental catch species MRAs for skates for each basis species listed in both Tables 10 and 30 from 20 percent to 5 percent. NMFS notes the basis species termed "Aggregated amount of non-groundfish species" includes all legally retained IFQ halibut as explained in footnote 12 to Table 10. The skate MRAs will be set equal to 5 percent in Tables 10 and 30 on the effective date of this final rule (see **DATES**).

Second, this final rule corrects two regulatory cross-reference errors. These

errors resulted from reorganizing and renumbering the Federal Fisheries Permit requirements in § 679.4(b) and were implemented in a final rule published on October 21, 2014 (79 FR 62885). Current regulations at § 679.7(a)(18) and § 679.28(f)(6)(i) incorrectly refer to the FFP requirements at § 679.4(b)(5)(vi), a paragraph that no longer exists. This final rule corrects those cross references to § 679.4(b).

Third, this final rule modifies regulatory text to clarify that a vessel fishing under a Rockfish Program cooperative quota (CQ) permit may harvest groundfish species not allocated as CQ up to the MRA for that species as established in Table 30 to 50 CFR part 679. This final rule removes the last sentence in regulations at § 679.20(f)(2), because the sentence makes an incorrect statement. The last sentence in 679.20(f)(2) states that “only primary rockfish species harvested under the Rockfish Program may be used to calculate retainable amounts of other species, as provided in Table 30 to this part.” The heading in the last column in Table 30 correctly states that the MRA for vessels fishing under the Rockfish Program is calculated as “a percentage of total retained rockfish primary species and rockfish secondary species.” NMFS corrects this discrepancy by removing the inaccurate last sentence of § 679.20(f)(2) that refers only to rockfish primary species. The current regulations at § 679.81(h)(4)(i) and (h)(5) use the term “incidental catch species” in the calculation of an MRA to refer to “groundfish species not allocated as cooperative quota (CQ).” This final rule adds the referenced text to § 679.81(h)(4)(i) and (h)(5) to ensure consistent use of terminology in the regulations.

Fourth, this final rule revises Table 2a to 50 CFR part 679 to add Alaska, Aleutian, and whiteblotched skates, as well as the scientific names for individual skate species. Adding these individual skate species and the scientific names facilitates the reporting of individual skate species taken during groundfish harvest and provides more detailed information regarding skate harvests for stock assessments and fisheries management. This revision supports managing skates as a target species group or as individual target species. These skate species and scientific names were added to Table 2a in final regulations implementing changes to groundfish management in the BSAI and GOA on October 6, 2010 (75 FR 61639). Subsequent regulations published on July 11, 2011 (76 FR 40628), amended Table 2a to 50 CFR

part 679 and that revision inadvertently removed the skate species codes implemented on October 6, 2010. The addition of these skate species and scientific names corrects this error. The addition of species codes does not change the management of skates or the other provisions of this final rule.

Fifth, this final rule makes several clarifications and corrections to Table 10 and Table 30 to part 679. These clarifications are:

- In Table 10 to part 679, the genus name, common name, and numeric species codes for Alaska skate, Aleutian skate, and whiteblotched skate are added;
- In Table 10 to part 679, the basis species, pelagic shelf rockfish, is replaced with dusky rockfish to be consistent with the appropriate species designation in regulation;
- In Table 10 to part 679, the genus name, common name, and species codes in the table and in the notes to the table are updated for consistency;
- In Note 4 to Table 10 to part 679, the references to “slope rockfish” are removed and replaced with the correct term “other rockfish”; and widow rockfish and yellowtail rockfish are added to the 17 species that form the “other rockfish” group to correctly categorize these species;
- Note 5 to Table 10 to part 679 is removed because it is no longer applicable, and Notes 6 through 13 are renumbered as Notes 5 through 12, respectively.
- In Note 6 to Table 10 to part 679, the erroneous regulatory reference to § 679.7(b)(4) is deleted and the regulatory reference, § 679.20(j), is clarified so as to provide for full retention of demersal shelf rockfish by catcher vessels in the Southeast Outside District;
- In Note 8 to Table 10 to part 679, the regulatory reference, § 679.2, is clarified to exclude the species listed;
- In Table 30 to part 679, grenadier species is added as an incidental catch species for the fishery category “Rockfish Cooperative vessels fishing under a Rockfish CQ permit for rockfish non-allocated species” and an MRA of 8 percent is added. This change from the proposed rule would correct an oversight from the recently published regulations that implemented an MRA for grenadiers for the groundfish fisheries in the GOA (80 FR 11897, March 5, 2015). That rule added the grenadier MRA of 8 percent to Table 10 to part 679, which does not apply to vessels when fishing in the Central GOA Rockfish Program. However, it is clear from the preamble to the proposed rule (79 FR 27557, May 14, 2014) and the

final rule (80 FR 11897, March 5, 2015) that the intent was to apply the MRA to all groundfish fishing in the GOA. Adding a grenadier MRA to Table 30 to part 679 will achieve this intent by applying the grenadier MRA to vessels when fishing in the Central GOA Rockfish Program; and

- In Table 30 to part 679, a footnote is added to explain that the descriptions of different incidental catch species groups listed in this table can be found in the notes to Table 10 to part 679.

Changes From the Proposed Rule

The proposed rule for this action was published in the **Federal Register** on July 10, 2015 (80 FR 39734). There are five categories of regulatory changes made from the proposed rule.

First, this final rule adds a suite of corrections to Table 10 and Table 30 to part 679 in response to comment 10 on the proposed rule (see Comment and Response). These technical corrections are described in the previous section of this preamble as the fifth amendment made to the regulations and in comment 10 and are not repeated here.

Second, this final rule reorders the listing of the skate species and the corresponding species codes added to Table 2a to part 679 and the listing of skate species and corresponding species codes in Table 10 to part 679 to follow the formatting convention that lists the species description alphabetically. This is not a substantive change.

Third, this final rule replaces the references to “numerical percentage” with “MRA” in Note 1 and Note 7 to Table 10 to part 679, replaces “retainable percentage” with “MRA” in Note 1 to Table 10 to part 679, and replaces “category” with “species group” in Note 7 to Table 10 to part 679. These changes clarify that the percentages are the MRAs established in Table 10, and that DSR and SR/RE represent separate species groups. This is not a substantive change.

Fourth, this final rule revises Note 2 to Table 10 to part 679, to add Kamchatka flounder and its species code to the list of species that comprise the deep-water flatfish species group to be consistent with current harvest specifications. This is not a substantive change.

Fifth, this final rule revises Table 30 to part 679, to clarify that the Rockfish Entry Level Fishery using longline gear, the fishery for opt-out vessels, and the fishery for Rockfish Cooperative Vessels not fishing under a CQ permit referred to in Table 30 to part 679 are to “use” Table 10 to part 679 rather than “see” Table 10 to part 679. This is not a substantive change.

Comment and Response

During the public comment period, NMFS received two comment letters generally expressing support for the proposed rule. The letters contain 10 unique comments on the proposed rule. A summary of the comments received and NMFS' responses follow.

Comment 1: The commenters support a reduction in the skate MRA from 20 percent to 5 percent for the following reasons: (1) The reduced MRA will remove the incentive to target and top off on skates while fishing for other groundfish species; (2) An MRA set at 5 percent will more closely reflect the normal encounter rate of skates during fishing; (3) Reducing the skate MRA could slow skate retention and thus the catch rate of skate species; (4) Reducing the skate MRA will decrease the potential for prohibiting skate species retention, allow retention of skates throughout the year, and minimize regulatory discard of skates.

Response: NMFS acknowledges this comment and agrees with the commenter's rationale for support.

Comment 2: The commenter notes that this final rule may avoid triggering prohibition of skate harvest when catches approach a skate ABC or TAC. However, it is still unknown whether the incidental species catch of skates will exceed 5 percent of the catch on an individual haul-by-haul basis for vessels in the trawl fishery. The commenter recommends the adoption of a comprehensive GOA-wide trawl bycatch management program with cooperative target species and prohibited species catch allocations to eliminate the race for fish and reduce regulatory discards.

Response: NMFS acknowledges that a vessel may have an incidental species catch of skates that exceeds 5 percent of the catch of a given haul, but the 5 percent MRA applies to the sum of all basis species on board the vessel. This is likely to include catch from many different hauls. Therefore, regulatory discard may not be required. The comment recommending the adoption of a comprehensive GOA-wide trawl bycatch management program is outside of the scope of this action. The Council and NMFS are considering measures similar to those recommended by the commenter under a separate action. NMFS has prepared a Notice of Intent to prepare an Environmental Impact Statement that would consider a broad range of alternative management programs for the GOA trawl fisheries, including those suggested by the commenter. The Notice of Intent published on July 14, 2015, and NMFS requested public comment through

August 28, 2015 (80 FR 40988, July 14, 2015). NMFS will incorporate written comments from the public to identify the issues of concern and assist the Council in determining the appropriate range of management alternatives for the EIS. Additional information on management actions related to the GOA trawl fisheries is available through the NMFS Alaska Region Web site at: <http://alaskafisheries.noaa.gov>.

Comment 3: NMFS should place more emphasis on the assessment of GOA skates. The commenters suggest additional research on population density, migration, natural mortality, and other factors affecting skates would aid in the assessment and management of GOA skate resources. The commenters state their willingness to participate in cooperative research.

Response: NMFS acknowledges the comment. The stock assessment process used to determine the status of skate biomass is described in Section 3.1.1 of the Analysis. Additional information on the research NMFS has conducted and is undertaking to improve its understanding of GOA skates is available through the Alaska Fishery Science Center's Web site at <http://www.afsc.noaa.gov/REFM/stocks/assessments.htm>. NMFS has engaged in cooperative research with the fishing industry to investigate sustainable fisheries management. Specific cooperative research regarding skates would be conducted with the Alaska Fisheries Science Center and are outside of the scope of this action.

Comment 4: Trawl and hook-and-line gear discard mortality rates (DMRs) should be estimated for GOA skates. The current DMR is assumed to be 100 percent and is not accurate. This DMR overestimates the mortality of skate bycatch and impacts the skate biomass estimate for the GOA.

Response: The 2014 Stock Assessment and Fishery Evaluation for GOA skates states that the highest priority for research is in understanding the focus on direct fishing effects on skate populations. Scientists consider the most important component of this research to be a full evaluation of the catch and discards in all fisheries capturing skates. NMFS will continue to explore the effects of fishing, including DMRs, in future research.

Comment 5: Improving the species-specific reporting of skate catch delivered to processors would help the stock assessment authors. The commenter suggests some outreach by NMFS to educate processor personnel about skate identification. The commenter notes that NMFS has aided processor personnel in the identification

of other species catch, such as GOA rockfish, and a similar approach for skates could improve species identification.

Response: NMFS acknowledges the comment and agrees that outreach and broad distribution of NMFS' skate identification guide (<http://alaskafisheries.noaa.gov/er/skateguide.pdf>) would improve skate harvest information for stock assessment. NMFS will forward a recommendation for these improvements to the Council plan team responsible for management of groundfish under the FMP, and will coordinate with GOA processors.

Comment 6: The commenter suggests that text on page 39735 of the preamble to the proposed rule (July 10, 2015; 80 FR 39734) could be clarified. The commenter states that when retention of the incidental catch of a skate species is prohibited (*i.e.*, placed on prohibited species catch (PSC) status), then only the specific skate species or species group (*e.g.*, big skate, longnose skate or other skates species) must be discarded. For example, if the incidental catch of big skates is prohibited, big skates must be discarded but longnose skates and other skates species (in aggregate) may be retained up to the MRA.

Response: NMFS acknowledges the comment and agrees with the commenter's clarification. NMFS intends to manage skates as described in the comment. This is also consistent with the description of management provided in Section 4.10 of the Analysis. No change to the regulatory text is required.

Comment 7: The commenter suggests that text on page 39735 of the preamble to the proposed rule (July 10, 2015; 80 FR 39734) could be clarified. The commenter states that the reason that other skates species are not managed separately or under area-specific ABCs or TACs is that the management in this aggregate for the GOA management area is adequate to maintain those species at a sustainable level. It should be noted, as it is in the 2014 GOA Skate Stock Assessment and Fishery Evaluation (available at: <http://www.afsc.noaa.gov/refm/stocks/assessments.htm>), that skates are generally difficult for harvesters and processors to identify to the species level, especially the less common skates defined as other skates species.

Response: NMFS acknowledges and agrees with the commenter's clarification. NMFS recognizes management of skates at the individual species and regulatory area level depends on accurate species-specific harvest information. Section 4.10 of the

Analysis states that misidentification of other skates species could cause a serious enforcement issue for differing species-specific MRAs. No change to the regulatory text is required.

Comment 8: The commenter suggests that text on page 39735 of the preamble to the proposed rule (July 10, 2015; 80 FR 39734) could be clarified. The commenter states that NMFS does not have the authority to issue in-season management measures to close a commercial fishery for individual fishing quota (IFQ) halibut in the GOA should a skate OFL be reached in the GOA. The commenter states that the GOA FMP groundfish species (Table 2a to part 679) does not include halibut. Halibut is included in the FMP only as a prohibited species. Because the halibut is not defined as a groundfish species, NMFS in-season management measures to close a groundfish fishery to prevent overfishing do not include IFQ halibut and apply only to groundfish species managed by NMFS under the FMP. The commenter recommends that this issue should be addressed in the 10-year review of the halibut and sablefish IFQ program which has been initiated by the Council.

Response: NMFS acknowledges the comment and agrees with the commenter's clarification regarding the regulations. Regulations at § 679.21 establish the requirements for closing a groundfish fishery if an OFL will be reached. Extending in-season management authority to the IFQ halibut fishery under § 679.21 is outside of the scope of this action and is not addressed further. The final rule does not change regulations governing the Pacific halibut fisheries implemented by the International Pacific Halibut Commission or NMFS.

Comment 9: The commenter suggests that text on page 39736 of the preamble to the proposed rule (July 10, 2015; 80 FR 39734) could be clarified. The commenter states that the incidental catch of skates by jig gear, although likely low in volume, are actually unknown because the GOA jig fishery was exempt from observer coverage before 2013.

Response: Overall, NMFS estimates that jig gear catches a small amount of skates relative to hook-and-line and trawl gear (Section 5.6 of Analysis). NMFS uses data submitted electronically by shoreside or stationary floating processors to estimate the landed catch of any skates delivered by vessels using jig gear. NMFS acknowledges that there is not currently observer coverage on vessels in the jig fisheries to obtain estimates of the amount of at-sea discards of skates. In

the future, NMFS could modify deployment of observers on jig vessels through its Annual Deployment Plan (ADP) process. NMFS could modify the ADP and expand coverage to vessels with jig gear if needed for conservation and management. Currently, there is no evidence that catch of skates by vessels using jig gear warrants additional observer coverage.

Comment 10: The commenter recommends a number of clarifications and corrections to Table 10 to part 679 and Table 30 to part 679 to improve their usefulness to the fishing industry. The commenter states that these tables are difficult to interpret due to inconsistencies with other regulations, revisions over time that have reduced their clarity, or references to outdated regulations that are no longer applicable. The commenter suggests updating and clarifying these tables as follows:

- In Table 10 to part 679, add the proper genus name, common name, and numeric species codes for Alaska skate, Aleutian skate, and whiteblotched skate;
- In Table 10 to part 679, replace the basis species, pelagic shelf rockfish, with dusky rockfish to be consistent with the appropriate species designation in regulation;
- In Table 10 to part 679, consistently use the genus name, common name, and species codes in the table and in the notes to the table;
- In Note 4 to Table 10 to part 679, remove the reference to slope rockfish and replace it with "rockfish" so that it is clear that this provision applies to all rockfish species except demersal shelf rockfish (DSR) and shortraker/rougeye rockfish (SR/RE); and add widow rockfish and yellowtail rockfish to the 15 species that form the new "rockfish" group;
- Delete Note 5 to Table 10 to part 679 because it is no longer applicable;
- In Note 6 to Table 10 to part 679, clarify the regulatory reference;
- In Note 8 to Table 10 to part 679, replace the reference to § 679.2 and instead refer to the list of species already contained in the notes to the table;
- In Table 30 to part 679, add grenadier species as an incidental catch species for the fishery category for Rockfish Cooperative vessels fishing under Rockfish CQ permit for rockfish non-allocated species and add an MRA of 8 percent to be consistent with MRAs for grenadiers that are applicable in Table 10; and
- In Table 30 to part 679, add a footnote to Table 30 to explain that the descriptions of different incidental catch species groups listed in this table

can be found in the notes to Table 10 to part 679.

Response: NMFS agrees with each of the commenter's suggested changes to Tables 10 and 30 with one exception. In Table 10 to part 679, NMFS replaced the references to "slope rockfish" with "other rockfish" instead of "rockfish" as suggested by the commenter. The commenter also suggested NMFS define "these rockfish species as all rockfish species except DSR and SR/RE." NMFS disagrees with this definition because: (1) "all rockfish species" includes rockfish species besides those in the other rockfish species group; and (2) excluding DSR conflicts with the explanations of the other rockfish species groups in the Western regulatory area, Central regulatory area, and West Yakutat District. NMFS uses "other rockfish" to correctly name this rockfish species group and accurately refers to "other rockfish" by regulatory area consistent with regulations.

The changes suggested by the commenter are minor clarifications and do not have a substantive effect on the calculation or applicability of MRAs. Each of the comments and the rationale for accepting the comment follows.

The change to add Alaska, Aleutian, and whiteblotched skate to Table 10 is consistent with NMFS' recommendation in the proposed rule to add these species to Table 2a of CFR part 679.

The change in Table 10 to part 679, to replace "pelagic shelf rockfish" with "dusky rockfish" is consistent with NMFS' intent in the final rule implementing the Central GOA Rockfish Program that published December 27, 2011 (76 FR 81248). This change corrects the species designation to be consistent with existing regulations.

The change to consistently use the genus name, common name, and species codes in Table 10 to part 679 is a minor clerical correction.

The change to Note 4 to Table 10 to part 679, to remove references for "slope rockfish" and replace them with "rockfish", where rockfish means all rockfish species except DSR and SR/RE, was clarified by NMFS. Specifically, NMFS determined that references to "slope rockfish" should be replaced with "other rockfish" because other rockfish in the Western regulatory area, Central regulatory area, and West Yakutat district means other rockfish and DSR. Therefore, explaining the meaning of "other rockfish" by using "rockfish means all rockfish species except DSR and SR/RE", as recommended by the commenter, would incorrectly include the universe of rockfish species and inaccurately exclude DSR from the Western, Central

and West Yakutat areas. The correct reference is “other rockfish.” This change does not modify any of the MRAs that are applicable to the specific species, or otherwise modify management.

The change to delete Note 5 to Table 10 to part 679 provides consistency with regulations because Note 5 is no longer applicable.

The change to Note 6 to Table 10 to part 679, clarifies the regulatory reference to § 679.20(j), provides for full retention of demersal shelf rockfish by catcher vessels in the Southeast Outside District.

The change to Note 8 to Table 10 to part 679, should provide clarity to the reader by explaining the species included and excluded in the species group and listed in the regulatory reference at § 679.2.

The changes to Table 30 to part 679, to add grenadier species as an incidental catch species for the fishery category for Rockfish Cooperative vessels fishing under a Rockfish CQ permit for rockfish non-allocated species and add an MRA of 8 percent would be consistent with recently implemented regulations that established an MRA for grenadiers (80 FR 11897, March 5, 2015). This change from the proposed rule would correct an oversight in the publication of regulations that established an MRA for grenadiers. Currently, the MRA is only described in Table 10 to part 679.

However, it is clear from the preamble to the proposed rule (79 FR 27557, May 14, 2014) and the final rule (80 FR 11897, March 5, 2015) that the intent was to apply the MRA to all groundfish fishing, and not to specifically exclude vessels when fishing under the Central GOA Rockfish Program. This change would correct that oversight to be consistent with MRAs for grenadiers that are applicable in Table 10.

The last change to Table 30 to part 679 adds a footnote to Table 30 to explain that the descriptions of different incidental catch species groups listed in Table 30 can be found in the notes to Table 10 to part 679. This change provides a clarification to the reader and does not change existing management.

Classification

The Administrator, Alaska Region, NMFS, determined that this final rule is necessary for the conservation and management of the GOA groundfish fishery and that it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable laws.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of

1996 states that, for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis (FRFA), the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. The preamble to the proposed rule and this final rule serve as the small entity compliance guide. This action does not require any additional compliance from small entities that is not described in the preambles. Copies of the proposed and final rules are available from NMFS at the following Web site: <http://alaskafisheries.noaa.gov>.

Executive Order 12866

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

Final Regulatory Flexibility Analysis

Section 604 of the Regulatory Flexibility Act (RFA) requires that, when an agency promulgates a final rule under section 553 of Title 5 of the U.S. Code, after being required by that section, or any other law, to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis.

Section 604 describes the contents of a FRFA: (1) A statement of the need for, and objectives of, the rule; (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities

consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Need for and Objectives of This Action

A statement of the need for, and objectives of, the rule is contained in the preamble to this final rule (see the “*Purpose of this Final Rule*” section in this preamble) and is not repeated here.

Summary of Significant Issues Raised During Public Comment

NMFS published a proposed rule on July 10, 2015 (80 FR 39734). An initial regulatory flexibility analysis (IRFA) was prepared and summarized in the “Classification” section of the preamble to the proposed rule. The comment period closed on August 10, 2015. NMFS received two letters of public comment on the proposed rule containing 10 unique comments. No comments were received on the IRFA or the economic impacts of the rule on small entities. The Chief Counsel for Advocacy of the SBA did not file any comments on the proposed rule.

Number and Description of Small Entities Regulated by This Action

The Small Business Administration (SBA) establishes the size standards for all major industry sectors in the U.S., including commercial finfish harvesters (79 FR 33647, June 12, 2014). A business primarily involved in finfish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual gross receipts not in excess of \$20.5 million, for all its affiliated operations worldwide. For purposes of this FRFA, the effects of the final rule fall primarily on the distinct segment of the fishery industry characterized as commercial finfish harvesters.

The entities that can reasonably be expected to be directly regulated by the final rule include all catcher vessels and catcher/processors directed fishing for groundfish and halibut in the GOA that may harvest any species of skate. Based on data from 2013 (the most recent year of complete data), this action is estimated to directly regulate 1,153 small entities: 1,073 small catcher vessels fishing with hook-and-line gear (including jig gear), 116 small catcher vessels fishing with pot gear, and 32 small catcher vessels fishing with trawl

gear. The average gross revenues estimates for 2013 are \$380,000 for small hook-and-line catcher vessels, \$960,000 for small pot catcher vessels, and \$2.8 million for small trawl catcher vessels. In addition, this action would directly regulate 2 small catcher/processors fishing with hook-and-line gear, and one small catcher/processor fishing with trawl gear. Specific revenue data for these small catcher/processors are confidential but are less than \$20.5 million annually.

The annual revenue at risk for all catcher vessels and catcher/processors that could be affected by this final rule is estimated at \$2.4 million. However, the impact relative to each vessel that retains skates in the GOA is quite small. Reducing the skate MRA primarily affects those vessels whose operators have retained big skate at an amount greater than 5 percent of their basis species in the Central GOA. In general, vessels that catch and retain skates show relatively little dependence on GOA skates for their gross revenues. The actual impact on gross revenue for a specific vessel may vary from year to year depending on the total abundance of skates, total catch of skates, market conditions, and ex-vessel price.

Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities

FRFA also requires a description of the steps the agency has taken to minimize the significant impact on directly regulated small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative (Alternative 4) adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency that affect the economic impact on small entities was rejected. NMFS and the Council considered four alternative MRAs to reduce the incentive for fishermen to pursue top-off fishing for skates and slow the catch rate of skates in the GOA groundfish and halibut fisheries. In addition to the status quo of an MRA of 20 percent, the Council and NMFS evaluated alternatives to reduce skate MRAs to 15, 10, and 5 percent.

The analysis examined the rate of big skate catch relative to groundfish catch by directed fishery before and after big skate retention was prohibited in 2013 and 2014 (Section 4.5.1.1 of the Analysis). Comparison of changes in catch rates after retention was prohibited show the harvest rate for big skate dropped from as much as 8.6 percent of the total groundfish and

halibut catch to a harvest rate that ranged from 6.3 percent to 0.1 percent of the total groundfish and halibut catch depending on the year, gear type, and target fishery. These data indicate that participants in various target fisheries could avoid the incidental catch of big skate when there was not an incentive to retain big skates.

Further analysis used a model to compare the retained skate catch of all skate species, in all areas and by vessels using all gear types under the alternative percentages of the basis species (Section 4.5.1.4 of the Analysis). The model indicates that reducing the skate MRA below 10 percent is expected to reduce the incentive for vessel operators to engage in top-off fishing and overall skate catch as fishermen avoid areas where skates are encountered. The model indicates that a 5 percent MRA best ensures that NMFS will not have to prohibit the retention of skates and that skate TACs will not be exceeded.

The Analysis did not identify any other alternatives that more effectively meet the RFA criteria to minimize adverse economic impacts on directly regulated small entities.

This action implements Alternative 4, a 5 percent skate MRA. As discussed in Section 4.7 and 4.8 of the Analysis, the preferred alternative is the only alternative of the alternatives considered that is expected to adequately reduce the incentive for fishermen to target skates that may be retained as incidental catch species. A 5 percent MRA accomplishes the objectives of this final rule to slow the catch rate of skates in the GOA groundfish and halibut fisheries to ensure that the TACs for skate species are not exceeded.

Reporting, Recordkeeping Requirements, and Other Compliance Requirements

This action does not impose any additional reporting requirements on the participants of the GOA groundfish and halibut fisheries.

Duplicate, Overlapping, or Conflicting Federal Rules

NMFS has not identified other Federal rules that may duplicate, overlap, or conflict with this final rule.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries.

Dated: December 21, 2015.

Eileen Sobeck,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 679 as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Pub. L. 108–447; Pub. L. 111–281.

■ 2. In § 679.7, revise paragraph (a)(18) to read as follows:

§ 679.7 Prohibitions.

* * * * *

(a) * * *
(18) *Pollock, Pacific Cod, and Atka Mackerel Directed Fishing and VMS.*

Operate a vessel in any Federal reporting area when a vessel is authorized under § 679.4(b) to participate in the Atka mackerel, Pacific cod, or pollock directed fisheries and the vessel’s authorized species and gear type is open to directed fishing, unless the vessel carries an operable NMFS-approved Vessel Monitoring System (VMS) and complies with the requirements in § 679.28(f).

* * * * *

■ 3. In § 679.20, revise paragraph (f)(2) to read as follows:

§ 679.20 General limitations.

* * * * *

(f) * * *

(2) *Retainable amounts.* Any groundfish species for which directed fishing is closed may not be used to calculate retainable amounts of other groundfish species. Only fish harvested under the CDQ Program may be used to calculate retainable amounts of other CDQ species.

* * * * *

■ 4. In § 679.28, revise paragraph (f)(6)(i) to read as follows:

§ 679.28 Equipment and operational requirements.

* * * * *

(f) * * *

(6) * * *

(i) You operate a vessel in any reporting area (see definitions at § 679.2) off Alaska while any fishery requiring VMS, for which the vessel has a species and gear endorsement on its Federal Fisheries Permit under § 679.4(b), is open.

* * * * *

■ 5. In § 679.81, revise paragraphs (h)(4)(i) and (h)(5) introductory text to read as follows:

§ 679.81 Rockfish Program annual harvester privileges.

* * * * *

(h) * * *

(4) * * *

(i) The MRA for groundfish species not allocated as CQ (incidental catch species) for vessels fishing under the

authority of a CQ permit is calculated as a proportion of the total allocated rockfish primary species and rockfish secondary species on board the vessel in round weight equivalents using the retainable percentage in Table 30 to this part; except that—

* * * * *

(5) *Maximum retainable amount (MRA) calculation and limits—catcher/processor vessels.* The MRA for groundfish species not allocated as CQ

(incidental catch species) for vessels fishing under the authority of a CQ permit is calculated as a proportion of the total allocated rockfish primary species and rockfish secondary species on board the vessel in round weight equivalents using the retainable percentage in Table 30 to this part as determined under § 679.20(e)(3)(iv).

■ 6. Revise Table 2a to part 679 to read as follows:

TABLE 2a TO PART 679—SPECIES CODES: FMP GROUND FISH

Species description	Code
Atka mackerel (greenling)	193
Flatfish, miscellaneous (flatfish species without separate codes)	120
FLOUNDER:	
Alaska plaice	133
Arrowtooth	121
Bering	116
Kamchatka	117
Starry	129
Octopus, North Pacific	870
Pacific cod	110
Pollock	270
ROCKFISH:	
Aurora (<i>Sebastes aurora</i>)	185
Black (BSA) (<i>S. melanops</i>)	142
Blackgill (<i>S. melanostomus</i>)	177
Blue (BSA) (<i>S. mystinus</i>)	167
Bocaccio (<i>S. paucispinis</i>)	137
Canary (<i>S. pinniger</i>)	146
Chilipepper (<i>S. goodei</i>)	178
China (<i>S. nebulosus</i>)	149
Copper (<i>S. caurinus</i>)	138
Darkblotched (<i>S. crameri</i>)	159
Dusky (<i>S. variabilis</i>)	172
Greenstriped (<i>S. elongatus</i>)	135
Harlequin (<i>S. variegatus</i>)	176
Northern (<i>S. polyspinis</i>)	136
Pacific Ocean Perch (<i>S. alutus</i>)	141
Pygmy (<i>S. wilsoni</i>)	179
Quillback (<i>S. maliger</i>)	147
Redbanded (<i>S. babcocki</i>)	153
Redstripe (<i>S. proriger</i>)	158
Rosethorn (<i>S. helvomaculatus</i>)	150
Rougheye (<i>S. aleutianus</i>)	151
Sharpchin (<i>S. zacentrus</i>)	166
Shortbelly (<i>S. jordani</i>)	181
Shortraker (<i>S. borealis</i>)	152
Silvergray (<i>S. brevispinis</i>)	157
Splitnose (<i>S. diploproa</i>)	182
Stripetail (<i>S. saxicola</i>)	183
Thornyhead (all <i>Sebastolobus</i> species)	143
Tiger (<i>S. nigrocinctus</i>)	148
Vermilion (<i>S. miniatus</i>)	184
Widow (<i>S. entomelas</i>)	156
Yelloweye (<i>S. ruberrimus</i>)	145
Yellowmouth (<i>S. reedi</i>)	175
Yellowtail (<i>S. flavidus</i>)	155
Sablefish (blackcod)	710
Sculpins	160
SHARKS:	
Other (if salmon, spiny dogfish or Pacific sleeper shark—use specific species code)	689
Pacific sleeper	692
Salmon	690
Spiny dogfish	691
SKATES:	
Alaska (<i>Bathyraja parmifera</i>)	703
Aleutian (<i>B. aleutica</i>)	704
Whiteblotched (<i>B. maculata</i>)	705
Big (<i>Raja binoculata</i>)	702

TABLE 2a TO PART 679—SPECIES CODES: FMP GROUND FISH—Continued

Species description	Code
Longnose (<i>R. rhina</i>)	701
Other (if, Alaska, Aleutian, whiteblotched, big, or longnose skate—use specific species code listed above)	700
SOLE:	
Butter	126
Dover	124
English	128
Flathead	122
Petrale	131
Rex	125
Rock	123
Sand	132
Yellowfin	127
Squid, majestic	875
Turbot, Greenland	134

■ 7. Revise Table 10 to part 679 to read as follows:

Table 10 to Part 679—Gulf of Alaska Retainable Percentages

BASIS SPECIES		INCIDENTAL CATCH SPECIES (for DSR caught on catcher vessels in the SEO, see § 679.20 (j) ⁵)															
Code	Species	Pollock	Pacific cod	DW Flat ⁽²⁾	Rex sole	Flathead sole	SW Flat ⁽³⁾	Arrow-tooth	Sablefish	Aggregated rockfish ⁽⁷⁾	SR/RE ERA ⁽¹⁾	DSR SEO (C/Ps only) ⁽⁵⁾	Atka mackerel	Aggregated forage fish ⁽⁹⁾	Skates ⁽¹⁰⁾	Other species ⁽⁶⁾	Grenadiers ⁽¹²⁾
110	Pacific cod	20	n/a ⁽⁹⁾	20	20	20	20	35	1	5	⁽¹⁾	10	20	2	5	20	8
121	Arrowtooth	5	5	20	20	20	20	n/a	1	5	0	0	20	2	5	20	8
122	Flathead sole	20	20	20	20	n/a	20	35	7	15	7	1	20	2	5	20	8
125	Rex sole	20	20	20	n/a	20	20	35	7	15	7	1	20	2	5	20	8
136	Northern rockfish	20	20	20	20	20	20	35	7	15	7	1	20	2	5	20	8
141	Pacific ocean perch	20	20	20	20	20	20	35	7	15	7	1	20	2	5	20	8
143	Thornyhead	20	20	20	20	20	20	35	7	15	7	1	20	2	5	20	8
152/ 151	Shorthead/rougheye ⁽¹⁾	20	20	20	20	20	20	35	7	15	n/a	1	20	2	5	20	8
193	Atka mackerel	20	20	20	20	20	20	35	1	5	⁽¹⁾	10	n/a	2	5	20	8
270	Pollock	n/a	20	20	20	20	20	35	1	5	⁽¹⁾	10	20	2	5	20	8
710	Sablefish	20	20	20	20	20	20	35	n/a	15	7	1	20	2	5	20	8
	Flatfish, deep-water ⁽²⁾	20	20	n/a	20	20	20	35	7	15	7	1	20	2	5	20	8
	Flatfish, shallow-water ⁽³⁾	20	20	20	20	20	n/a	35	1	5	⁽¹⁾	10	20	2	5	20	8
	Rockfish, other ⁽⁴⁾	20	20	20	20	20	20	35	7	15	7	1	20	2	5	20	8
172	Dusky rockfish	20	20	20	20	20	20	35	7	15	7	1	20	2	5	20	8
	Rockfish, DSR-SEO ⁽⁵⁾	20	20	20	20	20	20	35	7	15	7	n/a	20	2	5	20	8
	Skates ⁽¹⁰⁾	20	20	20	20	20	20	35	1	5	⁽¹⁾	10	20	2	n/a	20	8
	Other species ⁽⁶⁾	20	20	20	20	20	20	35	1	5	⁽¹⁾	10	20	2	5	n/a	8
	Aggregated amount of non-groundfish species ⁽¹¹⁾	20	20	20	20	20	20	35	1	5	⁽¹⁾	10	20	2	5	20	8

Notes to Table 10 to Part 679					
1	Shortraker/rougheye rockfish				
	SR/RE	<i>Sebastes borealis</i> (shortraker) (152)			
		<i>S. aleutianus</i> (rougheye) (151)			
	SR/RE ERA	Shortraker/rougheye rockfish in the Eastern Regulatory Area (ERA).			
Where an MRA is not indicated, use the MRA for SR/RE included under Aggregated Rockfish					
2	Deep-water flatfish	Dover sole (124), Greenland turbot (134), Kamchatka flounder (117), and deep-sea sole			
3	Shallow-water flatfish	Flatfish not including deep-water flatfish, flathead sole (122), rex sole (125), or arrowtooth flounder (121)			
4	Other rockfish	Western Regulatory Area	means other rockfish and demersal shelf rockfish		
		Central Regulatory Area			
		West Yakutat District			
		Southeast Outside District			means other rockfish
			Other rockfish		
			<i>S. aurora</i> (aurora) (185)	<i>S. variegates</i> (harlequin) (176)	<i>S. brevispinis</i> (silvergrey) (157)
			<i>S. melanostomus</i> (blackgill) (177)	<i>S. wilsoni</i> (pygmy) (179)	<i>S. diploproa</i> (splitnose) (182)
			<i>S. paucispinis</i> (bocaccio) (137)	<i>S. babcocki</i> (redbanded) (153)	<i>S. saxicola</i> (stripetail) (183)
			<i>S. goodei</i> (chilipepper) (178)	<i>S. proriger</i> (redstripe) (158)	<i>S. miniatus</i> (vermilion) (184)
			<i>S. crameri</i> (darkblotch) (159)	<i>S. zacentrus</i> (sharpchin) (166)	<i>S. reedi</i> (yellowmouth) (175)
			<i>S. elongatus</i> (greenstriped) (135)	<i>S. jordani</i> (shortbelly) (181)	
			<i>S. entomelas</i> (widow) (156)	<i>S. flavidus</i> (yellowtail) (155)	
			In the Eastern Regulatory Area only, other rockfish also includes <i>S. polyspinis</i> (northern) (136)		
	5	Demersal shelf rockfish (DSR)	<i>S. pinniger</i> (canary) (146)	<i>S. maliger</i> (quillback) (147)	<i>S. ruberrimus</i> (yelloweye) (145)
<i>S. nebulosus</i> (china) (149)			<i>S. helvomaculatus</i> (rosethorn) (150)		
<i>S. caurinus</i> (copper) (138)			<i>S. nigrocinctus</i> (tiger) (148)		
DSR-SEO = Demersal shelf rockfish in the Southeast Outside District (SEO). Catcher vessels in the SEO have full retention of DSR (see § 679.20(j)).					
6	Other species	Sculpins (160)	Octopus (870)	Sharks (689)	Squid (875)
7	Aggregated rockfish	Aggregated rockfish (see § 679.2) means any species of the genera <i>Sebastes</i> or <i>Sebastolobus</i> except <i>Sebastes ciliates</i> (dark rockfish), <i>Sebastes melanops</i> (black rockfish), and <i>Sebastes mystinus</i> (blue rockfish), except in:			
		Southeast Outside District	where DSR is a separate species group for those species marked with an MRA		
		Eastern Regulatory Area	where SR/RE is a separate species group for those species marked with an MRA		

Notes to Table 10 to Part 679		
8	n/a	Not applicable
9	Aggregated forage fish (all species of the following taxa)	
	Bristlemouths, lightfishes, and anglemouths (family <i>Gonostomatidae</i>)	209
	Capelin smelt (family <i>Osmeridae</i>)	516
	Deep-sea smelts (family <i>Bathylagidae</i>)	773
	Eulachon smelt (family <i>Osmeridae</i>)	511
	Gunnels (family <i>Pholidae</i>)	207
	Krill (order <i>Euphausiacea</i>)	800
	Laternfishes (family <i>Myctophidae</i>)	772
	Pacific sand fish (family <i>Trichodontidae</i>)	206
	Pacific sand lance (family <i>Ammodytidae</i>)	774
	Pricklebacks, war-bonnets, eelblennys, cockscombs and shannys (family <i>Stichaeidae</i>)	208
	Surf smelt (family <i>Osmeridae</i>)	515
10	Skates Species and Groups	
	Alaska (<i>Bathyraja. parmifera</i>)	703
	Aleutian (<i>B. aleutica</i>)	704
	Whiteblotched skate (<i>B. maculata</i>)	705
	Big skates (<i>Raja binoculata</i>)	702
	Longnose skates (<i>R. rhina</i>)	701
	Other skates (<i>Bathyraja</i> and <i>Raja spp.</i>)	700
11	Aggregated non-groundfish	All legally retained species of fish and shellfish, including IFQ Pacific halibut (<i>Hippoglossus stenolepis</i>), that are not listed as FMP
12	Grenadiers	
	Giant grenadiers (<i>Albatrossia pectoralis</i>)	214
	Other grenadiers (all grenadiers that are not Giant grenadiers)	213

■ 8. Revise Table 30 to part 679 to read as follows:

TABLE 30 TO PART 679—ROCKFISH PROGRAM RETAINABLE PERCENTAGES
[In round wt. equivalent]

Fishery	Incidental catch species ¹	Sector	MRA as a percentage of total retained rockfish primary species and rockfish secondary species
Rockfish Cooperative Vessels fishing under a CQ permit.	Pacific cod	Catcher/Processor	4.0
	Shortraker/Rougeye aggregate catch.	Catcher Vessel	2.0
See rockfish non-allocated species for "other species"			
Rockfish non-allocated Species for Rockfish Cooperative vessels fishing under a Rockfish CQ permit.	Pollock	Catcher/Processor and Catcher Vessel	20.0
	Deep-water flatfish	Catcher/Processor and Catcher Vessel	20.0
	Rex sole	Catcher/Processor and Catcher Vessel	20.0
	Flathead sole	Catcher/Processor and Catcher Vessel	20.0
	Shallow-water flatfish	Catcher/Processor and Catcher Vessel	20.0
	Arrowtooth flounder	Catcher/Processor and Catcher Vessel	35.0
	Other rockfish	Catcher/Processor and Catcher Vessel	15.0
	Atka mackerel	Catcher/Processor and Catcher Vessel	20.0
	Aggregated forage fish	Catcher/Processor and Catcher Vessel	2.0
	Skates	Catcher/Processor and Catcher Vessel	5.0
	Other species	Catcher/Processor and Catcher Vessel	20.0
Grenadiers	Catcher/Processor and Catcher Vessel	8.0	
Longline gear Rockfish Entry Level Fishery.	Use Table 10 to this part.		
Opt-out vessels	Use Table 10 to this part.		
Rockfish Cooperative Vessels not fishing under a CQ permit.	Use Table 10 to this part.		

¹ See Notes to Table 10 to Part 679 for descriptions of species groups.

Proposed Rules

Federal Register

Vol. 80, No. 248

Monday, December 28, 2015

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 26, 50, 52, 73, and 140

[NRC–2015–0070]

RIN 3150–AJ59

Regulatory Improvements for Decommissioning Power Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Advance notice of proposed rulemaking; extension of comment period.

SUMMARY: On November 19, 2015, the U.S. Nuclear Regulatory Commission (NRC) requested comments on an advance notice of proposed rulemaking (ANPR) on regulatory improvements for decommissioning power reactors. The public comment period was originally scheduled to close on January 4, 2016. The NRC has decided to extend the public comment period to allow more time for members of the public to develop and submit their comments.

DATES: The due date of comments requested in the document published on November 19, 2015, (80 FR 72358) is extended. Comments should be filed no later than March 18, 2016, providing a comment period of 120 days.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC–2015–0070. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: Carol.Gallagher@nrc.gov. For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Email comments to:* Rulemaking.Comments@nrc.gov. If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.

- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Jason B. Carneal, Office of Nuclear Reactor Regulation, U. S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1451; email: Jason.Carneal@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2015–0070 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC–2015–0070.

- *NRC’s Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “ADAMS Public Documents” and then select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to pdr.resource@nrc.gov. The ANPR on regulatory improvements for decommissioning power reactors is available in ADAMS under Accession No. ML15167A010.

- *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.

B. Submitting Comments

Please include Docket ID NRC–2015–0070 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <http://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

On November 19, 2015, the NRC requested comments on an ANPR on regulatory improvements for decommissioning power reactors. The NRC is specifically seeking input from stakeholders for the development of a draft regulatory basis. The draft regulatory basis will explore the NRC’s options for addressing various regulatory issues involved with the decommissioning of nuclear power reactors. The ANPR’s public comment period was originally scheduled to close on January 4, 2016. In response to several requests to extend the public comment period, the NRC has decided to extend the public comment period on the ANPR to March 18, 2016, providing a comment period of 120 days from the date of publication, in order to allow more time for members of the public to submit their comments. As stated in the November 19, 2015, publication of the ANPR, the NRC does not intend to provide detailed responses to comments on this ANPR.

Dated at Rockville, Maryland, this 18th day of December 2015.

For the Nuclear Regulatory Commission.
Victor M. McCree,
Executive Director for Operations.
 [FR Doc. 2015–32599 Filed 12–24–15; 8:45 am]
 BILLING CODE 7590–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 766

[Docket No. 151204999–5999–01]

RIN 0694–AG73

Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, Revision of Supplement No. 1 to Part 766 of the Export Administration Regulations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise Bureau of Industry and Security's (BIS) guidance regarding administrative enforcement cases based on violations of the Export Administration Regulations (EAR). The rule would rewrite Supplement No. 1 to part 766 of the EAR, setting forth the factors BIS considers when setting penalties in settlements of administrative enforcement cases and when deciding whether to pursue administrative charges or settle allegations of EAR violations. This proposed rule would not apply to alleged violations of part 760—Restrictive Trade Practices and Boycotts, which would continue to be subject to Supplement No. 2 to part 766. BIS is proposing these changes to make administrative penalties more predictable to the public and aligned with those promulgated by the Department of the Treasury, Office of Foreign Assets Control (OFAC).

DATES: Comments must be received no later than February 26, 2016.

ADDRESSES: You may submit comments by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. The identification number for this rulemaking is BIS–2015–0051.

By email directly to: publiccomments@bis.doc.gov. Include RIN 0694–AG73 in the subject line.

By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230. Refer to RIN 0694–AG73.

FOR FURTHER INFORMATION CONTACT: Norma Curtis, Assistant Director, Office of Export Enforcement, Bureau of Industry and Security. Tel: (202) 482–5036, or by email at norma.curtis@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

The mission of the Office of Export Enforcement (OEE) at BIS is to enforce the provisions of the Export Administration Regulations (EAR), secure America's trade, and preserve America's technological advantage by detecting, investigating, preventing, and deterring the unauthorized export and reexport of U.S.-origin items to parties involved with: (1) Weapons of mass destruction programs; (2) threats to national security or regional stability; (3) terrorism; or (4) human rights abuses. Export Enforcement at BIS is the only federal law enforcement agency exclusively dedicated to the enforcement of export control laws and the only agency constituted to do so with both administrative and criminal export enforcement authorities. OEE's criminal investigators and analysts leverage their subject-matter expertise, unique and complementary administrative enforcement tools, and relationships with other federal agencies and industry to protect our national security and promote our foreign policy interests. OEE protects legitimate exporters from being put at a competitive disadvantage by those who do not comply with the law. It works to educate parties to export transactions on how to improve export compliance practices, supporting American companies' efforts to be reliable trading partners and reputable stewards of U.S. national and economic security. BIS also discourages, and in some circumstances prohibits, U.S. companies from furthering or supporting any unsanctioned foreign boycott (including the Arab League boycott of Israel).

OEE at BIS may refer violators of export control laws to the U.S. Department of Justice for criminal prosecution, and/or to BIS's Office of Chief Counsel for administrative prosecution. In cases where there has been a willful violation of the EAR, violators may be subject to both criminal fines and administrative penalties. Administrative penalties may also be imposed when there is no willful intent, allowing administrative cases to be brought in a much wider variety of circumstances than criminal cases. BIS has a unique combination of administrative enforcement authorities

including both civil penalties and denials of export privileges. BIS may also place individuals and entities on lists that restrict or prohibit their involvement in exports, reexports, and transfers (in-country).

In this rule, BIS is proposing to amend the EAR to update its Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases (the "Guidelines") found in Supplement No. 1 to part 766 of the EAR in order to make civil penalty determinations more predictable and transparent to the public and aligned with those promulgated by the Treasury Department's Office of Foreign Assets Control (OFAC). OFAC administers most of its sanctions programs under the International Emergency Economic Powers Act (IEEPA), the same statutory authority by which BIS implements the EAR. OFAC uses the transaction value as the starting point for determining civil penalties pursuant to its Economic Sanctions Enforcement Guidelines. Under IEEPA, criminal penalties can reach 20 years imprisonment and \$1 million per violation, and administrative monetary penalties can reach \$250,000 or twice the value of the transaction, whichever is greater. Both agencies coordinate and cooperate on investigations involving violations of export controls that each agency enforces, including programs relating to weapons of mass destruction, terrorism, Iran, Sudan, Specially Designated Nationals and Specially Designated Global Terrorists. This guidance would not apply to civil administrative enforcement cases for violations under part 760 of the EAR—Restrictive Trade Practices and Boycotts. Supplement No. 2 to Part 766 continues to apply to enforcement cases involving part 760 violations.

The Guidelines would provide factors by which violations could be characterized as either egregious or non-egregious and describe the difference in the base penalty amount likely to apply in an enforcement case. The base penalty would depend on whether the violation is egregious or non-egregious and whether or not the case resulted from a voluntary self-disclosure that satisfies all the requirements of § 764.5 of the EAR. Base penalty amounts would be described in terms of the applicable statutory maximum, the transaction value, or the applicable schedule amount. The terms "transaction value" and "applicable schedule amount" would be defined in the Guidelines. The "statutory maximum" would be the maximum permitted by § 764.3(a)(1) of the EAR

(15 CFR 764.3(a)(1)) subject to adjustment under the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461). Additional information about the changes proposed here and how they differ from the current Guidelines set forth in Supplement No. 1 to Part 766 is described below.

Once the base penalty amount has been determined, Factors set forth in these Guidelines would be applied to determine whether the base penalty amount should be adjusted downward or, subject to the statutory maximum, upward. Factors set forth in the current Guidelines would be reorganized into the following categories: (1) Aggravating Factors (*e.g.*, willfulness or recklessness); (2) General Factors that could be considered either aggravating or mitigating depending upon the circumstances (*e.g.*, the absence or presence and adequacy of an internal compliance program); (3) Mitigating Factors (*e.g.*, remedial measures taken); and (4) other Relevant Factors on a case-by-case basis (*e.g.*, additional violations or other enforcement actions). Voluntary self-disclosures (VSDs) would no longer be listed as mitigating factors in and of themselves, but credit accorded to VSDs would be built into the determination of the base penalty amount. This credit would no longer be characterized as constituting “great weight” mitigation, but violations disclosed in a complete and timely VSD may be afforded a deduction of 50 percent of the transaction value or, in egregious cases, the statutory maximum in determining the base penalty amount. Mitigating Factors would also be assigned specific percentages off the base penalty amount, as further described below. Mitigating Factors may be combined for a greater reduction in penalty but mitigation will generally not exceed 75 percent of the base penalty.

Willfulness, recklessness and concealment would be set forth as Aggravating Factor A—*Willful or Reckless Violation of Law* in the revised Guidelines. The degree to which these actions are present would determine the degree of aggravation factored into the penalty calculation. Aggravating Factor B—*Awareness of Conduct at Issue* would be listed as a separate factor in the revised Guidelines to address situations where the Respondent knew or had reason to know of the violation(s), and took no action to address them. Currently, knowing violations are subsumed within consideration of the “Degree of Willfulness.” Harm to regulatory program objectives would be listed as Aggravating Factor C—*Harm to*

Regulatory Program Objectives. This factor would take into account all of the following: The destination involved, the end use and end user, and the sensitivity and control level of the item(s) involved in the transaction. Aggravating Factors A–C would be considered key in determining whether a violation was egregious or not, as further discussed below. Other aggravating facts, whether relating to the General Factors or Other Relevant Factors discussed below, may also be pertinent in determining whether a violation was egregious.

Under this proposed rule, General Factors could either be mitigating or aggravating depending upon the circumstances. Two General Factors would be set forth in the revised Guidelines: General Factor D, involving an assessment of the individual characteristics of a Respondent; and General Factor E, assessing the presence and adequacy of a compliance program. General Factor D—*Individual Characteristics*—would encompass an evaluation of the Respondent’s commercial sophistication, exporting experience, volume and value of transactions, and regulatory history. General Factor E—*Compliance Program*—would involve a determination of whether or not the Respondent had an effective risk-based BIS compliance program in place at the time of the apparent violation, including an assessment of the extent to which it complied with BIS’s Export Management System (EMS) Guidelines. Under General Factor E, if the Respondent’s compliance program served to uncover the violation and led to prompt and comprehensive remedial measures taken to ensure against future violations, additional mitigation may be accorded to the Respondent under Mitigating Factor F, *Remedial Response*. That factor looks at whether the Respondent took corrective action in response to the apparent violation, such as stopping the conduct at issue.

Mitigating Factor G—*Exceptional Cooperation with OEE* may result in a 25 percent to 40 percent reduction of the base penalty amount. This level of cooperation goes beyond what would be considered minimally necessary to address a violation and take corrective measures. In cases not involving a VSD, the Respondent must have provided substantial additional information regarding the apparent violation and/or other apparent violations caused by the same course of conduct. Exceptional cooperation in cases involving VSDs may also be considered as a further mitigating factor.

Transactions that would likely have received a license had one been sought, as set forth in Mitigating Factor H—*License Was Likely To Be Approved* also may result in up to a 25 percent reduction of the base penalty amount. First offenses, addressed in the context of calculation of the base penalty amount, may also result in a reduction of that amount by up to 25 percent.

Finally, proposed Factors I–M pertain to factors that may be relevant in certain circumstances and considered on a case-by-case basis. Factor I—*Related Violations* would address situations in which a single export transaction can give rise to multiple violations. Factor J—*Multiple Unrelated Violations* would address situations where multiple unrelated violations, as described in this proposed rule, could warrant a stronger enforcement response, including a denial order. Factor K—*Other Enforcement Action* would provide that corresponding enforcement action taken by federal, state, or local agencies in response to the apparent violation or similar apparent violations may be considered, particularly with regard to global settlements or criminal convictions and/or plea agreements.

Factor L—*Future Compliance/Deterrence Effect* would address the impact that the administrative action may have with regard to promoting future compliance and deterring such conduct by other similar parties, particularly in the same industry sector. Factor M—*Other Factors That BIS Deems Relevant* would serve as a “catch-all” category to retain flexibility to consider factors not already specifically addressed in the Guidelines, whether proposed by the Respondent or BIS.

Consideration of these Factors would not dictate a particular outcome in any particular case, but rather is intended to identify those Factors most relevant to BIS’s decision and to guide the agency’s exercise of its discretion. The Guidelines would provide sufficient flexibility to allow for the consideration of the Factors most relevant to a particular case. Penalties for settlements reached after the initiation of an enforcement proceeding and litigation through the filing of a charging letter will usually be higher than those described by these Guidelines.

In accordance with OEE’s existing posture that enhanced maximum civil penalties authorized by the International Emergency Economic Powers Enhancement Act (Enhancement Act) (Pub. L. 110–96, 50 U.S.C. 1701, *et seq.*) should be reserved for the most serious cases, the Guidelines would formally account for the substantial

increase in the maximum penalties for violations of IEEPA and distinguish between egregious and non-egregious civil monetary penalty cases. Egregious cases would be those involving the most serious violations, based on an analysis of all applicable Factors, with substantial weight given to considerations of willfulness or recklessness, awareness of the conduct giving rise to an apparent violation, and harm to the regulatory program objectives, taking into account the individual characteristics of the parties involved. As described below, the Guidelines generally would provide for significantly higher civil penalties for egregious cases. OEE anticipates that the majority of apparent violations investigated by OEE will fall in the non-egregious category. OEE does not expect that adoption of these guidelines will increase the number of cases that are charged administratively rather than closed with a warning letter.

The Guidelines define the “transaction value” to mean the dollar value of a subject transaction. Where the dollar value cannot be determined with certainty, the Guidelines would provide sufficient flexibility to allow for the determination of an appropriate transaction value in a wide variety of circumstances. The applicable schedule amounts, which would provide for a graduated series of penalties based on the underlying transaction values, reflect appropriate starting points for penalty calculations in non-egregious cases not involving VSDs. The base penalty amount for a non-egregious case involving a VSD would equal one-half of the transaction value, capped at \$125,000, for an apparent violation of the EAR. Such calculation would ensure that the base penalty for a VSD case will not be more than one-half of the base penalty for a similar case that is not voluntarily self-disclosed. This difference is intended to serve as an additional incentive for the submission of VSDs. In the interest of providing greater transparency and predictability to BIS administrative enforcement actions, BIS would also allot penalty reductions—all from the base penalty amount—of between 25 and 40 percent for exceptional cooperation, and up to an additional 25 percent for first offenses and for transactions where a license was likely to be approved.

BIS encourages the submission of VSDs by persons who believe they may have violated the EAR. The purpose of an enforcement action includes raising awareness, increasing compliance, and deterring future violations, not merely punishing past conduct. VSDs are a compelling indicator of a person’s

present intent and future commitment to comply with U.S. export control requirements. The purpose of mitigating the enforcement response in voluntary self-disclosure cases is to encourage the notification to OEE of apparent violations about which OEE would not otherwise have learned. OEE’s longstanding policy of encouraging the submission of VSDs involving apparent violations is reflected by the fact that, over the past several years, on average only three percent of VSDs submitted have resulted in a civil penalty. The majority of cases brought to the attention of OEE through VSDs result in the issuance of warning letters, containing a finding that a violation may have taken place. With respect to VSDs generally, OEE will issue warning letters in cases involving inadvertent violations and cases involving minor or isolated compliance deficiencies, absent the presence of aggravating factors.

Finally, in appropriate cases in the context of settlement negotiations, BIS may suspend or defer payment of a civil penalty, taking into account whether the Respondent has demonstrated a limited ability to pay, whether the matter is part of a global settlement with other U.S. government agencies, and/or whether the Respondent will apply a portion or all of the funds suspended or deferred for purposes of improving its internal compliance program.

Cases will continue to be processed in accordance with the enforcement guidelines and precedents currently in existence until the new Guidelines are issued in final form after review of public comments.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct 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, distribute 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. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject

to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule does not contain any collections of information.

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

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration that this proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities.

Number of Small Entities

Under the Regulatory Flexibility Act, the term “small entities” encompasses small businesses, small (not for profit) organizations and small governmental jurisdictions. The Bureau of Industry and Security (BIS) does not collect data on the size of entities that apply for and are issued export licenses pursuant to the Export Administration Regulations (EAR). However, in this instance, no small entities would be impacted by this rule because this rule would not require any person to change its behavior, nor would it alter any rights that any person has pursuant to the EAR. Only BIS would be directly affected by this proposed rule and BIS is not a small entity for purposes of the Regulatory Flexibility Act.

Economic Impact

This proposed rule would revise Bureau of Industry and Security’s guidance regarding administrative enforcement cases based on violations of the EAR. The rule would set forth the factors BIS would consider when setting penalties in the settlement of administrative enforcement cases, when deciding whether to pursue administrative charges or settle allegations of EAR violations, and when

deciding what level of penalty to seek in settlements of administrative cases. As with the existing guidelines, consideration of these factors would not dictate the outcome in a particular case. Instead the guidelines are intended to identify those factors most relevant to BIS's decision and to guide BIS in the exercise of its discretion. The guidelines themselves would provide sufficient flexibility for consideration of the factors most relevant in a particular case. Publication of this proposed rule and any resulting final rule is intended to make BIS decisions related to administrative enforcement of the Export Administration Regulations more transparent and predictable to the public. The rule would not require any party other than BIS to alter its behavior, nor would it alter any right that any person (including any small entity) currently has under the Export Administration Regulations. BIS is not a small entity for purposes of the Regulatory Flexibility Act.

Export Administration Act

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 7, 2015, (80 FR 48233 (Aug. 11, 2015)), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222 as amended by Executive Order 13637.

List of Subjects in 15 CFR Part 766

Administrative practice and procedure, Confidential business information, Exports, Law Enforcement, Penalties.

Accordingly, this proposed rule proposes to amend part 766 of the Export Administration Regulations (15 CFR parts 730–774) (EAR) as follows:

PART 766—[AMENDED]

- 1. The authority citation for part 766 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2015, 80 FR 48233 (August 11, 2015).

- 2. Supplement No. 1 to Part 766 is revised to read as follows:

Supplement No. 1 to Part 766— Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases Introduction

This Supplement describes how the Bureau of Industry and Security (BIS) responds to apparent violations of the Export Administration Regulations (EAR) and, specifically, how BIS makes penalty determinations in the settlement of civil administrative enforcement cases under part 764 of the EAR. This guidance does not apply to enforcement cases for violations under part 760 of the EAR—Restrictive Trade Practices or Boycotts. Supplement No. 2 to Part 766 continues to apply to civil administrative enforcement cases involving part 760 violations.

Because many administrative enforcement cases are resolved through settlement, the process of settling such cases is integral to the enforcement program. BIS carefully considers each settlement offer in light of the facts and circumstances of the case, relevant precedent, and BIS's objective to achieve in each case an appropriate penalty and deterrent effect. In settlement negotiations, BIS encourages parties to provide, and will give serious consideration to, information and evidence that parties believe are relevant to the application of this guidance to their cases, to whether a violation has in fact occurred, or to whether they have an affirmative defense to potential charges.

This guidance does not confer any right or impose any obligation regarding what penalties BIS may seek in litigating a case or what posture BIS may take toward settling a case. Parties do not have a right to a settlement offer or particular settlement terms from BIS, regardless of settlement positions BIS has taken in other cases.

I. Definitions

Note: See also: Definitions contained in § 766.2 of the EAR.

Apparent violation means conduct that constitutes an actual or possible violation of the Export Administration Act of 1979, the International Emergency Economic Powers Act, the EAR, other statutes administered or enforced by BIS, as well as executive orders, regulations, orders, directives, or licenses issued pursuant thereto.

Applicable schedule amount means:

1. \$1,000 with respect to a transaction valued at less than \$1,000;
2. \$10,000 with respect to a transaction valued at \$1,000 or more but less than \$10,000;

3. \$25,000 with respect to a transaction valued at \$10,000 or more but less than \$25,000;

4. \$50,000 with respect to a transaction valued at \$25,000 or more but less than \$50,000;

5. \$100,000 with respect to a transaction valued at \$50,000 or more but less than \$100,000;

6. \$170,000 with respect to a transaction valued at \$100,000 or more but less than \$170,000;

7. \$250,000 with respect to a transaction valued at \$170,000 or more.

Transaction value means the U.S. dollar value of a subject transaction, as demonstrated by commercial invoices, bills of lading, signed Customs declarations, or similar documents. Where the transaction value is not otherwise ascertainable, BIS may consider the market value of the items that were the subject of the transaction and/or the economic benefit derived by the Respondent from the transaction, in determining transaction value. In situations involving a lease of U.S.-origin items, the transaction value will generally be the value of the lease. For purposes of these Guidelines, “transaction value” will not necessarily have the same meaning, nor be applied in the same manner, as that term is used for import valuation purposes at 19 CFR 152.103.

Voluntary self-disclosure means the self-initiated notification to OEE of an apparent violation as described in and satisfying the requirements of § 764.5 of the EAR.

II. Types of Responses to Apparent Violations

OEE, among other responsibilities, investigates apparent violations of the EAR, or any order, license or authorization issued thereunder. When it appears that such a violation has occurred, OEE investigations may lead to a warning letter or an administrative enforcement proceeding. A violation may also be referred to the Department of Justice for criminal prosecution. The type of enforcement action initiated by OEE will depend primarily on the nature of the violation. Depending on the facts and circumstances of a particular case, an OEE investigation may lead to one or more of the following actions:

A. *No Action.* If OEE determines that there is insufficient evidence to conclude that a violation has occurred, determines that a violation did not occur and/or, based on an analysis of the Factors outlined in Section III of these Guidelines, concludes that the conduct does not rise to a level warranting an administrative response,

then no action will be taken. In such circumstances, if the investigation was initiated by a voluntary self-disclosure (VSD), OEE will issue a letter in response indicating that the investigation is being closed with no administrative action being taken. OEE may issue a no-action letter in non-voluntarily disclosed cases at its discretion. A no-action determination represents a final determination as to the apparent violation, unless OEE later learns of additional information regarding the same or similar transactions or other relevant facts.

B. Warning Letter. If OEE determines that a violation may have occurred but a civil penalty is not warranted under the circumstances, and believes that the underlying conduct could lead to a violation in other circumstances and/or that a Respondent does not appear to be exercising due diligence in assuring compliance with the statutes, executive orders, and regulations that OEE enforces, OEE may issue a warning letter. A warning letter may convey OEE's concerns about the underlying conduct and/or the Respondent's compliance policies, practices, and/or procedures. It may also address an apparent violation of a technical nature, where good faith efforts to comply with the law and cooperate with the investigation are present, or where the investigation commenced as a result of a voluntary self-disclosure satisfying the requirements of § 764.5 of the EAR, provided that no aggravating factors exist. In the exercise of its discretion, OEE may determine in certain instances that issuing a warning letter, instead of bringing an administrative enforcement proceeding, will achieve the appropriate enforcement result. A warning letter will describe the apparent violation and urge compliance. A warning letter represents OEE's enforcement response to the apparent violation, unless OEE later learns of additional information concerning the same or similar apparent violations. A warning letter does not constitute a final agency determination as to whether a violation has occurred.

C. Administrative enforcement case. If BIS determines that a violation has occurred and, based on an analysis of the Factors outlined in Section III of these Guidelines, concludes that the Respondent's conduct warrants a civil monetary penalty or other administrative sanctions, BIS may initiate an administrative enforcement case. The issuance of a charging letter under § 766.3 of the EAR initiates an administrative enforcement proceeding. Charging letters may be issued when there is reason to believe that a violation has occurred. Cases may be settled

before or after the issuance of a charging letter. See § 766.18 of the EAR. BIS may prepare a proposed charging letter which could result in a case being settled before issuance of an actual charging letter. See § 766.18(a) of the EAR. If a case does not settle before issuance of a charging letter and the case proceeds to adjudication, the resulting charging letter may include more violations than alleged in the proposed charging letter. Civil monetary penalty amounts for cases settled before the issuance of a charging letter will be determined as discussed in Section IV of these Guidelines. A civil monetary penalty may be assessed for each violation. The maximum amount of such a penalty per violation is stated in § 764.3(a)(1), subject to adjustments under the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461), which are codified at 15 CFR 6.4. BIS will afford the Respondent an opportunity to respond to a proposed charging letter. Responses to charging letters following the institution of an enforcement proceeding under part 766 of the EAR are governed by § 766.3 of the EAR.

D. Civil Monetary Penalty. BIS may seek a civil monetary penalty if BIS determines that a violation has occurred and, based on the Factors outlined in Section III of these Guidelines, concludes that the Respondent's conduct warrants a monetary penalty. Section IV of these Guidelines will guide the agency's exercise of its discretion in determining civil monetary penalty amounts.

E. Criminal Referral. In appropriate circumstances, BIS may refer the matter to the Department of Justice for criminal prosecution. Apparent violations referred for criminal prosecution also may be subject to a civil monetary penalty and/or other administrative sanctions or action by BIS.

F. Other Administrative Sanctions or Actions. In addition to or in lieu of other administrative actions, BIS may seek sanctions listed in § 764.3 of the EAR. BIS may also take the following administrative actions, among other actions, in response to an apparent violation:

License Revision, Suspension or Revocation. BIS authorizations to engage in a transaction pursuant to a license or license exception may be revised, suspended or revoked in response to an apparent violation as provided in §§ 740.2(b) and 750.8 of the EAR.

Denial of Export Privileges. An order denying a Respondent's export privileges may be issued, as described in § 764.3(a)(2) of the EAR. Such a

denial may extend to all export privileges, as set out in the standard terms for denial orders in Supplement No. 1 to part 764 of the EAR, or may be narrower in scope (e.g., limited to exports of specified items or to specified destinations or customers). A denial order may also be suspended in whole or in part in accordance with § 766.18(c).

Exclusion from practice. Under § 764.3(a)(3) of the EAR, any person acting as an attorney, accountant, consultant, freight forwarder or other person who acts in a representative capacity in any matter before BIS may be excluded from practicing before BIS.

Training and Audit Requirements. In appropriate cases, OEE may require as part of a settlement agreement that the Respondent provide training to employees as part of its compliance program, adopt other compliance measures, and/or be subject to internal or independent audits by a qualified outside person. In those cases, OEE may suspend or defer a portion or all of the penalty amount if the suspended amount is applied to comply with such requirements.

G. Suspension or Deferral. In appropriate cases, payment of a civil monetary penalty may be suspended or deferred during a probationary period under a settlement agreement and order. If the terms of the settlement agreement or order are not adhered to by the Respondent, then suspension or deferral may be revoked and the full amount of the penalty imposed. See § 764.3(a)(1)(iii) of the EAR. In determining whether suspension or deferral is appropriate, BIS may consider, for example, whether the Respondent has demonstrated a limited ability to pay a penalty that would be appropriate for such violations, so that suspended or deferred payment can be expected to have sufficient deterrent value, and whether, in light of all of the circumstances, such suspension or deferral is necessary to make the impact of the penalty consistent with the impact of penalties on other parties who committed similar violations. BIS may also take into account when determining whether or not to suspend or defer a civil penalty whether the Respondent will apply a portion or all of the funds suspended or deferred to audit, compliance, or training that may be required under a settlement agreement and order, or the matter is part of a "global settlement" as discussed in more detail below.

III. Factors Affecting Administrative Sanctions

Many apparent violations are isolated occurrences, the result of a good-faith misinterpretation, or involve no more than simple negligence or carelessness. In such instances, absent the presence of aggravating factors, the matter frequently may be addressed with a warning letter. If the violations are of such a nature and extent that a monetary fine alone represents an insufficient penalty, a denial or exclusion order may also be imposed to prevent future violations of the EAR.

While some violations of the EAR have a degree of knowledge or intent as an element of the offense, OEE may regard a violation of any provision of the EAR as knowing or willful if the facts and circumstances of the case support that conclusion. For example, evidence that a corporate entity had knowledge at a senior management level may mean that a higher penalty may be appropriate. OEE will also consider, in accordance with Supplement No. 3 to part 732 of the EAR, the presence of any red flags that should have alerted the Respondent that a violation was likely to occur. The aggravating factors identified in the Guidelines do not alter or amend § 764.2(e) or the definition of “knowledge” in § 772.1, or other provisions of parts 764 and 772 of the EAR.

As a general matter, BIS will consider some or all of the following Factors in determining the appropriate sanctions in administrative cases, including the appropriate amount of a civil monetary penalty where such a penalty is sought and is imposed as part of a settlement agreement and order. These factors describe circumstances that, in BIS’s experience, are commonly relevant to penalty determinations in settled cases. Factors that are considered exclusively aggravating, such as willfulness, or exclusively mitigating, such as situations where remedial measures were taken, are set forth below. This guidance also identifies General Factors—which can be either mitigating or aggravating—such as the presence or absence of an internal compliance program at the time the apparent violations occurred. Other relevant Factors may also be considered at the agency’s discretion.

Aggravating Factors

A. Willful or Reckless Violation of Law: BIS will consider a Respondent’s apparent willfulness or recklessness in violating, attempting to violate, conspiring to violate, or causing a violation of the law. Generally, to the

extent the conduct at issue appears to be the result of willful conduct—a deliberate intent to violate, attempt to violate, conspire to violate, or cause a violation of the law—the OEE enforcement response will be stronger. Among the factors BIS may consider in evaluating apparent willfulness or recklessness are:

1. *Willfulness.* Was the conduct at issue the result of a decision to take action with the knowledge that such action would constitute a violation of U.S. law? Did the Respondent know that the underlying conduct constituted, or likely constituted, a violation of U.S. law at the time of the conduct?

2. *Recklessness/gross negligence.* Did the Respondent demonstrate reckless disregard or gross negligence with respect to compliance with U.S. regulatory requirements or otherwise fail to exercise a minimal degree of caution or care in avoiding conduct that led to the apparent violation? Were there warning signs that should have alerted the Respondent that an action or failure to act would lead to an apparent violation?

3. *Concealment.* Was there a deliberate effort by the Respondent to hide or purposely obfuscate its conduct in order to mislead BIS, federal, state, or foreign regulators, or other parties involved in the conduct, about an apparent violation?

Note: Failure to voluntarily disclose an apparent violation to OEE does not constitute concealment.

4. *Pattern of Conduct.* Did the apparent violation constitute or result from a pattern or practice of conduct or was it relatively isolated and atypical in nature?

5. *Prior Notice.* Was the Respondent on notice, or should it reasonably have been on notice, that the conduct at issue, or similar conduct, constituted a violation of U.S. law?

6. *Management Involvement.* In cases of entities, at what level within the organization did the willful or reckless conduct occur? Were supervisory or managerial level staff aware, or should they reasonably have been aware, of the willful or reckless conduct?

B. Awareness of Conduct at Issue: The Respondent’s awareness of the conduct giving rise to the apparent violation. Generally, the greater a Respondent’s actual knowledge of, or reason to know about, the conduct constituting an apparent violation, the stronger the BIS enforcement response will be. In the case of a corporation, awareness will focus on supervisory or managerial level staff in the business unit at issue, as well as other senior officers and

managers. Among the factors OEE may consider in evaluating the Respondent’s awareness of the conduct at issue are:

1. *Actual Knowledge.* Did the Respondent have actual knowledge that the conduct giving rise to an apparent violation took place, and remain willfully blind to such conduct, and fail to take remedial measures to address it? Was the conduct part of a business process, structure or arrangement that was designed or implemented with the intent to prevent or shield the Respondent from having such actual knowledge, or was the conduct part of a business process, structure or arrangement implemented for other legitimate reasons that consequently made it difficult or impossible for the Respondent to have actual knowledge?

2. *Reason to Know.* If the Respondent did not have actual knowledge that the conduct took place, did the Respondent have reason to know, or should the Respondent reasonably have known, based on all readily available information and with the exercise of reasonable due diligence, that the conduct would or might take place?

3. *Management Involvement.* In the case of an entity, was the conduct undertaken with the explicit or implicit knowledge of senior management, or was the conduct undertaken by personnel outside the knowledge of senior management? If the apparent violation was undertaken without the knowledge of senior management, was there oversight intended to detect and prevent violations, or did the lack of knowledge by senior management result from disregard for its responsibility to comply with applicable regulations and laws?

C. Harm to Regulatory Program Objectives: The actual or potential harm to regulatory program objectives caused by the conduct giving rise to the apparent violation. This factor would be present where the conduct in question, in purpose or effect, substantially implicated national security or other essential interests (e.g., foreign policy, nonproliferation) protected by the U.S. export control system, in view of such factors as the reason for controlling the item to the destination in question; the sensitivity of the item; the prohibitions or restrictions against the recipient of the item; and the licensing policy concerning the transaction (such as presumption of approval or denial). BIS, in its discretion, may consult with other U.S. agencies or with licensing and enforcement authorities of other countries in making its determination. Among the factors BIS may consider in evaluating the harm to regulatory program objectives are:

1. *Implications for U.S. National Security:* The impact that the apparent violation had or could potentially have on the national security of the United States. For example, if a particular export could undermine U.S. military superiority or endanger U.S. or friendly military forces or be used in a military application contrary to U.S. interests, BIS would consider the implications of the apparent violation to be significant.

2. *Implications for U.S. Foreign Policy:* The effect that the apparent violation had or could potentially have on U.S. foreign policy objectives. For example, if a particular export is, or is likely to be, used by a foreign regime to monitor communications of its population in order to suppress free speech and persecute dissidents, BIS would consider the implications of the apparent violation to be significant.

General Factors

D. *Individual Characteristics:* The particular circumstances and characteristics of a Respondent. Among the factors BIS may consider in evaluating individual characteristics are:

1. *Commercial Sophistication:* The commercial sophistication and experience of the Respondent. Is the Respondent an individual or an entity? If an individual, was the conduct constituting the apparent violation for personal or business reasons?

2. *Size and Sophistication of Operations:* The size of a Respondent's business operations, where such information is available and relevant. At the time of the violation, did the Respondent have any previous export experience and was the Respondent familiar with export practices and requirements? Qualification of the Respondent as a small business or organization for the purposes of the Small Business Regulatory Enforcement Fairness Act, as determined by reference to the applicable standards of the Small Business Administration, may also be considered.

3. *Volume and Value of Transactions:* The total volume and value of transactions undertaken by the Respondent on an annual basis, with attention given to the volume and value of the apparent violations as compared with the total volume and value of all transactions. Was the quantity and/or value of the exports high, such that a greater penalty may be necessary to serve as an adequate penalty for the violation or deterrence of future violations, or to make the penalty proportionate to those for otherwise comparable violations involving exports of lower quantity or value?

4. *Regulatory History:* The Respondent's regulatory history, including BIS's issuance of prior penalties, warning letters, or other administrative actions (including settlements), other than with respect to antiboycott matters under part 760 of the EAR. BIS will generally only consider a Respondent's regulatory history for the five years preceding the date of the transaction giving rise to the apparent violation. When an acquiring firm takes reasonable steps to uncover, correct, and voluntarily disclose or cause the voluntary self-disclosure to OEE of conduct that gave rise to violations by an acquired business before the acquisition, BIS typically will not take such violations into account in applying these Factors in settling other violations by the acquiring firm.

5. *Other illegal conduct in connection with the export:* Was the transaction in support of other illegal conduct, for example the export of firearms as part of a drug smuggling operation, or illegal exports in support of money laundering?

6. *Criminal Convictions:* Has the Respondent has been convicted of an export-related criminal violation?

Note: Where necessary to effective enforcement, the prior involvement in export violation(s) of a Respondent's owners, directors, officers, partners, or other related persons may be imputed to a Respondent in determining whether these criteria are satisfied.

E. *Compliance Program:* The existence, nature and adequacy of a Respondent's risk-based BIS compliance program at the time of the apparent violation. BIS will take account of the extent to which a Respondent complies with the principles set forth in BIS's Export Management System (EMS) Guidelines. Information about the EMS Guidelines can be accessed through the BIS Web site at www.bis.doc.gov. In this context, BIS will also consider whether a Respondent's export compliance program uncovered a problem, thereby preventing further violations, and whether the Respondent has taken steps to address compliance concerns raised by the violation, including steps to prevent reoccurrence of the violation, that are reasonably calculated to be effective.

Mitigating Factors

F. *Remedial Response:* The Respondent's corrective action taken in response to the apparent violation. Among the factors BIS may consider in evaluating the remedial response are:

1. The steps taken by the Respondent upon learning of the apparent violation.

Did the Respondent immediately stop the conduct at issue?

2. In the case of an entity, the processes followed to resolve issues related to the apparent violation. Did the Respondent discover necessary information to ascertain the causes and extent of the apparent violation, fully and expeditiously? Was senior management fully informed? If so, when?

3. In the case of an entity, whether it adopted new and more effective internal controls and procedures to prevent the occurrence of similar apparent violations. If the entity did not have a BIS compliance program in place at the time of the apparent violation, did it implement one upon discovery of the apparent violation? If it did have a BIS compliance program, did it take appropriate steps to enhance the program to prevent the recurrence of similar violations? Did the entity provide the individual(s) and/or managers responsible for the apparent violation with additional training, and/or take other appropriate action, to ensure that similar violations do not occur in the future?

4. Where applicable, whether the Respondent undertook a thorough review to identify other possible violations.

G. *Exceptional Cooperation with OEE:* The nature and extent of the Respondent's cooperation with OEE, beyond those actions set forth in Factor F. Among the factors BIS may consider in evaluating exceptional cooperation are:

1. Did the Respondent provide OEE with all relevant information regarding the apparent violation at issue in a timely, comprehensive and responsive manner (whether or not voluntarily self-disclosed), including, if applicable, overseas records?

2. Did the Respondent research and disclose to OEE relevant information regarding any other apparent violations caused by the same course of conduct?

3. Did the Respondent provide substantial assistance in another OEE investigation of another person who may have violated the EAR?

4. Did the Respondent enter into a statute of limitations tolling agreement, if requested by OEE (particularly in situations where the apparent violations were not immediately disclosed or discovered by OEE, in particularly complex cases, and in cases in which the Respondent has requested and received additional time to respond to a request for information from OEE)? If so, the Respondent's entering into a tolling agreement will be deemed a mitigating factor.

Note: A Respondent's refusal to enter into a tolling agreement will not be considered by BIS as an aggravating factor in assessing a Respondent's cooperation or otherwise under the Guidelines.

H. License Was Likely To Be Approved: Would an export license application have likely been approved for the transaction had one been sought? Some license requirements sections in the EAR also set forth a licensing policy (*i.e.*, a statement of the policy under which license applications will be evaluated), such as a general presumption of denial or case by case review. BIS may also consider the licensing history of the specific item to that destination and if the item or end-user has a history of export denials.

Other Relevant Factors Considered on a Case-by-Case Basis

I. Related Violations: Frequently, a single export transaction can give rise to multiple violations. For example, an exporter who inadvertently misclassifies an item on the Commerce Control List may, as a result of that error, export the item without the required export license and file Electronic Export Information (EEI) to the Automated Export System (AES) that both misstates the applicable Export Control Classification Number (ECCN) and erroneously identifies the export as qualifying for the designation "NLR" (no license required) or cites a license exception that is not applicable. In so doing, the exporter commits three violations: one violation of § 764.2(a) of the EAR for the unauthorized export and two violations of § 764.2(g) of the EAR for the two false statements on the EEI filing to the AES. It is within the discretion of BIS to charge three separate violations and settle the case for a penalty that is less than would be appropriate for three unrelated violations under otherwise similar circumstances, or to charge fewer than three violations and pursue settlement in accordance with that charging decision.

J. Multiple Unrelated Violations: In cases involving multiple unrelated violations, BIS is more likely to seek a denial of export privileges and/or a greater monetary penalty than BIS would otherwise typically seek. For example, repeated unauthorized exports could warrant a denial order, even if a single export of the same item to the same destination under similar circumstances might warrant just a civil monetary penalty. BIS takes this approach because multiple violations may indicate serious compliance problems and a resulting greater risk of future violations. BIS may consider whether a Respondent has taken

effective steps to address compliance concerns in determining whether multiple violations warrant a denial in a particular case.

K. Other Enforcement Action: Other enforcement actions taken by federal, state, or local agencies against a Respondent for the apparent violation or similar apparent violations, including whether the settlement of alleged violations of BIS regulations is part of a comprehensive settlement with other federal, state, or local agencies. Where an administrative enforcement matter under the EAR involves conduct giving rise to related criminal or civil charges, OEE may take into account the related violations, and their resolution, in determining what administrative sanctions are appropriate under part 766 of the EAR. A criminal conviction indicates serious, willful misconduct and an accordingly high risk of future violations, absent effective administrative sanctions. However, entry of a guilty plea can be a sign that a Respondent accepts responsibility for complying with the EAR and will take greater care to do so in the future. In appropriate cases where a Respondent is receiving substantial criminal penalties, BIS may find that sufficient deterrence may be achieved by lesser administrative sanctions than would be appropriate in the absence of criminal penalties. Conversely, BIS might seek greater administrative sanctions in an otherwise similar case where a Respondent is not subjected to criminal penalties. The presence of a related criminal or civil disposition may distinguish settlements among civil penalty cases that appear otherwise to be similar. As a result, the factors set forth for consideration in civil penalty settlements will often be applied differently in the context of a "global settlement" of both civil and criminal cases, or multiple civil cases, and may therefore be of limited utility as precedent for future cases, particularly those not involving a global settlement.

L. Future Compliance/Deterrence Effect: The impact an administrative enforcement action may have on promoting future compliance with the regulations by a Respondent and similar parties, particularly those in the same industry sector.

M. Other Factors That BIS Deems Relevant: On a case-by-case basis, in determining the appropriate enforcement response and/or the amount of any civil monetary penalty, BIS will consider the totality of the circumstances to ensure that its enforcement response is proportionate to the nature of the violation.

IV. Civil Penalties

A. Determining What Sanctions Are Appropriate in a Settlement

OEE will review the facts and circumstances surrounding an apparent violation and apply the Factors Affecting Administrative Sanctions in Section III above in determining the appropriate sanction or sanctions in an administrative case, including the appropriate amount of a civil monetary penalty where such a penalty is sought and imposed. Penalties for settlements reached after the initiation of litigation will usually be higher than those described by these guidelines.

B. Amount of Civil Penalty

1. Determining Whether a Case is Egregious. In those cases in which a civil monetary penalty is considered appropriate, OEE will make a determination as to whether a case is deemed "egregious" for purposes of the base penalty calculation. This determination will be based on an analysis of the applicable Factors. In making the egregiousness determination, substantial weight will generally be given to Factors A ("willful or reckless violation of law"), B ("awareness of conduct at issue"), C ("harm to regulatory program objectives"), and D ("individual characteristics"), with particular emphasis on Factors A, B, and C. A case will be considered an "egregious case" where the analysis of the applicable Factors, with a focus on Factors A, B, and C indicates that the case represents a particularly serious violation of the law calling for a strong enforcement response. A determination by OEE that a case is "egregious" must have the concurrence of the Assistant Secretary of Commerce for Export Enforcement.

2. Monetary Penalties in Egregious Cases and Non-Egregious Cases. The civil monetary penalty amount shall generally be calculated as follows, except that neither the base amount nor the penalty amount will exceed the applicable statutory maximum:

a. Base Category Calculation and Voluntary Self-Disclosures

i. In a non-egregious case, if the apparent violation is disclosed through a voluntary self-disclosure, the base amount shall be one-half of the transaction value, capped at a maximum base amount of \$125,000 per violation.

ii. In a non-egregious case, if the apparent violation comes to OEE's attention by means other than a voluntary self-disclosure, the base amount shall be the "applicable schedule amount," as defined above

(capped at a maximum base amount of \$250,000 per violation).

iii. In an egregious case, if the apparent violation is disclosed through a voluntary self-disclosure, the base amount shall be one-half of the statutory

maximum penalty applicable to the violation.

iv. In an egregious case, if the apparent violation comes to OEE's attention by means other than a voluntary self-disclosure, the base

amount shall be the statutory maximum penalty applicable to the violation.

The following matrix represents the base amount of the civil monetary penalty for each category of violation:

BASE PENALTY MATRIX

Egregious Case

		NO	YES
		(1)	(3)
Voluntary Self-Disclosure	YES	One-Half of Transaction Value (capped at \$125,000 per violation)	One-Half of Applicable Statutory Maximum
	NO	Applicable Schedule Amount (capped at \$250,000 per violation)	Applicable Statutory Maximum

b. Adjustment for Applicable Relevant Factors

The base amount of the civil monetary penalty may be adjusted to reflect applicable Factors for Administrative Action set forth in Section III of these Guidelines. A Factor may result in a lower or higher penalty amount depending upon whether it is aggravating or mitigating or otherwise relevant to the circumstances at hand. Mitigating factors may be combined for a greater reduction in penalty, but mitigation will generally not exceed 75 percent of the base penalty. Subject to this limitation, as a general matter, in those cases where the following Mitigating Factors are present, BIS will adjust the base penalty amount in the following manner:

In cases involving exceptional cooperation with OEE as set forth in Mitigating Factor G, but no voluntary self-disclosure as defined in § 764.5 of the EAR, the base penalty amount generally will be reduced between 25 and 40 percent. Exceptional cooperation in cases involving voluntary self-disclosure may also be considered as a further mitigating factor.

In cases involving a Respondent's first violation, the base penalty amount generally will be reduced by up to 25 percent. An apparent violation generally will be considered a "first violation" if the Respondent has not been convicted of an export-related criminal violation or been subject to a BIS final order in five years, or a warning letter in three years, preceding the date of the transaction giving rise to the apparent violation. A group of substantially similar apparent violations addressed in

a single Charging Letter shall be considered as a single violation for purposes of this subsection. In those cases where a prior Charging Letter or warning letter within the preceding five years involved conduct of a substantially different nature from the apparent violation at issue, OEE may consider the apparent violation at issue a "first violation." In determining the extent of any mitigation for a first violation, OEE may consider any prior enforcement action taken with respect to the Respondent, including any warning letters issued, or any civil monetary settlements entered into with BIS. When an acquiring firm takes reasonable steps to uncover, correct, and disclose or cause to be disclosed to OEE conduct that gave rise to violations by an acquired business before the acquisition, OEE typically will not take such violations into account as an aggravating factor in settling other violations by the acquiring firm.

iii. In cases involving charges pertaining to transactions where a license would likely have been approved had one been sought as set forth in Mitigating Factor H, the base penalty amount generally will be reduced by up to 25 percent.

In all cases, the penalty amount will not exceed the applicable statutory maximum. Similarly, while mitigating factors may be combined for a greater reduction in penalty, mitigation will generally not exceed 75 percent of the base penalty.

C. Settlement Procedures

The procedures relating to the settlement of administrative

enforcement cases are set forth in § 766.18 of the EAR.

Dated: December 22, 2015.

David W. Mills,
Assistant Secretary for Export Enforcement.

[FR Doc. 2015-32606 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA-2014-N-1207]

Use of the Term "Natural" in the Labeling of Human Food Products; Request for Information and Comments; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or we) is extending the comment period for a docket to receive information and comments on the use of the term "natural" in the labeling of human food products, including foods that are genetically engineered or contain ingredients produced through the use of genetic engineering. A notice requesting comments on this topic appeared in the **Federal Register** of November 12, 2015. We initially established February 10, 2016, as the deadline for the submission of comments. We are taking this action

in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period for a docket to receive information and comments on the use of the term “natural” in the labeling of human food products. We established the docket in a notice published on November 12, 2015 (80 FR 69905). Submit either electronic or written comments to the docket by May 10, 2016.

ADDRESSES: You may submit comments by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA-2014-N-1207 for “Use of the Term ‘Natural’ in the Labeling of Human Food

Products; Request for Information and Comments.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov>

and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Margaret-Hannah Emerick, Center for Food Safety and Applied Nutrition (HFS-820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240-402-2371.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 12, 2015 (80 FR 69905), we published a notice announcing the establishment of a

docket to receive information and comments on the use of the term “natural” in the labeling of human food products, including foods that are genetically engineered or contain ingredients produced through the use of genetic engineering. The notice discussed FDA’s position regarding the use of the term “natural”, the events that prompted us to establish a docket to request comment on this issue, and specific questions. We provided a 90-day comment period that was scheduled to end on February 10, 2016.

We received requests for a 90-day extension of the comment period. The requests conveyed concern that the current 90-day comment period does not allow sufficient time to develop meaningful or thoughtful comments to the questions and issues we presented in the notice.

FDA has considered the requests and is extending the comment period for 90 days, until May 10, 2016. We believe that a 90-day extension allows adequate time for interested persons to submit comments.

Dated: December 21, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015-32471 Filed 12-24-15; 8:45 am]

BILLING CODE 4164-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2015-0074; FRL-9940-58-Region 5]

Air Plan Approval; Indiana; Temporary Alternate Opacity Limits for American Electric Power, Rockport

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the Indiana State Implementation Plan (SIP), authorizing temporary alternate opacity limits (TAOLs) at the American Electric Power, Rockport (AEP Rockport) facility during periods of unit startup and shutdown. This action is consistent with the Clean Air Act (CAA) and EPA policy regarding emissions during periods of startup and shutdown. Indiana has provided an air quality analysis demonstrating that this revision will continue to protect the applicable National Ambient Air Quality Standards (NAAQS) for fine particulate matter (PM_{2.5}) in Spencer County.

DATES: Comments must be received on or before January 27, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2015-0074, by one of the following methods:

1. *www.regulations.gov*: Follow the on-line instructions for submitting comments.
2. *Email*: blakley.pamela@epa.gov.
3. *Fax*: (312) 692-2490.
4. *Mail*: Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery*: Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R05-OAR-2015-0074. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of

encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Matt Rau, Environmental Engineer, at (312) 886-6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6524, rau.matthew@epa.gov.

SUPPLEMENTARY INFORMATION:

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

- I. What should I consider as I prepare my comments for EPA?
- II. What is the background for this action?
- III. What is EPA's analysis?
- IV. What action is EPA taking?
- V. Incorporation by Reference
- VI. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at

your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background for this action?

On July 16, 2002 (67 FR 46589), EPA approved a revision to Indiana's SIP to include 326 Indiana Administrative Code (IAC) 5-1-3, which provides a mechanism to establish TAOLs. The rule is consistent with the criteria contained in EPA's September 20, 1999, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" memorandum. The criteria requires that: The frequency and duration of operation in startup or shutdown mode must be minimized to the extent possible; and the state must analyze the potential worst-case emissions that could occur during startup and shutdown to ensure that the NAAQS are protected. Indiana initially submitted TAOLs for 22 power plants with coal-fired boilers that use electrostatic precipitators (ESPs).¹

326 IAC 5-1-3(d) provides for a TAOL, upon EPA approval, if the following criteria are met: (1) The source burns any combination of coal, wood, fuel oil, tire-derived fuel, or petroleum coke, (2) the source demonstrates that the TAOL is needed during periods of startup and shutdown and a demonstration is made that the TAOL will not interfere with the NAAQS, (3) Indiana determines that acceptable operating and maintenance procedures are being used, be based on information provided to the commissioner, (4) the commissioner may require the source to install a continuous opacity monitor (COM), (5) the TAOL shall be reviewed by the commissioner after two years of monitoring, (6) the commissioner may deny a request for a TAOL limit if economically and technically feasible

¹ These facilities are identified in the attachment to the October 10, 2001, letter from Janet McCabe, IDEM Assistant Commissioner to Stephen Rothblatt, US EPA Region 5 Air Programs Branch Chief. They are: Alcoa Generating, AEP Tanners Creek, Crawfordsville Electric, Hoosier Energy Merom, Hoosier Energy Ratts, IKEC Clifty Creek, IPL Perry "K", IPL Stout, IPL Pritchard, IPL Petersburg units 1-3, NIPSCO Bailly, NIPSCO Michigan City, NIPSCO Schahfer, PSI Cayuga, PSI Edwardsport, PSI Gallagher, PSI Gibson, PSI Noblesville, PSI Wabash River, Richmond Power & Light, SIGECO Brown unit 1, and SIGECO Cully.

means are available to meet a more stringent opacity limit, and (7) the TAOL must be submitted to and approved by EPA.

On January 13, 2015, Indiana requested a SIP revision to add 326 IAC 5–1–8, which provides a mechanism to establish site-specific TAOLs. This provision was used to establish AEP Rockport Units #1 and #2 a TAOL during unit startup and shutdown. These two coal-fired boilers are each controlled by an ESP.

The TAOL for unit startup is only allowed until the exhaust temperature reaches 250 °F at the ESP inlet, up to a maximum of two hours (20 six-minute averaging periods). The TAOL for unit shutdown is only allowed when the exhaust temperature declines below 250 °F at the ESP inlet, up to a maximum of one and one-half (1.5) hours (15 six-minute averaging periods).

III. What is EPA's analysis?

To support the SIP revision request, Indiana evaluated COMs data for Units #1 and #2, and air dispersion modeling. Air dispersion modeling was conducted using the AERMOD regulatory dispersion model with five years of meteorological data. The analysis included conservative suppositions for stack temperature and flow rate. Indiana used worst-case emission rates to predict the highest hourly emissions during a cold startup. The modeling results yielded an eighth high 24-hour PM_{2.5} value of 22.2 micrograms per cubic meter (µg/m³), well below the 24-hour PM_{2.5} standard of 35 µg/m³. The air quality in the area will remain protected when Units #1 and #2 are operating with TOALs at the AEP Rockport facility.

EPA has reviewed the COMs data provided in Indiana's submission on AEP Rockport's startups and shutdowns from 2001 until the first quarter of 2004. The AEP Rockport TAOLs appear to be set at appropriate levels, minimizing the TAOL duration. The startup TAOL for AEP Rockport is limited to two hours. The shutdown TAOL is limited to one hour, 30 minutes. Both are less than the three-hour TAOL periods allowed under 326 IAC 5–1–3(e)(2). Indiana has provided the facility's operation and maintenance procedures for its ESPs, which support the expectation that AEP Rockport will operate in a manner that will minimize emissions with well operating emission control. In addition, because the ESP exhaust must be warm enough for it to be safely operated, it is impractical to require operating the ESPs during startup and shutdown periods.

Further, EPA reviewed the AEP Rockport COMs data from 2009 to 2013, which shows that it was in compliance with the opacity standards 99.81 percent of the time. This indicates that the facility is generally in compliance with the opacity rule, even during the startup and shutdown periods covered by the TAOLs.

EPA has determined the AEP Rockport TAOL meets the criteria contained in 326 IAC 5–1–3(d) as follows: (1) The AEP Rockport facility burns coal, (2) AEP Rockport has demonstrated that the TAOL is needed during periods of startup and shutdown, and that the TAOL will not interfere with the maintenance of the national ambient air quality standards, (3) Indiana has determined that acceptable operating and maintenance procedures are being used, based on information AEP Rockport provided, (4) AEP Rockport currently operates a COM for each boiler, (5) Indiana has determined that no economically and technically feasible controls are available to meet a more stringent limit, and (6) the TAOLs were submitted to EPA.²

IV. What action is EPA taking?

EPA is proposing to approve the addition of 326 IAC 5–1–8 to the Indiana SIP. The rule provides AEP Rockport Units #1 and Unit #2 with TAOLs during unit startup and shutdown periods. This action is consistent with the Clean Air Act (CAA) and EPA policy regarding emissions during periods of startup and shutdown. Indiana has provided an air quality analysis demonstrating that this revision will continue to protect the applicable National Ambient Air Quality Standards (NAAQS) for PM_{2.5} in Spencer County.

V. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Indiana Regulation 326 IAC 5–1–8 entitled "Site-specific temporary alternative opacity limitations", effective December 6, 2014. EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and/or in hard copy at the appropriate EPA office (see the ADDRESSES section of this preamble for more information).

²The requirement in 326 IAC 5–1–3(d)(5) related to Indiana review of monitoring data does not apply in this case because AEP has previously installed COMs and provided the necessary data.

VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal

governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

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

Dated: December 14, 2015.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2015-32509 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 271 and 272

[EPA-R06-RCRA-2015-0110; FRL-9939-50-Region 6]

Texas: Final Authorization of State-initiated Changes and Incorporation by Reference of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: During a review of Texas' regulations, the Environmental Protection Agency (EPA) identified a variety of State-initiated changes to Texas' hazardous waste program under the Resource Conservation and Recovery Act, as amended (RCRA), for which the State had not previously sought authorization. The EPA proposes to authorize the State for the program changes. In addition, the EPA proposes to codify in the regulations entitled "Approved State Hazardous Waste Management Programs, "Texas' authorized hazardous waste program". The EPA will incorporate by reference into the Code of Federal Regulations (CFR) those provisions of the State regulations that are authorized and that the EPA will enforce under RCRA.

DATES: Send your written comments by January 27, 2016.

ADDRESSES: Submit any comments identified by Docket ID No. EPA-R06-RCRA-2015-0110 by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

2. Email: patterson.alima@epa.gov.

3. Mail: Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD-O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733.

4. Hand Delivery or Courier. Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD-O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733.

Instructions: Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or email. Direct your comment to Docket No. EPA-R06-RCRA-2015-0109. The Federal regulations.gov Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. You can view and copy Texas' application and associated publicly available materials from 8:30 a.m. to 4 p.m. Monday through Friday at the following location: EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, phone number (214) 665-8533. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT:

Alima Patterson at (214) 665-8533 or Julia Banks at (214) 665-8178, State/Tribal Oversight Section (6PD-O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, (214) 665-8533) and Email address patterson.alima@epa.gov and bank.julia@epa.gov.

SUPPLEMENTARY INFORMATION: In the "Rules and Regulations" section of this **Federal Register**, EPA is authorizing the changes by direct final rule. EPA did not make a proposal prior to the direct final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this

authorization in the preamble to the direct final rule. Unless we get written comments which oppose this authorization during the comment period, the direct final rule will become effective 60 days after publication and we will not take further action on this proposal. If we receive comments that oppose this action, we will withdraw the direct final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

The purpose of this **Federal Register** document is to codify Texas' base hazardous waste management program and its revisions to that program through RCRA Cluster XXI (see 79 FR 52220; September 3, 2014). The EPA provided notices and opportunity for comments on the Agency's decisions to authorize the Texas program, and the EPA is not now reopening the decisions, nor requesting comments, on the Texas authorizations as published in FR notices specified in Section I.F of the direct final rule FR document.

This document incorporates by reference Texas' hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and federally enforceable program. By codifying Texas' authorized program and by amending the Code of Federal Regulations, the public will be more easily able to discern the status of federally approved requirements of the Texas hazardous waste management program.

Dated: October 1, 2015.

Ron Curry,

Regional Administrator, Region 6.

[FR Doc. 2015-31876 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 68

[CG Docket Nos. 12-32 and 13-46 and WT Docket Nos. 07-250 and 10-254; FCC 15-144]

Hearing Aid Compatibility Standards

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes to amend its hearing aid compatibility (HAC) rules to enhance equal access to the national

telecommunications network by people with hearing loss and implement the Twenty-First Century Communications and Video Accessibility. The proposed changes would expand the scope of the wireline HAC rules, add a volume control requirement for wireless handsets, address recently revised technical standards, and streamline the process for enabling industry to use new or revised technical standards for assessing HAC compliance.

DATES: Comments are due February 26, 2016 and Reply Comments are due March 28, 2016.

ADDRESSES: You may submit comments, identified by CG Docket Nos. 12–32 and 13–46 and WT Docket Nos. 07–250 and 10–254, by any of the following methods:

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS), through the Commission's Web site <http://fjallfoss.fcc.gov/ecfs2/>. Filers should follow the instructions provided on the Web site for submitting comments. For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal service mailing address, and CG Docket Nos. 12–32 and 13–46 and WT Docket Nos. 07–250 and 10–254.

- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

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

FOR FURTHER INFORMATION CONTACT: Robert Aldrich, Consumer and Governmental Affairs Bureau, Disability Rights Office, at 202–418–0996 or email Robert.Aldrich@fcc.gov.

SUPPLEMENTARY INFORMATION: Pursuant to 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial Mail sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

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

This is a summary of the Commission's document FCC 15–144, Access to Telecommunications Equipment and Services by Persons with Disabilities; Petition for Rulemaking Filed by the Telecommunications Industry Association Regarding Hearing Aid Compatibility Volume Control Requirements; Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets; and Comment Sought on 2010 Review of Hearing Aid Compatibility Regulations, Notice of Proposed Rulemaking, adopted October 23, 2015, and released October 30, 2015, in CG Docket Nos. 12–32 and 13–46 and WT Docket Nos. 07–250 and 10–254. The full text of document FCC 15–144 will be available for public inspection and copying via ECFS, and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. Document FCC 15–144 can also be downloaded in Word or Portable Document Format (PDF) at: <https://www.fcc.gov/encyclopedia/disability-rights-office-headlines>. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's ex parte rules. 47 CFR 1.1200 *et seq.* Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation

consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with 47 CFR 1.1206(b). In proceedings governed by 47 CFR 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

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

Initial Paperwork Reduction Act of 1995 Analysis

Document FCC 15–144 seeks comment on proposed rule amendments that may result in modified information collection requirements. If the Commission adopts any modified information collection requirements, the Commission will publish another notice in the **Federal Register** inviting the public to comment on the requirements, as required by the Paperwork Reduction Act. Public Law 104–13; 44 U.S.C. 3501–3520. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. Public Law 107–198; 44 U.S.C. 3506(c)(4).

Synopsis

Revised Wireline Volume Control Standard

1. Pursuant to section 710 of the Communications Act of 1934, as amended (Act), all wireline telephones manufactured or imported for use in the

United States must provide an “internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility.” 47 U.S.C. 610(b), (b)(1)(B). In 1996, the Commission amended its regulations to require that wireline telephones also be equipped with volume control to allow improved acoustic coupling, finding that doing so would make telephones more accessible for those wearing hearing aids and others with hearing loss. The volume control rules adopted by the Commission (47 CFR 68.317) incorporate by reference two technical standards: ANSI/EIA-470-A-1987 (*Telephone Instruments with Loop Signaling*) for analog phones; and ANSI/EIA/TIA-579-1991 (*Acoustic-To-Digital and Digital-To-Acoustic Transmission Requirements for ISDN Terminals*) for digital phones. In 2012 a revised technical standard for volume control, ANSI/TIA-4965-2012 (2012 ANSI Wireline Volume Control Standard), was approved by the American National Standards Institute (ANSI). The Telecommunications Industry Association (TIA) filed a petition requesting that the Commission revise § 68.317 of its rules to incorporate the revised standard by reference, and the Commission sought comment on TIA’s petition for rulemaking.

2. TIA notes that the 2012 ANSI Wireline Volume Control Standard modifies in two ways the manner in which amplification is measured for wireline phones. First, the standard discontinues the use of an IEC-318 coupler, which must form a seal with the telephone handset, as the physical set-up for measuring the amplification of wireline phones. Instead, the standard specifies the Head and Torso Simulator (HATS) method, which uses a mannequin that includes a human pinna (outer ear) simulator and which TIA states is appropriate for all types of handsets. Second, the 2012 ANSI Wireline Volume Control Standard replaces the Receive Objective Loudness Rating (ROLR) method of calibrating amplification, used in previous standards, with a new method called Conversational Gain. Under the ROLR method, gain is determined relative to the normal unamplified, or nominal, sound level for the particular equipment that is being measured, which can vary depending upon the equipment being used. By contrast, TIA explains, under the Conversational Gain method, the starting point—0 decibels (dB) Conversational Gain—is an absolute, not a relative, value, equivalent to 64 dB

sound pressure level in each ear, which is the volume of a face-to-face conversation where participants are 1 meter apart.

3. The Commission proposes to amend 47 CFR 68.317 to incorporate the 2012 ANSI Wireline Volume Control Standard and believes that doing so will make its rules more effective in ensuring that people with hearing loss have “equal access to the national telecommunications network” (Pub. L. 100-394, sec. 2 (1)) and that telephones provide “an internal means for effective use with hearing aids” (47 U.S.C. 610(b)). To ensure that its rules incorporate the most recent Congressional statement of purpose regarding HAC, the Commission also proposes to amend the statement of purpose in 47 CFR 68.1 to replace the previous statement of purpose, which was derived from the language of the 1982 amendment to the Communications Act, with the more recent language of Public Law 100-394.

4. Based on the TIA petition and the comments filed in response, the Commission’s proposal to incorporate the 2012 ANSI Wireline Volume Control Standard into its rules is likely to make ordinary telephones more usable for consumers who need telephone amplification. As noted by the American Speech-Language Hearing Association (ASHA) and TIA, the new standard’s HATS method for testing equipment appears to be “more representative of the user experience” because it reflects the actual manner in which phones are held to the ear, and the new measurement criterion, Conversational Gain, appears to provide “a more realistic metric for measuring speech through a phone” and has the potential to close a “loophole” in the current rule that appears to have resulted in a less than consistent means of measuring speech amplification across manufacturers. The Commission seeks comment on these assumptions and generally on the extent to which the new approaches embodied in the standard will improve the usability of telephones by consumers with hearing loss. In addition, the Commission seeks comment on whether incorporating the 2012 ANSI Wireline Volume Control Standard into its rules will improve the ability of the segment of the population that has hearing loss to communicate effectively with emergency services.

5. TIA research confirms that some vendors of high amplification phones have made claims about the amount of amplification offered that could not be verified when tested against the industry standard. The new ANSI/TIA standard’s Conversational Gain method

seems to address this problem because, according to ASHA, it will “allow consumers with hearing loss (and audiologists assisting them) to readily compare the sound levels of various digital and hardwire phones to determine which devices best meet their amplification needs.” The Commission notes that in addition to the 2012 ANSI Wireline Volume Control Standard, TIA has developed another voluntary standard employing Conversational Gain, ANSI/TIA-4953, which specifies measurement procedures and performance requirements for specialty high gain telephones. ANSI/TIA-4953 also addresses tone control, acoustic ringer level and tone, noise, distortion, stability, transmit levels, send quality, and volume for such high gain equipment and provides standardized labels to designate an amplified telephone as suitable for consumers with specified levels of hearing loss (HL), as follows: “Mild” (20 dB to 40 dB HL); “Moderate” (40 dB to 70 dB HL); and “Severe” (70 dB to 90 dB HL). The Commission seeks comment on the experience of industry and consumers with implementation of the HATS method and the Conversational Gain method for this purpose and others, and whether Commission incorporation of the new ANSI/TIA wireline volume control standard in its rules will lead to further improvement of a consumer’s ability to find devices that meet his or her communication needs, and in particular, a consumer’s ability to determine the need for high amplification telephones. The Commission also seeks information concerning the findings of any consumer tests or trials that may have been conducted to determine whether devices having the same conversational gain rating demonstrate comparable amplification as perceived by device users.

6. In addition, the Commission seeks comment on whether the standard promotes both market certainty and a level playing field for companies that manufacture terminal equipment and whether compliance with the standard poses any impediments for equipment that is marketed internationally. Pursuant to 47 U.S.C. 610(e), the Commission also seeks comment on the costs and benefits of the proposed rule amendment to persons with and without hearing loss. In particular, the Commission seeks comment on the likely impact of implementing the new standard on the cost of a telephone and whether incorporation of the new standard will encourage the use of currently available technology and will

not discourage or impair the development of improved technology.

7. The Commission proposes to require a minimum of 18 dB in amplification gain because, according to TIA, under the 2012 ANSI Wireline Volume Control Standard, 18 dB of Conversational Gain would be equivalent to the current measurement of 12 dB above the normal unamplified level of a traditional telephone. Similarly, because under the new standard 24 dB of gain is the equivalent of a current measurement of 18 dB of gain, TIA recommends revising 47 CFR part 68 to require an automatic reset if Conversational Gain is greater than 24 dB, rather than the gain of 18 dB that currently triggers a reset requirement. The Commission seeks comment on these proposed rule changes and specifically, whether these proposed rules will provide an appropriate degree of assurance that people with hearing loss can make effective use of telephones and that consumers generally will be protected from accidental injury due to increased volume settings. The Commission seeks comment generally on what other changes to the Commission's rules may be necessary or appropriate if the Commission incorporates the 2012 ANSI Wireline Volume Control Standard into § 68.317 of its rules.

8. The Commission proposes to allow a transition period of two years after the effective date of the rules for manufacturers to come into compliance. The Commission seeks comment on this proposal and on whether two years is necessary to allow sufficient time for the design, engineering, and marketing needs of manufacturers that will be subject to the new standard. The Commission also proposes to amend 47 CFR 68.112 to allow the existing inventory and installed base of telephones that comply with the current version of § 68.317 of its rules to remain in place until retired and to clarify that such phones need not be replaced in the future as a result of minor changes to 47 CFR 68.316 or 68.317, and seeks comment on these proposals.

9. Consistent with the intent of the CVAA to involve consumer representatives more directly in the standards development process, the Commission proposes to adopt a requirement that wireline telephone manufacturers engage in consultation with such consumers and their representative organizations for the purpose of assessing the effectiveness of the revised standard. The Commission proposes that an initial consultation should occur one year after the effective date of the revised standard, with

follow-up every three years thereafter to assess the impact of technological changes. The Commission seeks comment on this proposal and whether the Commission should define in more detail the specifics of the required consultation. For example, should this consultation be subject to the same parameters that the Commission proposes pursuant to 47 U.S.C. 610(c) regarding consultation with designated consumer representatives? The Commission also seeks comment on whether, as an alternative, the Commission should consult with the consumer stakeholder(s) to be designated pursuant to 47 U.S.C. 610(c) regarding the effectiveness of the revised standard.

10. The Commission proposes that manufacturers subject to the volume control rule be required to test a sample of products claiming to be compliant with the revised standard, to assess whether these products are providing a uniform and appropriate range of volume to meet the telephone needs of people with hearing loss. The Commission seeks comment on whether these or other steps could provide useful data to ensure effective communication by this population and on the costs of such testing. The Commission agrees with consumer commenters that, to the extent that measurements are referred to in marketing materials and user manuals, it would be helpful to consumers for the materials to explain, for example, that "1 meter apart" is equivalent to "approximately 1 yard" in describing how the standard utilizes a conversation between individuals as a benchmark. The Commission seeks comment on whether manufacturers currently reference such measurements in marketing and informational materials, and if so, whether the Commission has the authority to require conversion to non-metric equivalents and whether the Commission should do so. What are the costs and benefits associated with such a requirement?

Application of Inductive Coupling and Volume Control Requirements to Wireline VoIP Telephones

11. The CVAA amended section 710(b) of the Act to provide that the requirement for "customer premises equipment" to "provide internal means for effective use with hearing aids" applies not only to "telephones" used over the public switched telephone network (PSTN) but also to "[a]ll customer premises equipment used with advanced communications services that is designed to provide 2-way voice communication via a built-in speaker

intended to be held to the ear in a manner functionally equivalent to a telephone, subject to the regulations prescribed by the Commission under subsection (e)." 47 U.S.C. 610(b)(1)(C). The Act, as amended by the CVAA, defines "advanced communications services" (ACS) as including interconnected and non-interconnected Voice over Internet Protocol (VoIP) service. 47 U.S.C. 153(1). According to recent market research, the United States has almost 35.3 million fixed VoIP subscribers, and the number of subscribers is expected to grow at an annual rate of 11.6 percent. The CVAA mandates that people with hearing loss have access to this expanding market of VoIP phones. Public Law 111-260, sec. 716(a).

12. Accordingly, the Commission proposes to amend 47 CFR part 68 so that customer premises equipment (CPE) used with interconnected and/or non-interconnected VoIP services (other than secure telephones and mobile handsets used with such services) would be covered by 47 U.S.C. 610(b)(1)(C) if the CPE "is designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally equivalent to a telephone." The Commission further proposes that CPE covered by 47 U.S.C. 610(b)(1)(C) be subject to the existing inductive coupling and volume control requirements. 47 CFR 68.4, 68.6. The Commission also proposes that complaint procedures, labeling, and certification requirements shall be applicable to such equipment with respect to HAC compliance, in accordance with the relevant part 68 rules regarding complaint handling, labeling, certifications, and suppliers' declarations of conformity. *See, e.g.*, 47 CFR 68.160-62, 68.201, 68.218-24, 68.300, 68.320-54, 68.414-23. The Commission believes that applying these procedures and requirements to CPE used with VoIP service will promote accountability and compliance with the HAC requirements and thus better serve people with hearing loss.

13. The Commission seeks comment on this proposal, including the costs and benefits and technical impacts of covering customer premises equipment used with a VoIP service under the inductive coupling and volume control requirements of 47 CFR part 68. In particular, the Commission seeks comment on:

- The appropriate timetables or benchmarks that may be necessary for ensuring that such equipment is hearing aid compatible and provides volume control in accordance with part 68

standards in order to take account of technical feasibility or to ensure the marketability or availability of new technologies to users (*see* 47 U.S.C. 610(e));

- Whether volume control parameters for such equipment can be effectively measured under the 2012 ANSI Wireline Volume Control Standard, and if not, how such standard should be modified to permit effective measurement;

- whether inductive coupling compliance for such telephones can be effectively measured under the currently applicable inductive coupling standard (47 CFR 68.316), and if not, how such standard should be modified to permit effective measurement;

- whether any different treatment of VoIP CPE is appropriate under the part 68 rules addressing complaint handling, labeling, certifications, and suppliers' declarations of conformity; and

- whether it would be appropriate to require registration of VoIP CPE in a public database, such as the database of terminal equipment that the Administrative Council for Terminal Attachments (ACTA) administers (*see* 47 CFR 68.610).

Volume Control and Other Acoustic Coupling Issues for Wireless Handsets

14. While the Commission's HAC requirements for wireless handsets (47 CFR 20.19) currently address inductive coupling capability and the prevention of radio frequency (RF) interference with hearing aids, they do not require the provision of volume control in wireless handsets. The Commission adopted volume control requirements for wireline telephones in 1996, but to date it has not adopted such requirements for wireless handsets. The Commission proposes to adopt a rule requiring wireless handsets to have a specified level of volume control. The Commission further proposes that the volume control rule have the same scope of application as our radio frequency interference reduction and inductive coupling rules for wireless handsets. 47 CFR 20.19(c), (d). The Commission also seeks comment on whether a volume control rule should apply to all wireless handsets or to just a subset of such handsets.

15. In addition, the Commission seeks further comment on volume control and acoustic coupling issues on which the Wireless Telecommunications Bureau (WTB) sought comment in 2010 and 2012, including (1) whether volume control rules and standards are necessary to ensure that wireless phones will operate at appropriate volumes to achieve acoustic coupling compatibility,

(2) whether there is a need for Commission action to ensure adequate information is available to consumers and hearing aid manufacturers regarding wireless phones' volume settings and sound quality, (3) whether the Commission should take action to ensure that the magnetic fields emitted by wireless handsets are of sufficient strength to activate special acoustic coupling modes in hearing aids that are designed for telephone use, and (4) the relevance and benefits of TIA's new and revised standards relating to volume control for wireline phones (including digital cordless phones) in the wireless context. *See Comment Sought on 2010 Review of Hearing Aid Compatibility Regulations*, published at 76 FR 2625, 2629–30, January 14, 2011; *Updated Information and Comment Sought on Review of Hearing Aid Compatibility Regulations*, published at 77 FR 70407, 70408, November 26, 2012. The Commission notes that the original reason given by the Commission in 2010 for deferring action on volume control and acoustic coupling issues—*i.e.*, that an Alliance for Telecommunications Industry Solutions working group was studying this issue—is no longer applicable, given that this group is no longer actively working on this issue.

16. Surveys conducted by the Hearing Loss Association of America (HLAA) indicate that the available volume controls for wireless handsets do not consistently allow sufficient amplification to enable effective acoustic coupling between the handset and a user's hearing aid or cochlear implant. The Commission invites additional comment on the experiences that consumers with hearing loss are having when they attempt to locate wireless handsets with sufficient amplification capability to use with their hearing aids or cochlear implants. In general, the Commission invites parties to update the record of these proceedings with respect to the need for volume control requirements for wireless handsets, including information on facts or circumstances that have changed since the Commission last addressed this issue. What are the costs and benefits of adopting a volume control requirement for wireless handsets—for manufacturers, service providers, and consumers? If there are specific burdens associated with requiring handsets to achieve a specified amplification level for manufacturers and service providers, what are they? If a volume control requirement is adopted, should it apply to all wireless handsets or to a subset of total handset sales or models, as with

the current HAC rule? Would such a fragmented implementation approach cause confusion for consumers?

17. Are there currently any plans for ANSI ASC C63®-EMC to initiate or explore development of such a standard, and if so, what is the likely timeline for the completion of such a standard? Further, in light of the suggestions that hearing aid manufacturers need to participate more fully in addressing HAC issues, would ANSI ASC C63®-EMC be the appropriate forum for the development of a volume control standard, or should all stakeholders form a new working group to address this issue? The Commission invites additional comment on other relevant standards development activities that may be useful in establishing volume control requirements for wireless handsets. Given the absence of a readily available ANSI standard for volume control in wireless handsets, the Commission invites parties to submit other studies and information that may be relevant to the adoption of appropriate standards for volume control in these devices. The Commission seeks comment on the time needed for development and adoption of a volume control standard for wireless handsets. Would 18 months be sufficient for development and adoption of such a standard? If no standards development body begins work on a wireless handset volume control standard, or if no specific time frame for development and adoption of such a standard is specified, the Commission also seeks comment on whether the Commission should adopt a volume control standard for wireless handsets based on the best currently available information, subject to modification based on subsequent development of an ANSI standard, in order to ensure equal telephone access for people with hearing loss. The Commission invites additional comment on the extent to which the 2012 ANSI Wireline Volume Control Standard is adaptable to wireless and the nature of any differences between wireline and wireless handsets that affect the applicability of TIA's new methods and/or its standard. The Commission invites comment on the potential relevance and benefits of the new TIA procedures and metrics in the wireless context, despite such differences.

18. The Commission also invites comment on the types of information consumers need regarding amplification levels and acoustic coupling capabilities in order to make informed purchasing decisions. For example, the voluntary performance standard for wireline telephones with enhanced

amplification, ANSI/TIA-4953, provides for specific, easily understood labels for amplified telephones that are suitable for consumers with mild, moderate, and severe hearing loss, respectively. Would such labels be useful in the wireless context as well? Should the Commission encourage or require the use of such labels for wireless handsets, and by what means? The Commission also seeks comment on whether to address, via standards or through other means, factors other than amplification that affect the ability of consumers with hearing loss to hear and understand speech received over wireless handsets, including but not limited to acoustic coupling issues such as frequency response and distortion and magnetic field strength issues.

Testing and Rating Wireless Handsets Exclusively Under the 2011 ANSI Wireless HAC Standard

19. For testing and rating the HAC performance of wireless handsets, the Commission's rules currently reference the 2007 and 2011 revisions of ANSI technical standard ANSI C63.19 (the 2007 ANSI Wireless HAC Standard and the 2011 ANSI Wireless HAC Standard), developed by ANSI ASC C63®-EMC. 47 CFR 20.19(b)(1), (2). A handset is considered hearing aid compatible for preventing RF interference with hearing aids and cochlear implants if it meets a rating of at least M3 under the 2007 ANSI Wireless HAC Standard or 2011 ANSI Wireless HAC Standard. A handset is considered hearing aid compatible for inductive coupling with hearing aids and cochlear implants if it meets a rating of at least T3. The 2011 Wireless HAC Standard, added to the rule in 2012, expanded the range of frequencies over which HAC can be tested to frequencies between 698 MHz and 6 GHz and established a direct method for measuring the RF interference level of wireless devices to hearing aids, thereby enabling testing procedures to be applied to operations over any RF air interface or protocol.

20. The Commission proposes to require manufacturers to use the 2011 ANSI Wireless HAC Standard, subject to modifications, exclusively to certify future handsets as compliant with the RF interference reduction and inductive coupling rules. The 2011 ANSI Wireless HAC Standard is the most recent of the ANSI standards for testing and rating wireless handsets' HAC and provides the most accurate available RF interference reduction and inductive coupling ratings for such handsets. The Commission believes there will be relatively little burden in requiring manufacturers and service providers to

use the 2011 ANSI Wireless HAC Standard exclusively, and the Commission notes that since July 2013, manufacturers appear to have been using the 2011 ANSI Wireless HAC Standard to test the vast majority of their new handsets. The Commission seeks comment on this approach. The Commission asks commenters to include data or other specific information demonstrating whether and how the 2011 ANSI Wireless HAC Standard imposes lesser or greater burdens than the 2007 ANSI Wireless HAC Standard, as well as the advantages or disadvantages of using the 2011 ANSI Wireless HAC Standard exclusively for testing and rating wireless handsets' compliance with the RF interference reduction and inductive coupling rules.

21. The Commission further proposes to transition manufacturers and service providers, over a period of six months, to using the 2011 ANSI Wireless HAC Standard on an exclusive basis. The Commission seeks comment on whether sufficient time has passed since Commission adoption of this standard to enable it to be used on an exclusive basis, or whether additional transition time is necessary to avoid disruption. If more time is needed, what would be the appropriate timeframe to adopt the 2011 ANSI Wireless HAC Standard exclusively? In connection with this implementation timeline, the Commission proposes that handsets already certified under the 2007 ANSI Wireless HAC Standard or any previous standard would be grandfathered, and thus, there would be no need to retest or recertify this equipment. The Commission seeks comment on this proposal, its costs and benefits, and its advantages or disadvantages.

Power-Down Exception for GSM Operations at 1900 MHz

22. The wireless HAC rule provides an exception to the general requirement that, for purposes of determining HAC, handsets must be tested using their maximum output power. 47 CFR 20.19(e)(1)(ii). This limited power-down exception applies solely to manufacturers and service providers that offer only one or two Global System for Mobile Communications (GSM) handset models, but are required, because they employ a certain number of individuals, to meet the HAC standards for one model. The Commission proposes to eliminate the power-down exception for handsets certified on or after the date that the 2011 ANSI Wireless HAC Standard becomes the exclusive standard. The Commission requires handsets to be

tested at full power to ensure that Americans with hearing loss have equal access to all of the service quality and performance that a given wireless handset provides. 47 CFR 20.19(e)(1)(iii). The Commission believes that eliminating the power-down exception will advance this purpose and will ensure that consumers do not experience the drop-off in function that can otherwise occur with handsets certified under the power-down option. The Commission further proposes to grandfather GSM handsets that operate in the 1900 MHz band and that were previously certified under the exception. Even if the Commission eliminates the exception going forward, the Commission tentatively concludes that there will be no need to recertify these handsets and that the Commission should continue to treat them as certified hearing aid compatible handsets. The Commission seeks comment on this tentative conclusion. When addressing our proposal to eliminate the power-down exception, commenters should discuss the advantages or disadvantages and quantify the costs and benefits of eliminating the exception and of any proposed alternative approaches they recommend.

Use of Future ANSI Technical Standards

23. Section 710(c) of the Act requires the Commission "to establish or approve such technical standards as are required to enforce [the HAC provisions]." 47 U.S.C. 610(c). The CVAA retained the mandate for the Commission to establish or approve such technical standards but amended section 710(c) of the Act to provide a mechanism for HAC technical standards to become effective without a Commission rulemaking, subject to Commission approval or rejection of such standards. As amended by the CVAA, section 710(c) of the Act reads as follows:

The Commission shall establish or approve such technical standards as are required to enforce this section. A telephone or other customer premises equipment that is compliant with relevant technical standards developed through a public participation process and in consultation with interested consumer stakeholders (designated by the Commission for the purposes of this section) will be considered hearing aid compatible for purposes of this section, until such time as the Commission may determine otherwise. The Commission shall consult with the public, including people with hearing loss, in establishing or approving such technical standards. The Commission may delegate this authority to an employee pursuant to section 155(c) of this title. The Commission

shall remain the final arbiter as to whether the standards meet the requirements of this section.

24. The Commission proposes to adopt rules implementing each of the provisions of section 710(c) of the Act added by the CVAA. In particular, the Commission proposes to adopt a streamlined procedure whereby a wireline telephone or other customer premises equipment or a wireless handset may be considered hearing aid compatible if it “is compliant with relevant technical standards developed through a public participation process and in consultation with interested consumer stakeholders . . . until such time as the Commission may determine otherwise.” The Commission further proposes changes to our rules to ensure consultation “with the public, including people with hearing loss, in establishing or approving such technical standards,” and that the Commission “remain[s] the final arbiter as to whether the standards meet the requirements of this section.” The Commission invites comment generally on whether our proposals below are consistent with section 710 of the Act and whether they will effectively advance the Congressional objective to ensure that “to the fullest extent made possible by technology and medical science, [people who are deaf and hard of hearing] should have equal access to the national telecommunications network.” Public Law 100–394, sec. 2(1).

25. To implement section 710(c) of the Act, the Commission proposes that for compliance purposes, companies be permitted to rely on a HAC standard prior to that standard being adopted through a formal rulemaking process so long as it is developed through a voluntary and consensus-driven public participation process reflecting consultation with interested consumer stakeholders. The Commission notes, however, that it may also, in its discretion, establish or approve HAC standards through traditional rulemaking procedures, including, where appropriate, standards for mobile handsets through existing delegations of rulemaking authority under 47 CFR 20.19(k), independently of the alternative process added by the CVAA. More specifically, the Commission proposes that the standards development process must (1) be open to participation by all relevant stakeholders who have legitimate and meaningful interests in the process, (2) allow all interested parties, including consumers and groups representing them, to comment on a proposed standard prior to adoption and to have

their comments considered by the working groups that develop the standards, and (3) provide an appeal mechanism that allows interested parties to seek review of standards-setting decisions.

26. The Commission believes that the current ANSI process meets such criteria. Accordingly, the Commission proposes that a wireline telephone or other CPE or a wireless handset will be considered hearing aid compatible for purposes of section 710 of the Act, if it complies with a relevant technical standard adopted by ANSI using a process compliant with the requirements of section 710(c) of the Act, and further proposes that this include standards that cover equipment, services, or frequency bands not presently covered by the existing ANSI standards. The Commission seeks comment on whether it would be in the public interest for parties to be permitted to rely on technical standards developed under the ANSI process for purposes of assessing their equipment’s compliance with our HAC rules. The Commission also seeks comment on whether and how the ANSI standards development process can achieve Congress’s objective to ensure that the views of the public, including people with hearing loss, are considered in the establishment and approval of HAC technical standards. The Commission seeks comment on the extent to which this process is appropriate for consumer groups representing the interests of people with hearing loss to provide input into the development of HAC standards. Before a new standard is adopted, according to ANSI documents, all interested parties have a chance to comment on the revision and to have their comments considered by the working group. Will this process afford such individuals the opportunity to comment on proposed new or revised standards prior to their adoption even if such individuals are not ANSI members? Have consumer groups or individuals representing hearing loss interests participated in such standards-setting efforts in the past, and if so, what has been their experience with this process? What would be the most effective role for consumer groups and individual consumers in the process of setting standards for HAC that are based on complex engineering issues? The process also includes an appeal mechanism. Does ANSI’s appeal mechanism adequately protect consumer interests? To what extent do interested parties believe that the ANSI process will be capable of ensuring that revisions to HAC technical standards

will meet the needs of all interested stakeholders? The Commission also invites comment on whether there are other relevant standards development organizations following processes that could meet the requirements of section 710(c) of the Act. Commenters who recommend that the Commission recognize a particular alternative standards development organization or process should explain why such an organization or process qualifies as a “public participation process” for purposes of section 710(c) of the Act and why it is an appropriate process for development of a standard for assessing HAC compliance.

27. Section 710(c) of the Act further requires that standards be developed in consultation with “interested consumer stakeholders” who are “designated by the Commission.” The Commission proposes to direct the Commission’s newly formed Disability Advisory Committee (DAC) to provide recommendations on who should be designated as “interested consumer stakeholders” for purposes of section 710(c) of the Act and further proposes that the Consumer and Governmental Affairs Bureau (CGB) consider such recommendations in making these final designations. Additionally, the Commission proposes that the DAC be directed to consult with nationally recognized consumer organizations, both appointed to and outside of the DAC, that have expertise on HAC and related telecommunications issues. Further, the Commission proposes that, to qualify for designation as “interested consumer stakeholders,” individuals or organizations should have technical expertise in the field of hearing loss and a high level of knowledge about the communication needs of people who are deaf and hard of hearing. The Commission seeks comment on these proposed criteria and any other applicable criteria for designation of consumer stakeholders. Finally, the Commission proposes that each consumer representative or organization receiving a designation as an “interested consumer stakeholder” maintain such designation for a period of two years, with the process described above being repeated at the end of each two-year period. The Commission believes that taking this approach will provide the expertise and stability needed for effective participation in the standards-setting process. The Commission seeks comment on these proposals, as well as how many consumer stakeholders to designate.

28. The Commission proposes to define “in consultation with interested consumer stakeholders” as signifying a

process in which consumer stakeholders designated by the Commission are allowed to participate from the start and throughout the standards development process. The Commission further proposes that when there is adherence to this process, the resulting standards may become effective for compliance purposes in an accelerated manner pursuant to section 710(c) of the Act as amended by the CVAA. The Commission seeks comment on this proposal, and whether designated consumer stakeholders should also be invited to serve as voting members of relevant standards development committees such as TIA's TR-41 committee and ANSI ASC C63®-EMC. Would such voting membership be consistent with existing committee procedures, or would changes in committee procedures or by-laws be needed to accommodate it? Further, regarding possible steps to secure effective participation, the Commission seeks comment on whether, in order to qualify as a consumer consultation process under section 710(c) of the Act, organization membership fees that may ordinarily be required for participation in the ANSI standards setting process should be waived for Commission-designated consumer stakeholders operating under a tax-exempt, non-profit status, and whether reasonable accommodations, such as sign language interpreters and communication access real-time translation (CART), should be provided for the attendance and participation of such designees during committee deliberations, at no cost to individuals needing such accommodations. The Commission seeks comment on these proposals, their costs and benefits, and their advantages or disadvantages in advancing the purposes of section 710 of the Act. Commenters who believe that other types of processes would be more appropriate and sufficient to ensure effective public participation and "consultation with interested consumer stakeholders" as required by section 710(c) of the Act are asked to provide detailed proposals for how such alternatives would achieve the desired objectives.

29. The Commission emphasizes that section 710(c) of the Act, as amended, does not mandate that any standards-setting organization change its procedures to provide for consultation with interested consumer stakeholders designated by the Commission. In the event that a standards-setting organization were to conclude that consultation with consumer stakeholders, as defined by the rules

adopted in this proceeding, is not practicable or is inconsistent with the needs of the organization, the only legal consequence would be that, as is currently the case, standards developed by that organization would need to be formally adopted in a Commission rulemaking before they could be relied upon for hearing aid compatibility compliance purposes. Alternatively, a standard could be developed by another organization through a process that complies with section 710(c) of the Act and the Commission's implementing rules. The Commission invites comment on whether, in the event that ANSI chooses not to incorporate a consumer consultation process into its standards-setting procedures, the Commission should recognize another organization for purposes of section 710(c) of the Act, and invites commenters supporting recognition of another standards-setting body to propose other bodies for consideration.

30. In order to fully implement section 710(c) of the Act, as amended, it appears necessary to provide for Commission review of HAC standards after they have been developed, while allowing industry to rely on such standards for HAC compliance purposes "until such time as the Commission may determine otherwise." The Commission proposes that, upon publication by ANSI of a new or revised HAC standard, the relevant Bureaus and Offices shall issue a public notice describing such standard, specifying the effective date set by ANSI and the equipment and services to which the standard applies, and indicating where the standard and related information can be obtained. The Commission proposes that in such public notice, the relevant Bureaus and Offices shall initiate a review of the standard by seeking public comment on (1) whether the public participation and consumer consultation processes specified by section 710(c) of the Act and by the rules adopted in this proceeding were followed in developing the new or revised standard, and (2) whether the use of the standard to determine whether wireline telephones, other customer premises equipment, or wireless handsets are hearing aid compatible meets the substantive requirements of section 710 of the Act. The Commission seeks comment on this proposal generally, its costs and benefits, and the following matters in particular.

31. The Commission invites comment on whether ANSI should be permitted to seek Commission review of a draft standard that has been approved by a subcommittee before it is formally

approved by the parent committee, or before it is adopted through a public review process. Would the benefit of earlier Commission approval that could be gained by initiating review at an intermediate stage justify the potential for administrative waste if a draft standard is subsequently revised prior to its final adoption by the standards-setting organization? What other advantages or disadvantages are there for allowing such intermediate review?

32. The Commission proposes that the Commission's review be conducted by the relevant Bureau—CGB in the case of wireline standards and WTB in the case of wireless standards—in conjunction with the Office of Engineering and Technology (OET), and that such review be completed, and a determination issued by the relevant bureau approving or disapproving such standards, no later than 180 days after the review period begins. The Commission seeks comment on whether this timetable will be sufficient to ensure that the Commission addresses its responsibilities under section 710(c) of the Act. The Commission also seeks comment on what consequences should ensue in the event that the timetable is not met. Should the standard be deemed approved? Or should the proceeding remain open, so that a decision approving or disapproving the standard could still be made based on the record compiled, despite the expiration of the timetable? The Commission invites commenters to suggest alternative processes, such as, for Commercial Mobile Radio Service (CMRS) handsets, modification of the existing delegations of authority under § 20.19(k) of its rules, that they believe will more effectively or appropriately address the Commission's section 710(c) of the Act responsibilities.

33. The Commission seeks comment on the necessity of, and the appropriate procedure for, amending the Commission's rules to reflect Commission approval of a standard developed by ANSI in accordance with the manner described above. The Commission proposes that, where a technical standard has been approved for HAC compliance purposes pursuant to the Commission review process described above, such approval shall be codified in the Commission's rules. The Commission seeks comment on this proposal. The Commission also seeks comment on the appropriate procedure for phasing out reliance on a standard when it has been superseded by a revised version, *i.e.*, whether and how to terminate industry's ability to rely on a superseded standard.

34. The Commission seeks comment on whether the various processes set forth above for implementation of section 710(c) of the Act are consistent with section 559 of the Administrative Procedure Act (APA), which states that a “[s]ubsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly.” 5 U.S.C. 559. The District of Columbia Circuit has held that a statute may be found to authorize an administrative agency to adopt rules outside of an APA procedure if “Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm.” *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998). Specifically, the Commission seeks comment on the extent to which commenters believe that any components of the above processes differ from processes required by the APA, and whether § 710(c) of the Act nevertheless authorizes the Commission to implement such processes.

Incorporation by Reference

35. The Office of Federal Register (OFR) recently revised the regulations to require that agencies must discuss in the preamble of a proposed rule ways that the materials the agency proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties. In addition, the preamble of the proposed rule must summarize the material. 1 CFR 51.5(a). In accordance with OFR’s requirements, the discussion in this section summarizes the 2012 ANSI Wireline Volume Control Standard. The following document is available from the American National Standards Institute (ANSI), Sales Department, 11 West 42nd Street, 13th Floor, New York, NY 10036, (212) 642-4900, or at http://global.ihs.com/search_res.cfm?RID=TIA&INPUT_DOC_NUMBER=ANSI/TIA-4965: “ANSI/TIA-4965-2012, Receive Volume Control Requirements for Digital and Analog Wireline Terminals.” This standard modifies in two ways the manner in which amplification is measured for wireline phones. First, the standard discontinues the use of an IEC-318 coupler and specifies instead the Head and Torso Simulator (HATS) method. Second, the standard replaces the Receive Objective Loudness Rating (ROLR) method of calibrating amplification with a new method called Conversational Gain.

Initial Regulatory Flexibility Act Analysis

36. As required by the Regulatory Flexibility Act, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in document FCC 15-144. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the applicable deadline for comments as indicated in the **DATES** section. The Commission will send a copy of document FCC 15-144, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). See 5 U.S.C. 603(a).

Need For, and Objectives of, the Proposed Rules

37. The Commission proposes to amend the HAC rules with the goal of ensuring that Americans with hearing loss are able to access wireline and wireless communications services through a wide array of phones, including VoIP telephones.

38. Regarding wireline equipment, the Commission seeks comment on a Commission proposal to incorporate into the rules a revised industry volume control standard—ANSI/TIA-4965-2012 (2012 ANSI Wireline Volume Control Standard)—that appears likely to improve the ability of people with hearing loss to select wireline telephones with sufficient volume control to meet their communication needs and provide greater regulatory certainty for the industry. The revised standard modifies the physical set-up for measuring amplification for wireline phones, by discontinuing the use of an IEC-318 coupler, which must form a seal with the telephone handset, and specifying instead the HATS method, which uses a mannequin with a human pinna (outer ear) simulator. In addition, the new standard replaces the ROLR method of calibrating amplification with a new method called Conversational Gain. According to TIA, the new standard will provide a more consistent experience of amplified gain level, enabling consumers with hearing loss to better assess and compare the merits of various models of terminal equipment. The Commission believes that incorporating the 2012 ANSI Wireline Volume Control Standard into the wireline volume control rule will make the rule more effective in ensuring that people with hearing loss have “equal access to the national

telecommunications network” (Public Law 100-394, sec. 2(1)) and that telephones provide “an internal means for effective use with hearing aids” (47 U.S.C. 610(b)).

39. The Commission also proposes to apply the Commission’s wireline telephone volume control and other HAC requirements to handsets used with VoIP services. See 47 CFR 68.4, 68.6. This proposal implements the CVAA (Public Law 111-260; Public Law 111-265), which provides that the HAC requirements of the Act apply to all customer premises equipment used with advanced communications services, including VoIP services. The Commission seeks comment on the costs, benefits, and technical impacts of applying the rules to VoIP equipment, whether volume control and inductive coupling parameters for such equipment can be effectively measured under the 2012 ANSI Wireline Volume Control Standard and the currently applicable inductive coupling standard (47 CFR 68.316, 68.317), the appropriate timetables or benchmarks that may be necessary to take account of technical feasibility or to ensure the marketability or availability of new technologies to users, whether any different treatment of VoIP CPE is appropriate under the part 68 rules addressing complaint handling, labeling, certifications, and suppliers’ declarations of conformity, and whether it would be appropriate to require registration of VoIP CPE in a public database, such as the database of terminal equipment that ACTA administers.

40. Regarding wireless equipment, the Commission seeks comment on a Commission proposal to adopt a volume control rule and standard for wireless handsets. In light of the greatly expanded role of wireless voice communications in our society, the Commission believes that adopting a specific volume control requirement for wireless handsets is necessary to achieve effective acoustic coupling and improve communication for people with hearing loss. The Commission seeks comment on the costs and benefits of adopting a volume control requirement for wireless handsets, what specific burdens, if any, are associated with requiring handsets to achieve a specified amplification level, and whether a volume control requirement should apply to all wireless handsets or to a subset of total handset sales or models, as with the current HAC rule. Finally, the Commission seeks comment on the appropriate standard for volume control in wireless phones and on whether to address, via standards or through other means, factors other than

amplification that affect the ability of consumers with hearing loss to hear and understand speech received over wireless handsets, such as frequency response and distortion and magnetic field strength issues.

41. In addition, the Commission seeks comment on its proposals to require manufacturers to use exclusively the 2011 ANSI Wireless HAC Standard for certifying future handsets as hearing aid compatible and to eliminate the power-down exception to the existing wireless HAC rule. 47 CFR 20.19(e)(1)(iii). Since July 2013, manufacturers appear to have been using the 2011 ANSI Wireless HAC Standard to test the vast majority of their new handsets. In order to facilitate meeting the 2007 version of the standard, certain handsets were allowed to be tested using less than maximum output power, but that exception appears to be unnecessary for purposes of meeting the 2011 standard.

42. Regarding all equipment subject to HAC requirements, the Commission seeks comment on a proposed streamlined process for allowing manufacturers and service providers to rely on a new or revised technical standard as sufficient for assessing compliance with relevant HAC requirements, without a prior Commission rulemaking, if the standard is developed by an ANSI-accredited standards development organization in accordance with an appropriate public participation process and in consultation with consumer stakeholders designated by the Commission, as required by the CVAA. Public Law 111-260, sec. 102(b); 47 U.S.C. 610(c). In particular, the Commission seeks comment on its proposals to recognize the ANSI process as a "public participation process" for purposes of 47 U.S.C. 610(c), to require that for a standard to qualify for accelerated incorporation into the HAC rule, consumer stakeholders designated by the Commission must be allowed to participate throughout the standards development process, and to provide for streamlined Commission post-effectiveness review of standards to ensure consistency with statutory requirements.

Legal Basis

43. The authority for this proposed rulemaking is contained in sections 4(i) and 710 of the Act. 47 U.S.C. 154(i), 610.

Description and Estimate of the Number of Small Entities Impacted

44. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of

small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**." A "small business concern" is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

45. *Small Entities*. The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three comprehensive small entity size standards that encompass entities that could be directly affected by the proposals under consideration. As of 2009, small businesses represented 99.9% of the 27.5 million businesses in the United States, according to the SBA. Additionally, a "small organization" is generally any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Nationwide, as of 2007, there were approximately 1,621,215 small organizations. Independent Sector, "The New Nonprofit Almanac and Desk Reference" (2010). Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2011 indicate that there were 90,056 local governmental jurisdictions in the United States. The Commission estimates that, of this total, as many as 89,327 entities may qualify as "small governmental jurisdictions." Thus, the Commission estimates that most local governmental jurisdictions are small.

46. *Wireless Telecommunications Carriers (except satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services

using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services. The appropriate size standard under SBA rules is for the category Wireless Telecommunications Carriers (except satellite). For that category a business is small if it has 1,500 or fewer employees. For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year. Of this total, 1,368 firms had employment of fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carrier (except satellite) firms are small.

47. *Satellite Telecommunications*. According to the U.S. Census Bureau, the category of "Satellite Telecommunications" comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." The category has a small business size standard of \$32.5 million or less in average annual receipts, under SBA rules. For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year. Of this total, 482 firms had annual receipts of less than \$25 million. Consequently, the Commission estimates that the majority of satellite telecommunications providers are small entities that might be affected by its action.

48. *All Other Telecommunications*. "All Other Telecommunications" is defined by the U.S. Census Bureau as follows: "This U.S. industry comprises establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or VoIP services via client-supplied telecommunications connections are also included in this industry." The SBA has developed a small business size standard for All Other Telecommunications, which consists of all such firms with gross annual receipts of \$32.5 million or less. For this

category, census data for 2007 show that there were 2,383 firms that operated for the entire year. Of those firms, a total of 2,346 had gross annual receipts of less than \$25 million. Thus, a majority of All Other Telecommunications firms potentially affected by the proposed rule can be considered small.

49. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category to comprise “establishments primarily engaged in manufacturing wire telephone and data communications equipment.” The Census Bureau further states: “These products may be stand alone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.” In this category the SBA deems a telephone apparatus manufacturing business to be small if it has 1,000 or fewer employees. For this category of manufacturers, census data for 2007 showed that there were 398 such establishments that operated that year. Of those 398 establishments, 393 had fewer than 1,000 employees. Thus, under this size standard, the majority of establishments in this industry can be considered small.

50. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this industry as comprising “establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by the establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has established a size standard for this industry that classifies any business in this industry as small if it has 750 or fewer employees. Census Bureau data for 2007 indicate that in that year 939 such businesses operated. Of that number, 912 businesses operated with less than 500 employees. Based on this data, the Commission concludes that a majority of businesses in this industry are small by the SBA standard.

51. *Electronic Computer Manufacturing.* According to the U.S. Census Bureau, this category “comprises establishments primarily

engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers. Computers can be analog, digital, or hybrid. Digital computers, the most common type, are devices that do all of the following: (1) Store the processing program or programs and the data immediately necessary for the execution of the program; (2) can be freely programmed in accordance with the requirements of the user; (3) perform arithmetical computations specified by the user; and (4) execute, without human intervention, a processing program that requires the computer to modify its execution by logical decision during the processing run. Analog computers are capable of simulating mathematical models and contain at least analog, control, and programming elements. The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product.” The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. According to Census Bureau data for 2007, there were 425 establishments in this category that operated that year. Of these, 419 had less 1,000 employees. Consequently, the Commission estimates that the majority of these establishments are small entities that may be affected by its action.

52. *Computer Terminal Manufacturing.* According to the U.S. Census Bureau, this category “comprises establishments primarily engaged in manufacturing computer terminals. Computer terminals are input/output devices that connect with a central computer for processing.” As of December 2, 2014, the category “Computer Terminal Manufacturing,” North American Industry Classification System (NAICS) Code 334113, was superseded by a new NAICS Code classification, “Computer Terminal and Other Computer Peripheral Manufacturing,” NAICS Code 334118. However, since this rule making concerns only computer terminal manufacturing, only national data from the 2007 Census has been used to provide information about that industry. The SBA size standard, defining a firm within that industry as small if it has 1,000 or less employees, remained unchanged when NAICS Code 334113 was changed to NAICS Code 334118. The SBA has developed a small business size standard for this category of manufacturing; that size standard is

1,000 or fewer employees. According to Census Bureau data for 2007, there were 43 establishments in this category that operated that year. Of this total, all 43 had less than 500 employees. Consequently, the Commission estimates that the majority of these establishments are small entities that may be affected by its action.

53. *Software Publishers.* According to the U.S. Census Bureau, this category “comprises establishments primarily engaged in computer software publishing or publishing and reproduction. This industry comprises establishments primarily engaged in computer software publishing or publishing and reproduction. Establishments in this industry carry out operations necessary for producing and distributing computer software, such as designing, providing documentation, assisting in installation, and providing support services to software purchasers. These establishments may design, develop, and publish, or publish only.” The SBA has developed a small business size standard for software publishers, which consists of all such firms with gross annual receipts of \$38.5 million or less. For this category, census data for 2007 show that there were 5,313 firms that operated for the entire year. Of those firms, a total of 4,956 had gross annual receipts less than \$25 million. Thus, a majority of software publishers potentially affected by the proposed rule can be considered small.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

54. Certain rule changes proposed, if adopted by the Commission, would modify rules or add requirements governing reporting, recordkeeping, and other compliance obligations.

55. If the Commission were to incorporate the 2012 ANSI Wireline Volume Control Standard into the wireline volume control rules and eliminate the currently applicable standard after a transition period, such action would alter the compliance obligations of wireline telephone apparatus manufacturers, including small entities, by requiring them to use a different method for testing and evaluating compliance with the volume control requirement.

56. If the Commission were to explicitly apply some or all of the Commission’s wireline telephone volume control and other HAC rules, which include related labeling, certification, complaint processing, and registration requirements, to handsets used with VoIP services, such action

would impose new compliance obligations and reporting and recordkeeping obligations on some wireline telephone apparatus manufacturers, electronic computer manufacturers, computer terminal manufacturers, and software publishers, including small entities.

57. If the Commission were to adopt a rule and standard for wireless handsets to address volume control and other acoustic coupling issues, such action would impose new compliance obligations and may impose additional reporting and recordkeeping obligations on wireless telecommunications carriers, satellite telecommunications providers, and wireless communications equipment manufacturers, including small entities.

58. If the Commission were to modify the 2011 ANSI Wireless HAC Standard to achieve more effective coupling between handsets and hearing aids or cochlear implants, such action would alter the compliance obligations of wireless telecommunications carriers, satellite telecommunications providers, and wireless communications equipment manufacturers, including small entities. However, such changes would not result in new regulatory burdens.

59. If the Commission were to require manufacturers to use exclusively the 2011 ANSI Wireless HAC Standard (with any modifications adopted in this rulemaking) to certify future handsets as hearing aid compatible and eliminate the power-down exception to the existing wireless HAC rule, such action would alter the compliance obligations of wireless telecommunications carriers, satellite telecommunications providers, and wireless communications equipment manufacturers, including small entities. However, such changes would not result in new regulatory burdens.

60. If the Commission were to adopt a rule providing that, pursuant to section 710(c) of the Act, equipment may be considered to be in compliance with HAC rules if it complies with relevant ANSI technical standards, such action could affect the compliance obligations of wireless telecommunications carriers, satellite telecommunications providers, and wireless communications equipment manufacturers, including small entities.

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

61. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include

the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. 5 U.S.C. 603(b).

62. Regarding the Commission's proposal to incorporate the 2012 ANSI Wireline Volume Control Standard into the wireline volume control rules, the Commission notes that 2012 ANSI Wireline Volume Control Standard is a performance standard, not a design standard, and therefore implements alternative (3) above. Further, to minimize the difficulty of adjusting to the revised standard, the Commission proposes to allow a phase-in period during which manufacturers may comply with either the existing standard or the 2012 ANSI Wireline Volume Control Standard. Finally, to limit any potential burdens regarding the impact of the proposed rule change and future rule changes on previously manufactured telephones, the Commission proposes to amend its rules to allow the existing inventory and installed base of telephones that comply with the existing volume control standard to remain in place until retired and to clarify that future minor changes to the HAC and volume control standards will not result in a requirement to modify existing inventories or installed telephones. Each of these possible approaches, if adopted, could help minimize the impact of the revised standard on small entities. Further, if this revised standard more accurately measures the amplification achievable by wireline telephone products, incorporation of this standard could lighten regulatory burdens by increasing market certainty, promoting a level playing field, and reducing the number of complaints made to manufacturers by consumers of their products.

63. Regarding the Commission's proposal to amend 47 CFR part 68 to explicitly provide that customer premises equipment used with a VoIP service is subject to the wireline HAC and volume control requirements, the Commission notes that the standards provided in the rules are performance standards, not design standards. Further, the proposed rule amendment could increase regulatory certainty and market fairness regarding the application of the wireline HAC rules.

In addition, the Commission seeks comment on the appropriate timetables or benchmarks that may be necessary in order to take account of technical feasibility or to ensure the marketability or availability of new technologies to users. Such timetables or benchmarks could help minimize the impact of the revised standard on small entities.

64. Regarding the Commission's proposals (1) to adopt a rule and standard for wireless handsets to address volume control, (2) to require manufacturers to use the 2011 ANSI Wireless HAC Standard exclusively and (3) to eliminate the power-down exception to the existing wireless HAC rule, the Commission notes that the 2011 ANSI Wireless HAC Standard is a performance standard, not a design standard. In addition, the existing HAC rule limits the number of models that must comply with the rule, especially for smaller carriers and manufacturers, and the Commission seeks comment on whether a volume control requirement, if adopted, should utilize the same approach, which could help minimize the impact on small entities.

65. Regarding the Commission's proposal to permit industry to rely on HAC standards developed pursuant to section 710(c) of the Act, in advance of a Commission rulemaking, such action would not result in new or increased regulatory burdens and may decrease regulatory burdens on small entities.

Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals

66. None.

List of Subjects in 47 CFR Parts 20 and 68

Incorporation by reference, Individuals with disabilities, Telecommunications, Telephones.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend title 47 of the Code Federal Regulations as follows:

PART 20—COMMERCIAL MOBILE SERVICES

■ 1. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 615, 615a, 615b, 615c.

■ 2. Amend § 20.19 by:

- a. Revising paragraphs (b)(1) and (2) and (l) introductory text;
- b. Removing the word “and” at the end of paragraph (e)(1)(ii)(B) and removing the period at the end of paragraph (e)(1)(ii)(C) and adding “; and” in its place; and
- c. Adding paragraphs (e)(1)(iii)(D) and (k)(3).

The revisions and additions read as follows:

§ 20.19 Hearing aid-compatible mobile handsets.

* * * * *

(b) *Hearing aid compatibility; technical standards*—(1) *For radio frequency interference and other aspects of acoustic coupling*—(i) *Radio frequency interference*. A wireless handset submitted for equipment certification or for a permissive change relating to hearing aid compatibility must either comply with a standard meeting the requirements of paragraph (k)(3) of this section or meet, at a minimum, the M3 rating associated with the technical standard set forth in the standard document “American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids,” ANSI C63.19–2011. Any grants of certification issued before [SIX MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE], under previous versions of ANSI C63.19 remain valid for hearing aid compatibility purposes.

(ii) *Volume control*. A wireless handset submitted for equipment certification or for a permissive change relating to hearing aid compatibility must include volume control that is compliant with a relevant technical standard established or approved by the Commission pursuant to 47 U.S.C. 710(c).

(2) *For inductive coupling*. A wireless handset submitted for equipment certification or for a permissive change relating to hearing aid compatibility must either comply with a standard meeting the requirements of paragraph (k)(3) of this section or meet, at a minimum, the T3 rating associated with the technical standard set forth in the standard document “American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids,” ANSI C63.19–2011. Any grants of certification issued before [SIX MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE], under previous versions of ANSI C63.19 remain valid for hearing aid compatibility purposes.

* * * * *

- (e) * * *
- (1) * * *
- (iii) * * *

(D) The handset was certified as meeting the requirements of paragraph (b)(1) of this section with the power reduction prior to [SIX MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

* * * * *

- (k) * * *

(3) *Reliance on standards developed through a public participation and consumer consultation process*—(i) *General*. Wireless handsets that are compliant with a new or revised technical standard developed in accordance with this paragraph (k)(3) shall be considered hearing aid compatible for purposes of each relevant requirement of this section until such time as the Commission may determine otherwise.

(ii) *Qualifying public participation standards development process*. For a handset to be considered hearing aid compatible under this paragraph (k)(3), the handset must comply with a standard that was developed through a voluntary and consensus-driven process under the *aegis* of a standards-setting body that is recognized by the Commission for purposes of this paragraph (k)(3). Such process must:

- (A) Be open to participation by all relevant stakeholders who have legitimate and meaningful interests in the process;
- (B) Allow all interested parties, including consumers and groups representing them, to comment on a proposed standard prior to adoption and to have their comments considered by the working groups that develop the standards; and
- (C) Provide an appeal mechanism that allows interested parties to seek review of standards-setting decisions.

(iii) *Consultation with consumer stakeholders*. For a handset to be considered hearing aid compatible under this paragraph (k)(3), the handset must comply with a standard that was developed in consultation with interested consumer stakeholders as described in this paragraph (k)(3)(iii). Consumer stakeholders designated by the Consumer and Governmental Affairs Bureau shall be given the option to participate at the start of and throughout the standards development process and shall be invited to participate in relevant subcommittees and working groups. Any organization membership fees that may ordinarily be required for participation in the standards-setting process shall be waived for consumer organizations operating under a tax-

exempt, non-profit status, and reasonable accommodations, such as sign language interpreters and communication access real-time translation (CART), shall be provided, as needed, for the attendance and participation of such designees during committee deliberations, at no cost to individuals needing such accommodations.

(l) The standards listed in this section are incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All material associated with the standards listed in this paragraph (l) is available for inspection at the Federal Communications Commission (FCC), 445 12th St. SW., Reference Information Center, Room CY–A257, Washington, DC 20554 and is available from the sources indicated below. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.htm.

These standards may also be viewed on the “ANSI Incorporated by Reference (IBR) Portal” at <http://ibr.ansi.org/>.

* * * * *

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

- 3. The authority citation for part 68 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

- 4. Revise § 68.1 to read as follows:

§ 68.1 Purpose.

The purpose of the rules and regulations in this part is to provide for uniform standards for the protection of the telephone network from harms caused by the connection of terminal equipment and associated wiring thereto, for the compatibility of hearing aids and telephones, and the compatibility of hearing aids and customer premises equipment used to access advanced communications services, so as to ensure that, to the fullest extent made possible by technology and medical science, people who are deaf and hard of hearing have equal access to the national telecommunications network.

- 5. Amend § 68.2 by revising paragraph (a) to read as follows:

§ 68.2 Scope.

(a) Except as provided in paragraphs (b) and (c) of this section, the rules and

regulations apply to direct connection of all terminal equipment to the public switched telephone network for use in conjunction with all services other than party line services. Sections 68.4, 68.5, 68.6, 68.112, 68.160, 68.162, 68.201, 68.211 (except paragraph (a)(2)), 68.218, 68.224, and subparts D (except §§ 68.318, 68.324(e)(1) and (2), and 68.354) and E of this part also apply to “ACS telephonic CPE” as defined in § 68.3, for the purpose of achieving compliance with hearing aid compatibility and volume control requirements.

* * * * *

■ 6. Revise § 68.3 to read as follows:

§ 68.3 Definitions.

ACS Telephonic CPE. Customer premises equipment used with advanced communications services that is designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally equivalent to a telephone, except for mobile handsets.

Advanced communications services. Interconnected VoIP service, non-interconnected VoIP service, electronic messaging service, and interoperable video conferencing service.

Demarcation point (also point of interconnection). As used in this part, the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber’s premises.

Essential telephones. Only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids.

Harm. Electrical hazards to the personnel of providers of wireline telecommunications, damage to the equipment of providers of wireline telecommunications, malfunction of the billing equipment of providers of wireline telecommunications, and degradation of service to persons other than the user of the subject terminal equipment, his calling or called party.

Hearing aid compatible. Except as used at §§ 68.4(a)(3), 68.315, and 68.414, the terms “hearing aid compatible” or “hearing aid compatibility” shall have the meaning defined in § 68.316, unless it is specifically stated that hearing aid compatibility volume control, as defined in § 68.317, is intended or is included in the definition.

Inside wiring or premises wiring. Customer-owned or controlled wire on the subscriber’s side of the demarcation point.

Premises. As used herein, generally a dwelling unit, other building or a legal unit of real property such as a lot on which a dwelling unit is located, as determined by the provider of telecommunications service’s reasonable and nondiscriminatory standard operating practices.

Private radio services. Private land mobile radio services and other communications services characterized by the Commission in its rules as private radio services.

Public mobile services. Air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, and other common carrier radio communications services covered by part 22 of title 47 of the Code of Federal Regulations.

Responsible party. The party or parties responsible for the compliance of terminal equipment or protective circuitry that is intended for connection directly to the public switched telephone network or for use with advanced communications services with the applicable rules and regulations in this part and with any applicable technical criteria published by the Administrative Council for Terminal Attachments (see §§ 68.604 and 68.608). If a Telecommunications Certification Body certifies the terminal equipment, the responsible party is the holder of the certificate for that equipment. If the terminal equipment is the subject of a Supplier’s Declaration of Conformity, the responsible party shall be: the manufacturer of the equipment, or the manufacturer of protective circuitry that is marketed for use with terminal equipment that is not to be connected directly to the network, or if the equipment is imported, the importer, or if the equipment is assembled from individual component parts, the assembler. If the equipment is modified by any party not working under the authority of the responsible party, the party performing the modifications, if located within the U.S., or the importer, if the equipment is imported subsequent to the modifications, becomes the new responsible party. Retailers or original equipment manufacturers may enter into an agreement with the assembler or importer to assume the responsibilities to ensure compliance of the terminal equipment and to become the responsible party.

Secure telephones. Telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications.

Terminal equipment. As used in this part, communications equipment

located on customer premises at the end of a communications link, used to permit the stations involved to accomplish the provision of telecommunications or information services. “Terminal equipment” includes ACS telephonic CPE.

■ 7. Revise § 68.201 to read as follows:

§ 68.201 Connection to the public switched telephone network.

Terminal equipment may not be connected to the public switched telephone network unless it has either been certified by a Telecommunications Certification Body or the responsible party has followed all the procedures in this subpart for Supplier’s Declaration of Conformity. ACS telephonic equipment must be certified by a Telecommunications Certification Body or the responsible party has followed all the procedures in this subpart for Supplier’s Declaration of Conformity.

■ 8. Amend § 68.211 by revising paragraph (d) to read as follows:

§ 68.211 Terminal equipment approval revocation procedures.

* * * * *

(d) *Reauthorization.* A product that has had its approval revoked may not be re-authorized for a period of six months from the date of revocation of the approval.

* * * * *

■ 9. Revise § 68.218 to read as follows:

§ 68.218 Responsibility of the party acquiring equipment authorization.

(a) In acquiring approval for terminal equipment to be connected to the public switched telephone network or for ACS telephonic equipment, the responsible party warrants that each unit of equipment marketed under such authorization will comply with all applicable rules and regulations of this part and with any applicable technical criteria of the Administrative Council for Terminal Attachments (see §§ 68.604 and 68.608).

(b) In the case of terminal equipment that is directly connected to the public switched telephone network, the responsible party or its agent shall provide the user of the approved terminal equipment the following:

(1) Consumer instructions required to be included with approved terminal equipment by the Administrative Council for Terminal Attachments (see § 68.610);

(2) For a telephone that is not hearing aid-compatible, as defined in § 68.316 of these rules:

(i) Notice that FCC rules prohibit the use of that handset in certain locations; and

(ii) A list of such locations (*see* § 68.112).

(c) When approval is revoked for any item of equipment, the responsible party must take all reasonable steps to ensure that purchasers and users of such equipment are notified to discontinue use of such equipment.

■ 10. Amend § 68.300 by revising paragraph (a) to read as follows:

§ 68.300 Labeling requirements.

(a) Terminal equipment approved as set out in this part must be labeled in accordance with any applicable requirements published by the Administrative Council for Terminal Attachments (*see* §§ 68.604 and 68.608) and with requirements of this part for hearing aid compatibility and volume control.

* * * * *

■ 11. Add § 68.315 to subpart D to read as follows:

§ 68.315 Hearing aid compatibility; reliance on standards developed through a public participation and consumer consultation process.

(a) *General.* Telephones that are compliant with a new or revised technical standard developed in accordance with this section shall be considered hearing aid compatible for purposes of §§ 68.4 and 68.6 until such time as the Commission may determine otherwise.

(b) *Qualifying public participation standards development process.* For a telephone to be considered hearing aid compatible under this section, the telephone and telephone handset must comply with a standard that was developed through a voluntary and consensus-driven process, under the *aegis* of a standards-setting body that is recognized by the Commission for purposes of this section. Such process must:

(1) Be open to participation by all relevant stakeholders who have legitimate and meaningful interests in the process;

(2) Allow all interested parties, including consumers and groups representing them, to comment on a proposed standard prior to adoption and to have their comments considered by the working groups that develop the standards; and

(3) Provide an appeal mechanism that allows interested parties to seek review of standards-setting decisions.

(c) *Consultation with consumer stakeholders.* For a telephone to be considered hearing aid compatible under this section, the telephone and telephone handset must comply with a standard that was developed in

consultation with interested consumer stakeholders as described in this paragraph (c). Consumer stakeholders designated by the Consumer and Governmental Affairs Bureau shall be given the option to participate at the start of and throughout the standards development process and shall be invited to participate in relevant subcommittees and working groups. Any organization membership fees that may ordinarily be required for participation in the standards-setting process shall be waived for consumer organizations operating under a tax-exempt, non-profit status, and reasonable accommodations, such as sign language interpreters and communication access real-time translation (CART) shall be provided, as needed, for the attendance and participation of such designees during committee deliberations, at no cost to individuals needing such accommodations.

■ 12. Amend § 68.316 by revising the introductory text to read as follows:

§ 68.316 Hearing aid compatibility: Technical requirements.

A telephone handset is hearing aid compatible for the purposes of this section if it complies with a standard meeting the requirements of § 68.315 or with the following standard, published by the Telecommunications Industry Association, copyright 1983, and reproduced by permission of the Telecommunications Industry Association:

* * * * *

■ 13. Revise § 68.317 to read as follows:

§ 68.317 Hearing aid compatibility volume control: technical standards.

(a)(1) For telephones manufactured in the United States or imported for use in the United States prior to [TWO YEARS AFTER PUBLICATION OF THE FINAL RULE], such a telephone complies with the volume control requirements of this section if it complies with:

(i) The applicable provisions of paragraphs (b) through (g) of this section;

(ii) Paragraphs (h) and (i) of this section; or

(iii) A standard meeting the requirements of § 68.315.

(2) For telephones manufactured in the United States or imported for use in the United States on or after [TWO YEARS AFTER PUBLICATION OF THE FINAL RULE], such a telephone complies with the volume control requirements of this section if it complies with:

(i) Paragraphs (h) and (i) of this section; or

(ii) A standard meeting the requirements of § 68.315.

(b) An analog telephone complies with the Commission's volume control requirements if the telephone is equipped with a receive volume control that provides, through the receiver in the handset or headset of the telephone, 12 dB of gain minimum and up to 18 dB of gain maximum, when measured in terms of Receive Objective Loudness Rating (ROLR), as defined in paragraph 4.1.2 of ANSI/EIA-470-A-1987 (Telephone Instruments With Loop Signaling). The 12 dB of gain minimum must be achieved without significant clipping of the test signal. The telephone also shall comply with the upper and lower limits for ROLR given in table 4.4 of ANSI/EIA-470-A-1987 when the receive volume control is set to its normal unamplified level.

Note to paragraph (b): Paragraph 4.1.2 of ANSI/EIA-470-A-1987 identifies several characteristics related to the receive response of a telephone. It is only the normal unamplified ROLR level and the change in ROLR as a function of the volume control setting that are relevant to the specification of volume control as required by this section.

(c) The ROLR of an analog telephone shall be determined over the frequency range from 300 to 3300 HZ for short, average, and long loop conditions represented by 0, 2.7, and 4.6 km of 26 AWG nonloaded cable, respectively. The specified length of cable will be simulated by a complex impedance. (*See* Figure A.) The input level to the cable simulator shall be -10 dB with respect to 1 V open circuit from a 900 ohm source.

(d) A digital telephone complies with the Commission's volume control requirements if the telephone is equipped with a receive volume control that provides, through the receiver of the handset or headset of the telephone, 12 dB of gain minimum and up to 18 dB of gain maximum, when measured in terms of Receive Objective Loudness Rating (ROLR), as defined in paragraph 4.3.2 of ANSI/EIA/TIA-579-1991 (Acoustic-To-Digital and Digital-To-Acoustic Transmission Requirements for ISDN Terminals). The 12 dB of gain minimum must be achieved without significant clipping of the test signal. The telephone also shall comply with the limits on the range for ROLR given in paragraph 4.3.2.2 of ANSI/EIA/TIA-579-1991 when the receive volume control is set to its normal unamplified level.

(e) The ROLR of a digital telephone shall be determined over the frequency range from 300 to 3300 Hz using the

method described in paragraph 4.3.2.1 of ANSI/EIA/TIA-579-1991. No variation in loop conditions is required for this measurement since the receive level of a digital telephone is independent of loop length.

(f) The ROLR for either an analog or digital telephone shall first be determined with the receive volume control at its normal unamplified level. The minimum volume control setting shall be used for this measurement unless the manufacturer identifies a different setting for the nominal volume level. The ROLR shall then be determined with the receive volume control at its maximum volume setting. Since ROLR is a loudness rating value expressed in dB of loss, more positive values of ROLR represent lower receive levels. Therefore, the ROLR value determined for the maximum volume control setting should be subtracted from that determined for the nominal volume control setting to determine compliance with the gain requirement.

(g) The 18 dB of receive gain may be exceeded provided that the amplified receive capability automatically resets to nominal gain when the telephone is caused to pass through a proper on-hook transition in order to minimize the likelihood of damage to individuals with normal hearing.

(h) A telephone complies with the Commission's volume control requirements if it is equipped with a receive volume control that provides, through the receiver in the handset or headset of the telephone, 18 dB of Conversational Gain minimum and up to 24 dB of Conversational Gain maximum when measured as described in ANSI/TIA-4965-2012 (Telecommunications—Telephone Terminal Equipment—Receive Volume Control Requirements for Digital and Analog Wireline Telephones). The 18 dB of Conversational Gain minimum must be achieved without significant clipping of the speech signal used for testing.

(i) The 24 dB of Conversational Gain maximum may be exceeded provided the amplified receive capability automatically resets to a level less than 18 dB of Conversational Gain when the telephone is caused to pass through a proper on-hook transition in order to minimize the likelihood of damage to individuals with normal hearing.

(j) These incorporations by reference of paragraph 4.1.2 (including table 4.4) of American National Standards Institute (ANSI) Standard ANSI/EIA-470-A-1987, paragraph 4.3.2 of ANSI/EIA/TIA-579-1991, and ANSI/TIA-4965-2012 were approved by the Director of the Federal Register in

accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of these publications may be purchased from the American National Standards Institute (ANSI), Sales Department, 11 West 42nd Street, 13th Floor, New York, NY 10036, (212) 642-4900, or <http://global.ih.com/>. Copies also may be inspected during normal business hours at the following locations: Consumer and Governmental Affairs Bureau, Reference Information Center, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554; and the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/code-of-federal-regulations/ibr-locations.html>. These standards may also be viewed on the "ANSI Incorporated by Reference (IBR) Portal" at <http://ibr.ansi.org/>.

(k) Manufacturers and other responsible parties of telephones subject to this rule shall engage in consultation with people with hearing loss and their representative organizations for the purpose of assessing the effectiveness of the standard adopted pursuant to paragraph (j) of this section. Such consultation shall include testing a sample of products certified to be compliant with the revised standard to evaluate whether products compliant with such standard are providing a uniform and appropriate range of volume to meet the telephone needs of consumers. Such consultation and testing shall occur by [ONE YEAR AFTER THE EFFECTIVE DATE OF THE FINAL RULE], pursuant to paragraph (j) of this section, with follow-up every three years thereafter to assess the impact of these technological changes.

■ 14. Amend § 68.320 by revising paragraph (e) to read as follows:

§ 68.320 Supplier's Declaration of Conformity.

* * * * *

(e) No person shall use or make reference to a Supplier's Declaration of Conformity in a deceptive or misleading manner or to convey the impression that such a Supplier's Declaration of Conformity reflects more than a determination by the responsible party that the device or product has been shown to be capable of complying with the applicable technical.

■ 15. Amend § 68.324 by adding paragraphs (e) introductory text and (g) to read as follows:

§ 68.324 Supplier's Declaration of Conformity requirements.

* * * * *

(e) For terminal equipment that is directly connected to the public switched telephone network:

* * * * *

(g) For ACS telephonic CPE subject to a Supplier's Declaration of Conformity, the responsible party shall make a copy of the Supplier's Declaration of Conformity freely available to the general public on its company Web site.

[FR Doc. 2015-31368 Filed 12-24-15; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1040

[Docket No. EP 726]

On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) is proposing a definition of "on-time performance" for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA).

DATES: Comments are due by February 8, 2016. Reply comments are due by February 29, 2016.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the "E-FILING" link on the Board's Web site, at "<http://www.stb.dot.gov>." Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 726, 395 E Street SW., Washington, DC 20423-0001.

Copies of written comments and replies will be posted to the Board's Web site and will be available for viewing and self-copying at the Board's Public Docket Room, Room 131. Copies will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245-0238 or 395 E Street SW., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at (202) 245-0386. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: By decision served on May 15, 2015, the

Board instituted a rulemaking proceeding to define “on-time performance” for purposes of Section 213 of PRIIA, 49 U.S.C. 24308(f). The Board instituted this proceeding in response to a petition for rulemaking filed by the Association of American Railroads (AAR). Any rule promulgated in this proceeding would apply to complaints under 24308(f) currently pending before the Board, as well as future complaints or investigations under that section.¹

Background. The National Railroad Passenger Corporation (Amtrak) was established by Congress in 1970 to preserve passenger services and routes on the Nation’s railroads. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U. S. 374, 383–384 (1995); *Nat’l R.R. Passenger Corp. v. Atchison, Topeka, & Santa Fe R.R.*, 470 U. S. 451, 454 (1985); see also *Rail Passenger Serv. Act of 1970*, Public Law 91–518, 84 Stat. 1328 (1970). As a condition of relieving the freight railroads of their common carrier obligation to provide passenger service, Congress required that the freight railroads permit Amtrak to operate over their tracks and use their facilities. See 45 U.S.C. 561, 562 (1970 ed.). Since 1973, Congress has required freight railroads to give Amtrak trains preference over freight trains when using the lines and facilities of freight railroads: “Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing. . . .” 49 U.S.C. 24308(c); see *Amtrak Improvement Act of 1973*, Public Law 93–146, 10(2), 87 Stat. 552 (initial version).

In 2008, Congress enacted PRIIA to address, among other things, issues related to the performance of passenger rail service, including the concern that one cause of Amtrak’s inability to achieve reliable on-time performance was the failure of host freight railroads to honor Amtrak’s right to preference. See *Passenger Rail Inv. & Improvement Act*, Public Law 110–432, Div. B, 122 Stat. 4907 (2008); S. Rep. No. 67, 110th Cong., 1st Sess. 25–26 (2007). Section 207 of PRIIA charged Amtrak and the Federal Railroad Administration (FRA) with “jointly” developing new, or improving existing, metrics and

standards for measuring the performance of intercity passenger rail operations, including on-time performance and train delays incurred on host railroads.

Under Section 213(a) of PRIIA, if the on-time performance of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board may initiate an investigation, or Amtrak and other eligible complainants may file a complaint with the Board requesting that the Board initiate an investigation. The purpose of such an investigation is to determine whether and to what extent delays are due to causes that could reasonably be addressed by the passenger rail operator or the host railroad. Following the investigation, should the Board determine that Amtrak’s substandard performance is “attributable to” the rail carrier’s “failure to provide preference to Amtrak over freight transportation as required” by 49 U.S.C. 24308(c), the Board may choose to “award damages” or other appropriate relief from a host railroad to Amtrak. 49 U.S.C. 24308(f)(2). If the Board finds it appropriate to award damages to Amtrak, Amtrak must use the award “for capital or operating expenditures on the routes over which delays” were the result of the host railroad’s failure to grant the statutorily required preference to passenger transportation. 49 U.S.C. 24308(f)(4).

On August 19, 2011, AAR filed a lawsuit in the United States District Court for the District of Columbia challenging the constitutionality of Section 207 of PRIIA. See *Ass’n of Am. R.R.s. v. Dep’t of Transp.*, 865 F. Supp. 2d 22 (D.D.C. 2012). On January 19, 2012, prior to the issuance of a decision in that case, Amtrak filed a complaint with the Board pursuant to Section 213 of PRIIA in Docket No. NOR 42134, requesting that the Board initiate an investigation into alleged “substandard performance of Amtrak passenger trains” on certain rail lines owned by CN.² Amtrak’s complaint was subsequently held in abeyance for the purposes of mediation; the mediation period expired on October 4, 2012. Later, the Board granted the parties’ request that the case again be held in abeyance to permit them to continue discussions and potentially reach a settlement. This abeyance was extended several times; most recently, on August 19, 2013, the Board extended the abeyance period to July 31, 2014, which the parties argued was warranted by their ongoing discussions and to

provide additional time that may be necessary for final resolution of the lawsuit challenging the constitutionality of Section 207(a) of PRIIA. Ultimately, however, the mediation and discussions were unsuccessful.

Meanwhile, on May 31, 2012, the District Court upheld the constitutionality of Section 207. *Ass’n of Am. R.R.s. v. Dep’t of Transp.*, 865 F. Supp. 2d at 25. AAR then appealed to the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit). The D.C. Circuit reversed the District Court, holding that Section 207 of PRIIA impermissibly delegates regulatory authority to a “private entity” (Amtrak) and, therefore, is an unconstitutional delegation of legislative power. *Ass’n of Am. R.R.s. v. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013). The D.C. Circuit’s decision was then appealed to the United States Supreme Court, which agreed to review the case.

While review was pending before the Supreme Court, on August 29, 2014, Amtrak filed a motion to amend its complaint against CN in Docket No. 42134 (the “Illini/Saluki” case). Specifically, Amtrak sought to narrow the focus of the complaint to the performance of Amtrak’s Illini/Saluki service rather than all of the Amtrak services on lines owned by CN addressed in the original complaint. In addition, on November 17, 2014, Amtrak filed a new complaint under Section 213 of PRIIA in Docket No. NOR 42141, alleging “substandard performance of Amtrak’s Capitol Limited service between Chicago, IL and Washington, D.C.” on rail lines owned by CSX Transportation, Inc. and Norfolk Southern Railway Company (the “Capitol Limited” case).³

On December 19, 2014, while the Supreme Court case was still pending, the Board issued a decision in the Illini/Saluki case (December 2014 Decision) (1) granting Amtrak’s motion to amend its complaint against CN, and (2) concluding that the pending court litigation involving the constitutionality of Section 207 did not preclude Amtrak’s complaint before the Board from moving forward. The Board also directed the parties to provide arguments and replies addressing how to construe the term “on-time performance” as the term is used in Section 213. In dissent, Commissioner Begeman stated that the Board would best fulfill its obligations under the law by initiating a rulemaking to establish clear standards by which on-time

¹ AAR requested a rulemaking only if the Board did not grant Canadian National Railway’s (CN’s) petition for reconsideration in Docket No. NOR 42134 and the motions to dismiss in Docket No. NOR 42141—the two complaint cases under 24308(f) now pending before the Board. While the Board has not ruled on those pleadings, the Board decided to institute a rulemaking proceeding and invite public participation because AAR’s petition raised a number of important issues.

² Amtrak Complaint, NOR 42134, at 2 (Jan. 19, 2012).

³ Amtrak Complaint, NOR 42141, at 2 (Nov. 17, 2014).

performance cases could be fairly processed.

CN filed a petition for reconsideration in the Illini/Saluki case on January 7, 2015. AAR also submitted a conditional petition for rulemaking in this docket on January 15, 2015. In response, the Board, on January 16, 2015, served a decision postponing the filing deadlines in the Illini/Saluki case established by the December 2014 Decision, pending further order of the Board. In the Capitol Limited case, the Board served a decision on April 7, 2015, directing the parties to engage in mediation. The mediation period concluded on August 14, 2015, without success.

On March 9, 2015, the Supreme Court reversed the D.C. Circuit's decision, finding that Amtrak is a governmental entity for purposes of analyzing the constitutional issues surrounding the delegation of authority in Section 207. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225 (2015). However, the Court remanded the case to the D.C. Circuit for consideration of AAR's other arguments regarding the constitutionality of Section 207, which the D.C. Circuit had declined to reach. *Id.* at 1234. Currently, the legality of Section 207 of PRIIA remains in dispute.

As noted, on May 15, 2015, the Board instituted this rulemaking proceeding in response to a petition filed by AAR. In that decision, the Board stated that it intended to issue a notice of proposed rulemaking and a procedural schedule in a subsequent decision. The Board found persuasive the arguments regarding the advantages of rulemaking in this situation: There are multiple on-time performance cases pending in which the Board's definition could apply; it would be efficient to obtain the full range of stakeholder perspectives in one docket, rather than piecemeal on a case-by-case basis; and defining on-time performance by rulemaking would provide clarity regarding the trigger for potential adjudications and would avoid the potential relitigation of the issue in each case, thereby conserving party and agency resources.

The Proposed Rule. The proposed rule's definition of on-time performance, which is derived from a previous definition of on-time performance used by the Interstate Commerce Commission (ICC), reads as follows:

a train is deemed to be "on time" if it arrives at its final destination within five minutes of its scheduled arrival time per one hundred miles of operation (capped at 30 minutes).

The ICC's on-time performance regulations (former 49 CFR 1124.6)

provided that an intercity passenger train "shall arrive at its final terminus no later than 5 minutes after scheduled arrival time per 100 miles of operation, or 30 minutes after scheduled arrival time, whichever is the less." The ICC explained that "[t]he public should be able to rely on the established train schedule so that plans can be made with a modicum of certainty and trains may once again be attractive to travelers for whom on-time performance is imperative." *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. 758, 776 (1973).⁴ We believe that the ICC's prior sentiment is equally valid today.

Under Section 1040.2 of the proposed rule, *Definition of "On Time,"* a train would be considered "on time" if it arrives at its final terminus no more than five minutes after its scheduled arrival time for each 100 miles the train operated, or 30 minutes after its scheduled arrival time, whichever is less. Section 1040.3 of the proposed rule, *Table of Maximum Allowances*, sets forth the following table specifying the maximum number of minutes after a scheduled arrival time that an "on-time" train may arrive at its final terminus for each distance-variable band.

Distance operated (miles)		Maximum allowance (minutes)
Over	Up to and including	
0	100	5
100	200	10
200	300	15
300	400	20
400	500	25
500	No limit	30

As set forth in the table, a train operating up to 100 miles would be "on time" if it arrives at its final terminus no more than five minutes after its scheduled arrival time. Likewise, a train operating over 100 miles but no more than 200 miles would be considered "on time" if it arrives at its final terminus no more than 10 minutes after its scheduled arrival time, and a train operating a distance over 500 miles would be considered "on time" if it arrives at its final terminus no more than 30 minutes after its scheduled arrival time.

The proposed rule also provides a framework for calculating quarterly on-

⁴ Subsequently, in the Amtrak Reorganization Act of 1979, Pub. L. 96-73, 96 Stat. 537, Congress repealed the ICC's adequacy-of-service jurisdiction over Amtrak while establishing an internal Amtrak organization with similar functions. This transfer of responsibilities, however, implied no Congressional judgment on the merits of the ICC's definition of on-time performance.

time performance for purposes of filing or initiating a complaint. As proposed in Section 1040.4, *Calculation of Quarterly On-Time Performance*, on-time performance would be calculated as a percentage for each individual calendar quarter (e.g., January 1 through March 31, April 1 through June 30, and so on) by dividing the total number of "on-time" trains that calendar quarter, as determined by distance-variable thresholds in Sections 1040.2 and 1040.3, by the total number of trains that operated during that calendar quarter. Trains that did not operate from scheduled origin to scheduled destination would be excluded from this calculation.⁵ If the on-time performance percentage, calculated as described above, falls below 80% in each calendar quarter for two consecutive calendar quarters, an eligible complainant could file a complaint requesting an investigation pursuant to Section 213(a) of PRIIA, or the Board could initiate an investigation on its own.

The Board proposes to adopt the ICC's definition because relying on a comparison between Amtrak's scheduled arrival time and the time an Amtrak train actually arrives at its final destination would be clear and relatively easy to apply. In particular, adoption of this definition would simplify the record-keeping and production of evidence that may otherwise be necessary for Amtrak and the host carriers if on-time performance were defined using a number of additional factors, such as the amount of delay at intermediate stops or construction on the host carrier's line.

The Board seeks comments from all interested persons on the proposed rule. Importantly, the Board encourages interested persons to propose and discuss potential modifications or alternatives to the proposed rule. Examples of such alternatives might include, but are not limited to: Factoring into the calculation of on-time performance a train's punctuality at intermediate stops, rather than the final terminus only; implementing alternative tables of maximum allowances with respect to either the distance-variables or the maximum allowance of minutes for each distance-variable band; or calculating the "on-time" thresholds under an entirely different methodology, such as approaches that Amtrak or other public agencies and host carriers have implemented. The

⁵ Thus, excluded from the calculation would be, for example, trains that do not operate, for any reason; trains that terminate prematurely at an intermediate point rather than the scheduled final terminus; and trains that originate at an intermediate point rather than the scheduled origin.

Board will carefully consider all recommended proposals, and may take further comment, if appropriate, in an effort to establish the most meaningful and straightforward definition of on-time performance.

Procedural Schedule. On June 12, 2015, Amtrak requested that the Board limit the comment period in this proceeding to 30 days. AAR filed a request for procedural schedule on July 16, 2015, in which it requested that the Board schedule two rounds of pleadings (opening comments and replies) before issuing a proposed rule and allow 45 days for parties to submit each (essentially, an Advanced Notice of Proposed Rulemaking).

The Board will allow six weeks for parties to file opening comments in response to this notice of proposed rulemaking and three weeks for parties to file reply comments. Given the significance of the issue at hand, the Board finds that the 30-day comment period requested by Amtrak would provide insufficient time for parties to provide comments on the proposed rule. A procedural schedule allowing reply comments is appropriate because the Board here invites comments on not only the proposed rule, but potential modifications or alternatives (on which the Board may take further comment if appropriate). This approach is intended to balance the need to provide sufficient opportunity for public comments, as urged in part by AAR, with the need to complete this proceeding as expeditiously as possible.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 603(a), or certify that the proposed rule would not have a “significant impact on a substantial number of small entities.” 605(b). The impact must be a direct impact on small entities “whose conduct is circumscribed or mandated” by the proposed rule. *White Eagle Coop. v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

The proposed regulation would not create a significant impact on a substantial number of small entities. As

noted above, host carriers have been required to allow Amtrak to operate over their rail lines since the 1970s. Moreover, an investigation concerning delays to intercity passenger traffic is a function of Section 213 of PRIIA rather than this rulemaking. The proposed rule seeks only to define “on-time performance” for the purpose of implementing the rights and obligations already established in Section 213 of PRIIA. Thus, the proposed rule does not place any additional burden on small entities, but rather clarifies an existing obligation.

Even assuming for the sake of argument that the proposed regulation were to create an impact on small entities, which it does not, the number of small entities so affected would not be substantial. The proposed definition of on-time performance would apply in proceedings involving Amtrak, currently the only provider of intercity passenger rail transportation subject to PRIIA, and its host railroads. For almost all of its operations, Amtrak's host carriers are Class I rail carriers,⁶ and Class I carriers generally do not fall within the Small Business Administration's definition of a small business for the rail transportation industry.⁷ Of a total of approximately 560 smaller carriers that do fall within the SBA's definition of a small entity, only approximately 10 currently host Amtrak traffic.⁸ Therefore, the Board certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

This proposal would not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1040

On-time performance of intercity passenger rail service.

⁶ Under the Board's regulations, Class I carriers have annual carrier operating revenues of \$250 million or more in 1991 dollars (adjusted for inflation using 2014 data, the revenue threshold for a Class I rail carrier is \$475,754,803).

⁷ The Small Business Administration's Office of Size Standards has established a size standard for rail transportation, pursuant to which a line-haul railroad is considered small if its number of employees is 1,500 or less, and a short line railroad is considered small if its number of employees is 500 or less. 13 CFR 121.201 (industry subsector 482).

⁸ This number is derived from Amtrak's Monthly Performance Report for May 2015, historical on-time performance records, and system timetable, all of which are available on Amtrak's Web site.

It is ordered:

1. Comments are due by February 8, 2016. Reply comments are due by February 29, 2016.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. Notice of this decision will be published in the **Federal Register**.

4. This decision is effective on its service date.

Decided: December 16, 2015.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

Brendetta S. Jones,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, subchapter A, of the Code of Federal Regulations by adding part 1040 as follows:

PART 1040—ON-TIME PERFORMANCE OF INTERCITY PASSENGER RAIL SERVICE

Sec.

1040.1 Purpose.

1040.2 Definition of “on time.”

1040.3 Table of maximum allowances.

1040.4 Calculation of quarterly on-time performance.

Authority: 49 U.S.C. 721 and 24308(f).

§ 1040.1 Purpose.

This section defines “on-time performance” for the purpose of implementing Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 49 U.S.C. 24308(f).

§ 1040.2 Definition of “on time.”

A train is “on time” if it arrives at its final terminus no more than five minutes after its scheduled arrival time per 100 miles of operation, or 30 minutes after its scheduled arrival time, whichever is less. This definition shall be implemented in accordance with the table provided in § 1040.3.

§ 1040.3 Table of maximum allowances.

The following table sets forth the maximum number of minutes after the scheduled arrival time that a train may arrive at its final terminus and be considered on time for the purpose of implementing 49 U.S.C. 24308(f).

Distance operated (miles)		Maximum allowance (minutes)
Over	Up to and including	
0	100	5
100	200	10

Distance operated (miles)		Maximum allowance (minutes)
Over	Up to and including	
200	300	15
300	400	20
400	500	25
500	No limit	30

§ 1040.4 Calculation of quarterly on-time performance.

In any given calendar quarter, on-time performance shall be calculated as a percentage using the following formula:

(a) The denominator shall be the number of trains that operated during that calendar quarter, excluding any train not operating from its scheduled origin to its scheduled destination; and

(b) The numerator shall be the number of trains included in the denominator that also satisfy the definition of “on-time performance,” as set forth in §§ 1040.2 and 1040.3.

[FR Doc. 2015–32411 Filed 12–24–15; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 150924885–5999–01]

RIN 0648–BF38

International Fisheries; Pacific Tuna Fisheries; Fishing Restrictions for the Area of Overlap Between the Convention Areas of the Inter-American Tropical Tuna Commission and the Western and Central Pacific Fisheries Commission

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS hereby proposes regulations under the Tuna Conventions Act to implement Recommendation C–12–11 of the Inter-American Tropical Tuna Commission (IATTC). Recommendation C–12–11 revises the management regime for the area of overlapping jurisdiction between the IATTC and the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). These proposed regulations provide that the management measures of the IATTC would no longer apply in

the area of overlapping jurisdiction, with the exception of regulations governing the IATTC Regional Vessel Register. This action is necessary for the United States to satisfy its obligations as a member of the IATTC.

DATES: Comments on the proposed rule and supporting documents must be submitted in writing by January 27, 2016.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2015–0158, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0158>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to Rachael Wadsworth, NMFS West Coast Region Long Beach Office, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802. Include the identifier “NOAA–NMFS–2015–0158” in the comments.

Instructions: Comments must be submitted by one of the above methods to ensure they are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

Copies of the draft Regulatory Impact Review and other supporting documents are available via the Federal eRulemaking Portal: <http://www.regulations.gov>, docket NOAA–NMFS–2015–0158 or by contacting the Regional Administrator, William W. Stelle, Jr., NMFS West Coast Region, 7600 Sand Point Way, NE., Bldg 1, Seattle, WA 98115–0070, or *Regional Administrator.WCRHMS@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Rachael Wadsworth, NMFS, West Coast Region, 562–980–4036.

SUPPLEMENTARY INFORMATION:

Background on the IATTC

The United States is a member of the IATTC, which was established under the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission. The full text of the 1949 Convention is available at: http://www.iattc.org/PDFFiles/IATTC_convention_1949.pdf.

The IATTC consists of 21 member nations and four cooperating non-member nations and facilitates scientific research into, as well as the conservation and management of, highly migratory species of fish in the IATTC Convention Area. The IATTC Convention Area is defined as waters of the eastern Pacific Ocean (EPO) within the area bounded by the west coast of the Americas and by 50° N. latitude, 150° W. longitude, and 50° S. latitude. The IATTC has maintained a scientific research and fishery monitoring program for many years, and regularly assesses the status of tuna and billfish stocks in the EPO to determine appropriate catch limits and other measures deemed necessary to promote sustainable fisheries and prevent the overexploitation of these stocks.

International Obligations of the United States Under the Convention

As a Contracting Party to the 1949 Convention and a member of the IATTC, the United States is legally bound to implement decisions of the IATTC. The Tuna Conventions Act (16 U.S.C. 951–962), as amended on November 5, 2015, by Title II of Public Law 114–81, provides that the Secretary of Commerce, in consultation with the Secretary of State and, with respect to enforcement measures, the Secretary of the Department of Homeland Security, may promulgate such regulations as may be necessary to carry out the United States international obligations under the Convention, including recommendations and decisions adopted by the IATTC. The Secretary’s authority to promulgate such regulations has been delegated to NMFS.

Area of Overlap Recommendation

In 2004, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean entered into force. The Convention’s area of application (WCPFC Convention Area) overlaps with the IATTC Convention Area. The two convention areas overlap in the Pacific Ocean waters within a rectangular area bounded by 50° S. latitude, 150° W.

longitude, 130° W. longitude, and 4° S. latitude (“Area of Overlap”).

The IATTC and WCPFC recognized the need to clarify the management measures in the Area of Overlap, and the IATTC adopted Recommendation C-12-11 (*IATTC—WCPFC Overlap Area*) at its 84th meeting in October 2012. Recommendation C-12-11 sets forth specific provisions for management of the Area of Overlap. Specifically, Recommendation C-12-11 calls for each flag State member, if it is a member of both organizations, to decide whether IATTC or WCPFC conservation and management measures will apply to vessels listed in the registers of both organizations while fishing in the Area of Overlap. In December 2012, the WCPFC adopted a nearly identical decision. The record of the WCPFC’s decision can be found at paragraph 80 in the Summary Report for the Ninth Regular Session of the WCPFC, which is available at: <https://www.wcpfc.int/system/files/WCPFC9-Summary-Report-final.pdf>.

NMFS Proposal

As stated above, the United States is a member of the IATTC. The United States is also a member of the WCPFC, and implements WCPFC decisions under the authority of the Western and

Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act; 16 U.S.C. 6901 *et seq.*). Currently, both the U.S. regulations that implement the decisions of the IATTC (see 50 CFR part 300, subpart C) and the regulations that implement the decisions of the WCPFC (see 50 CFR part 300, subpart O) apply in the Area of Overlap. Rather than apply one Commission’s measures to an individual vessel or gear type and the other Commission’s measures to another vessel or gear type, NMFS proposes to apply the WCPFC’s management measures to the entire U.S. fleet. NMFS proposes this application of the regulations because each Commission develops a comprehensive and self-contained package of management measures to address similar conservation objectives. If one set of management measures were applied to some vessels and another set to others, management would fail to address the conservation objectives of either Commission.

NMFS proposes that the decisions of the WCPFC, rather than those of the IATTC, apply in the Area of Overlap because the U.S. fisheries impacted by this rulemaking occur mostly in the WCPFC Convention Area. In other

words, the impacted fisheries are subject to regulations that implement the decisions of the WCPFC at 50 CFR part 300, subpart O, in most of their fishing grounds. Being subject to only this set of regulations when fishing inside the Area of Overlap—rather than being subject to only the IATTC-related regulations in that area—would provide more uniform regulations for these fisheries. Alternatively, NMFS also welcomes public input on alternatives to this rule, *i.e.*, such as requiring U.S. vessels to adhere to some or all conservation measures of the IATTC, rather than those of the WCPFC, in the Area of Overlap. Depending on the input received, the final rule might be adjusted accordingly.

U.S. vessels do not fish in the Area of Overlap often, but the two gear types that have fished in the Area of Overlap since 2008 are troll vessels that harvest South Pacific albacore and purse seine vessels that harvest tropical tuna. The majority of the South Pacific albacore troll fishery occurs in the WCPFC Convention Area outside the Area of Overlap (*i.e.*, west of 150° W.), and some fishing has occurred in the Area of Overlap (Table 1). These fisheries are described in the Classification section below.

TABLE 1—NUMBER OF U.S. TROLL VESSELS (*i.e.*, VESSELS) AND DAYS FISHED BY VESSELS (*i.e.*, VESSEL DAYS) IN THE PACIFIC OCEAN FOR SOUTH PACIFIC ALBACORE FROM 2008 TO 2014 (DATA PROVIDED BY NMFS SOUTHWEST FISHERIES SCIENCE CENTER)

[Data for 2013 and 2014 are considered preliminary]

Year	East of 130° W.		Area of overlap		West of 150° W.	
	vessels	vessel-days	vessels	vessel-days	vessels	vessel-days
2008	—	—	3	93	3	162
2009	0	0	4	17	4	180
2010	3	7	5	58	6	339
2011	0	0	3	7	6	310
2012	6	17	9	152	9	378
2013	0	0	0	0	6	325
2014	0	0	7	116	8	503

— indicates data are for fewer than three vessels.

Although under this proposed rule, regulations implementing WCPFC decisions would continue to apply in the Area of Overlap, NMFS also proposes that regulations in 50 CFR 300.22 that pertain to the IATTC Regional Vessel Register would still apply with respect to U.S. vessels that are used to fish in the Area of Overlap. NMFS proposes that IATTC Regional Vessel Register regulations continue to apply so that the United States can continue to fulfill its obligations under the Agreement on the International Dolphin Conservation Program (AIDCP)

in the Area of Overlap. The IATTC Regional Vessel Register is used as a mechanism to implement AIDCP provisions, including vessel assessment fees, observer coverage, and authorization for the active status of purse seine vessels. Therefore, the IATTC Regional Vessel Register requirements that include the cost associated with vessel assessment fees would continue to apply in the Area of Overlap. In addition, the United States is obligated to manage U.S. purse seine well volume capacity in the IATTC Convention Area within the limits

established by the IATTC, and the IATTC Regional Vessel Register is used for this purpose. Similarly, the IATTC Regional Vessel Register is used to manage the one-trip option for U.S. purse seine vessels licensed under the South Pacific Tuna Treaty for fishing trips that do not exceed 90 days in duration.

Proposed Regulations for Area of Overlap

This proposed rule would implement Recommendation C-12-11 and establish that, in the Area of Overlap, the

regulations that implement the decisions of the IATTC at 50 CFR part 300, subpart C, would not apply; however, regulations pertaining to the IATTC Regional Vessel Register at 50 CFR 300.22(b) would still apply. The decisions of the WCPFC as implemented by NMFS regulations at 50 CFR part 300, subpart O, would continue to apply in the Area of Overlap. Under this proposed rule, the definition of the IATTC Convention Area would be revised into two parts: (1) include the Area of Overlap in the definition of the IATTC Convention Area for the purpose of IATTC Regional Vessel Register regulations at 50 CFR 300.22(b), and (2) exclude the Area of Overlap in the definition of the Convention Area for the purpose of regulations at 50 CFR part 300, subpart C.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tuna Conventions Act and other applicable laws.

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

Additionally, although there are no new collection-of-information requirements associated with this action that are subject to the Paperwork Reduction Act, existing collection-of-information requirements still apply under the following Control Numbers: (1) 0648-0596, Vessel Monitoring System (VMS) Requirements under the WCPFC; (2) 0648-0595, WCPFC Vessel Information Family of Forms; (3) 0648-0649, Transshipment Requirements under the WCPFC; and (4) 0648-0204, West Coast Region Family of Forms. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection-of-information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB control number.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The rationale for the certification is provided in the following paragraphs.

As described in the **SUPPLEMENTARY INFORMATION** above, the proposed regulations would implement Recommendation C-12-11 adopted by the IATTC at its October 2012 meeting. Recommendation C-12-11 calls for each

flag State member, if it is a member of both organizations, to decide whether IATTC or WCPFC conservation and management measures will apply to vessels listed in the registers of both organizations while fishing in the Area of Overlap. Currently, both the U.S. regulations that implement the decisions of the IATTC (see 50 CFR part 300, subpart C) and the regulations that implement the decisions of the WCPFC (see 50 CFR part 300, subpart O) apply in the Area of Overlap. This proposed rule would provide that the regulations that implement management measures of the IATTC would no longer apply in the Area of Overlap, with the exception of regulations governing the IATTC Regional Vessel Register.

The failure to promulgate the proposed action would continue to require the decisions of both the IATTC and WCPFC to apply in the Area of Overlap. Alternatively, the implementation of Recommendation C-12-11 would establish the application of the measures of only one organization (*i.e.*, the WCPFC) as opposed to both organizations (*i.e.*, the WCPFC and the IATTC).

On June 12, 2014, the Small Business Administration (SBA) issued an interim final rule revising the small business size standards for several industries effective July 14, 2014 (79 FR 33467). The rule increased the size standard for Finfish Fishing from \$19.0 million to \$20.5 million, Shellfish Fishing from \$5.0 million to \$5.5 million, and Other Marine Fishing from \$7.0 million to \$7.5 million. The National Marine Fisheries Service (NMFS) conducted its analysis for this action in light of the new size standards.

NMFS considers all entities subject to this action to be small entities as defined by both the former, lower size standards and the revised size standards. The small entities that would be affected by the proposed action are all U.S. vessels that may fish for tuna or tuna-like species in the Area of Overlap; however, U.S. vessels do not fish for tuna or tuna-like species in the Area of Overlap often. Since 2008, no U.S. fishing vessel with pelagic longline gear has fished in the Area of Overlap. Two gear types that have fished in the Area of Overlap since 2008 are troll vessels that harvest South Pacific albacore and purse seine vessels that harvest tropical tunas.

There are two components to the U.S. tuna purse seine fishery in the EPO: (1) purse seine vessels with at least 363 mt fish hold volume (class size 6 vessels) that are typically based in the western and central Pacific Ocean (WCPO), and (2) coastal purse seine vessels with

smaller fish hold volume that are based on the U.S. West Coast. Because the coastal purse seine vessels do not typically fish south of the equator or on the high seas, this rule would likely only affect the size class 6 purse seine vessels.

In recent years, most of the yellowfin, skipjack, and bigeye tuna catch in the EPO have been landed by size class 6 purse seine vessels. Estimates of ex-vessel revenues in this purse seine fishery in the IATTC Convention Area since 2005 are confidential and may not be publicly disclosed because of the small number of vessels in the fishery. In the Area of Overlap, no purse seine vessels fished from 2008 to 2010, fewer than three purse seine vessels fished in 2011 and 2012 (therefore, their landings and revenue are confidential), and no purse seine vessels fished in 2013 or 2014.

As of November 2015, there are 22 size class 6 purse seine vessels on the IATTC Regional Vessel Register and 40 size class 6 purse seine vessels on the WCPFC Record of Fishing Vessels. For the purse seine fishery based in the WCPO, NMFS estimates that the average annual receipts over 2010 to 2012 for each purse seine vessel were less than the \$20.5 million threshold for finfish harvesting businesses (the greatest was about \$19 million) based on the catches of each vessel in the purse seine fleet during that period and indicative regional cannery prices developed by the Pacific Islands Forum Fisheries Agency (available online: <https://www.ffa.int/node/425#attachments>). Since 2012, cannery prices have declined dramatically, so the vessels' revenues in 2013 and 2014 have very likely declined as well.

U.S. vessels that fish with troll gear in the Pacific Ocean can be described as part of the North Pacific albacore troll fishery and the South Pacific albacore troll fishery. As of November 2, 2015, there are 1,394 vessels with active Pacific Highly Migratory Species permits authorized to use troll gear. An average of 640 West Coast albacore trollers participated in the fishery from 2008 to 2014, with an average ex-vessel revenue of approximately \$53,829 per vessel. The North Pacific albacore troll fishery occurs mostly in the IATTC Convention Area from April through November, while the South Pacific albacore troll fishery occurs almost exclusively in the WCPFC Convention Area from November through April.

From 2008 to 2012, and in 2014, fewer than three U.S. West Coast trollers participated in the South Pacific albacore fishery and landed on the West Coast. In 2013, four West Coast trollers

participated in the South Pacific albacore fishery and landed on the West Coast, with an ex-vessel revenue of about \$275,000 per vessel. To estimate revenues, only data from vessels that landed on the West Coast were used. From 2008 to 2014, the number of U.S. trollers targeting South Pacific albacore in the Area of Overlap has ranged from three to nine vessels on an annual basis (Table 1). However, fishing activity in the Area of Overlap could change with ocean conditions such as El Niño Southern Oscillation events.

This action will not increase the economic or record keeping and reporting burden on U.S. vessel owners and operators; but rather, the rule is expected to reduce the burden because affected vessels will only be required to follow the measures of one organization (*i.e.*, the WCPFC) rather than both organizations (*i.e.*, the WCPFC and the IATTC) in the Area of Overlap. For example, WCPFC regulations at § 300.223(a) establish a limit of 1,828 purse seine fishing days in the WCPFC Convention Area in the areas of high seas and U.S. EEZ between 20° N. latitude and 20° S. latitude (an area known as the ELAPS), which includes some of the Area of Overlap, for calendar year 2015. The limit was reached and a closure of the applicable area to purse seine fishing took effect June 15, 2015, and will remain in effect through December 31, 2015 (80 FR 32313). In contrast, the IATTC implementing regulations at § 300.25(f) provide that U.S. purse seine vessels select one of two options for 62-day closures in the IATTC Convention Area for 2015 and 2016. Under this proposed rule, vessel owners would not have to comply with both sets of purse seine closures in the Area of Overlap, only the WCPFC closure. In other instances, this regulation would remove duplicative regulations governing the U.S. fleet in the Area of Overlap. However, vessel owners and operators will still need to

comply with the IATTC Regional Vessel Register requirements, such as vessel assessment fees and observer coverage.

In addition, this action is not expected to change the typical fishing practices of impacted vessels because the U.S. fisheries affected by this rulemaking occur mostly in the WCPFC Convention Area. In other words, the impacted fisheries are subject to regulations that implement the decisions of the WCPFC at 50 CFR part 300, subpart O, in most of their fishing grounds. Imposing only this set of regulations to vessels fishing inside the Area of Overlap would provide more uniform regulations for these fisheries.

Pursuant to the Regulatory Flexibility Act and the SBA's June 20, 2013, and June 14, 2014, final rules (78 FR 37398 and 79 FR 33647, respectively), this certification was developed for this action using the SBA's revised size standards. NMFS considers all entities subject to this action to be small entities as defined by both the former, lower size standards and the revised size standards. Because each affected vessel is a small business, this proposed action is considered to equally affect all of these small entities in the same manner. Based on the disproportionality and profitability analysis above, the proposed action, if adopted, will not have adverse or disproportional economic impact on these small business entities. Therefore, the proposed action would not have a significant economic impact on a substantial number of small entities. As a result, an Initial Regulatory Flexibility Analysis is not required, and was not prepared for this proposed rule.

List of Subjects in 50 CFR Part 300

Fish, Fisheries, Fishing, Fishing vessels, International organizations, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: December 17, 2015.

Eileen Sobeck,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951 *et seq.*

■ 2. In § 300.21, revise the definition for “Convention Area” in alphabetical order to read as follows:

§ 300.21 Definitions.

* * * * *

Convention Area or IATTC

Convention Area means:

(1) for the purpose of section 300.22(b) of this subpart, all waters of the Pacific Ocean within the area bounded by the west coast of the Americas and by 50° N. latitude from the coast of North America to its intersection with 150° W. longitude, then 150° W. longitude to its intersection with 50° S. latitude, and then 50° S. latitude to its intersection with the coast of South America; and

(2) for the purpose of all other sections and paragraphs of this subpart, all waters of the Pacific Ocean within the area bounded by the west coast of the Americas and by 50° N. latitude from the coast of North America to its intersection with 150° W. longitude, then 150° W. longitude to its intersection with 4° S. latitude, then 4° S. to its intersection with 130° W. longitude, then 130° W. longitude to its intersection with 50° S. latitude, and then 50° S. latitude to its intersection with the coast of South America.

* * * * *

[FR Doc. 2015-32581 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-22-P

Notices

Federal Register

Vol. 80, No. 248

Monday, December 28, 2015

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Risk Management Agency

Submission for OMB Review; Comment Request

December 16, 2015.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602.

Comments regarding these information collections are best assured of having their full effect if received within January 27, 2016. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to

the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Risk Management Agency

Title: Multiple Peril Crop Insurance.
OMB Control Number: 0563–0053.

Summary of Collection: Previous amendments to the Federal Crop Insurance Act expanded the role of the crop insurance program to be the principal tool for risk management by producers of farm products and provided that crop insurance program operate on an actuarially sound basis, provided for independent review of crop insurance products by person experienced as actuaries and in underwriting, and required that the crop insurance program operate on an actuarially sound basis. The Agricultural Act of 2014 (2014 Farm Bill) strengthens crop insurance by providing more risk management options for farmers and ranchers and by making crop insurance more affordable for beginning farmers. It continues the growth of the crop insurance program, new crop products developed, provides avenues to expand farm safety net options for organic producers and specialty crop producers, and new insurance concepts studied for possible implementation. Federal Crop Insurance Corporation (FCIC) offers a Standard Reinsurance Agreement to eligible crop insurance companies under which FCIC will use data elements instead of standards forms.

Need and Use of the Information: FCIC requires crop acreage information to be submitted to the insurance agent by each producer on or before a specific date. The basic provision covers information such as the name of the crop, the number of timely planted acres, person sharing in the crop, location of the acreage, etc. This information is used to determine liability, premium and subsidy. Federal agencies, Risk Management Agency, crop insurance companies that are reinsured by FCIC, and other agencies that require such information in the performance of their duties may use this information. If the information were not collected by specified dates, the producers may not have insurance coverage or the amount of insurance may be reduced and the crop insurance

program would not be administered in an actuarially sound manner.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 590,750.

Frequency of Responses: Recordkeeping; Reporting: Quarterly; Weekly; Semi-annually; Monthly; Annually.

Total Burden Hours: 8,555,856.

Charlene Parker,

Departmental Information Clearance Officer.

[FR Doc. 2015–32173 Filed 12–24–15; 8:45 am]

BILLING CODE 3410–08–P

COMMISSION ON CIVIL RIGHTS

Revised Sunshine Act Meeting Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission Telephonic Business Meeting.

DATES: Monday, December 28, 2015, at 10 a.m. EST.

ADDRESSES: Telephonic Business Meeting.

FOR FURTHER INFORMATION CONTACT: Mauro Morales, Staff Director at (202) 376–7700.

SUPPLEMENTARY INFORMATION: This business meeting is open to the public by telephone only. The public may listen on the following toll-free number: 1–888–278–8476 with conference ID number 8154942.

Hearing-impaired persons who will attend the briefing and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376–8105 or at signlanguage@usccr.gov at least seven business days before the scheduled date of the meeting.

Meeting Agenda

I. Approval of Agenda

II. Program Planning

- Presentation of town hall budget estimates for the environmental justice report
- Discussion and vote on town hall meeting plan
- Discussion on plan for revision of Native American “Quiet Crisis”

V. Adjourn Meeting

Dated: December 22, 2015.

David Mussatt,

*Regional Programs Unit Chief, U.S.
Commission on Civil Rights.*

[FR Doc. 2015-32672 Filed 12-23-15; 11:15 am]

BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-57-2015]

Authorization of Production Activity; Foreign-Trade Zone 84; Bauer Manufacturing Inc.; (Stationary Oil/Gas Drilling Rigs) Conroe, Texas

On August 19, 2015, the City of Conroe, Texas, grantee of FTZ 84, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board on behalf of Bauer Manufacturing Inc., within FTZ 84, in Houston, Texas.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (80 FR 54520, September 10, 2015). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14, and further subject to a restriction requiring that foreign status textile-based cotton transport straps (classified within HTSUS Subheading 5806.31) be admitted to the zone in privileged foreign status (19 CFR 146.41).

Dated: December 21, 2015.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2015-32636 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-979]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2013-2014

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") is conducting an

administrative review of the antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells"), from the People's Republic of China ("PRC"). The period of review ("POR") is December 1, 2013 through November 30, 2014. The administrative review covers two mandatory respondents, (1) Yingli Energy (China) Company Limited ("Yingli"), and (2) Changzhou Trina Solar Energy Co., Ltd. and Trina Solar (Changzhou) Science & Technology Co., Ltd. ("Trina"). The Department preliminarily finds that both mandatory respondents sold subject merchandise in the United States at prices below normal value ("NV") during the POR. Interested parties are invited to comment on these preliminary results.

DATES: Effective date: December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen and Thomas Martin, AD/CVD Operations, Office IV, Enforcement & Compliance, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-2769 or (202) 482-3936, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise covered by the order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.¹ Merchandise covered by this order is classifiable under subheading 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

¹ For a complete description of the scope of the order, see "Decision Memorandum for Preliminary Results of the 2013-2014 Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China" from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, issued concurrently with and hereby adopted by this notice ("Preliminary Decision Memorandum").

Preliminary Determination of No Shipments

Based on an analysis of U.S. Customs and Border Protection ("CBP") information, and comments provided by a number of companies, the Department preliminarily determines that Jiangsu Sunlink PV Technology Co., Ltd. and Shanghai JA Solar Technology Co., Ltd. each had no shipments during the POR. For additional information regarding this determination, see the Preliminary Decision Memorandum.

Consistent with an announced refinement to its assessment practice in non-market economy ("NME") cases, the Department is not rescinding this review, in part, but intends to complete the review with respect to the companies for which it has preliminarily found no shipments and issue appropriate instructions to CBP based on the final results of the review.²

Preliminary Affiliation and Single Entity Determination

Based on record evidence, the Department preliminarily finds that the mandatory respondent Yingli is affiliated with the following eight companies pursuant to section 771(33)(F) of the Tariff Act of 1930, as amended ("the Act"): (1) Baoding Tianwei Yingli New Energy Resources Co., Ltd.; (2) Tianjin Yingli New Energy Resources Co., Ltd.; (3) Hengshui Yingli New Energy Resources Co., Ltd.; (4) Lixian Yingli New Energy Resources Co., Ltd.; (5) Baoding Jiasheng Photovoltaic Technology Co., Ltd.; (6) Beijing Tianneng Yingli New Energy Resources Co., Ltd.; (7) Hainan Yingli New Energy Resources Co., Ltd.; (8) Shenzhen Yingli New Energy Resources Co., Ltd. Furthermore, the Department preliminarily finds that the mandatory respondent Trina is affiliated with the following four companies pursuant to section 771(33)(F) of the Act: (1) Yancheng Trina Solar Energy Technology Co., Ltd.; (2) Changzhou Trina Solar Yabang Energy Co., Ltd.; (3) Turpan Trina Solar Energy Co., Ltd.; (4) Hubei Trina Solar Energy Co., Ltd. In addition, based on the information presented in this review, we preliminarily find that each of the mandatory respondents and their affiliates should be treated, respectively, as a single entity for the purposes of this review pursuant to 19 CFR 351.401(f). For additional information, see the Preliminary Decision Memorandum and

² See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694, 65694-95 (October 24, 2011) and the "Assessment Rates" section, below.

Yingli and Trina Collapsing Memoranda.³

Use of Partial Facts Available (“FA”) and Partial Adverse Facts Available (“AFA”)

Section 776(a) of the Act provides that the Department shall apply FA if (1) necessary information is not on the record, or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying FA (*i.e.*, AFA) when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

Yingli was unable to obtain factor of production (“FOP”) data from its unaffiliated processors and its unaffiliated suppliers of solar cells. Pursuant to section 776(a) of the Act, the Department finds that it is appropriate to use FA in valuing the missing FOP data. For details regarding these determinations, *see* the Preliminary Decision Memorandum and the Yingli Unreported FOP Memorandum.⁴

Trina was also unable to obtain FOPs from all but one of its unaffiliated toll processors and its unaffiliated suppliers of solar cells. Because the unreported FOPs for solar cells represented a significant quantity of missing information, the Department subsequently issued a questionnaire to the largest five of Trina’s suppliers of solar cells, by quantity. In response, these suppliers stated that they would not respond to the Department’s questionnaire. Because necessary

information is not available on the record, and in accordance with section 776(a)(1) of the Act, the Department is applying FA with respect to the FOPs from the unaffiliated tollers. However, we have determined that it is appropriate to apply AFA, pursuant to section 776(b) of the Act, to the unreported FOPs for purchased solar cells. For details regarding this determination, *see* the Preliminary Decision Memorandum and the Trina Unreported FOP Memorandum.⁵

Separate Rates

The Department preliminarily determines that information placed on the record by the mandatory respondents Trina and Yingli, as well as by 15 other separate rate applicants, demonstrates that these companies are entitled to separate rate status. For additional information, *see* the Preliminary Decision Memorandum.

Rate for Separate-Rate Companies Not Individually Examined

The statute and the Department’s regulations do not address the establishment of a rate to be applied to respondents not selected for individual examination when the Department limits its examination in an administrative review pursuant to section 777A(c)(2)(B) of the Act. Generally, the Department looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents which we did not individually examine in an administrative review. Section 735(c)(5)(A) of the Act articulates a preference that we not calculate an all-others rate using rates which are zero, *de minimis* or based entirely on facts available. Accordingly, the Department’s usual practice has been to average the weighted-average dumping margins for the examined companies, excluding rates that are zero, *de minimis*, or based entirely on facts available.⁶ In this administrative review both mandatory respondents, Yingli and Trina, have estimated weighted-average dumping margins which are not zero or *de minimis* and which are not based

entirely on facts available. Because there are only two relevant weighted-average dumping margins for these preliminary results, using a weighted-average of these two rates risks disclosure of business proprietary data. Therefore, the Department assigned a weighted-average dumping margin to the separate rate companies as described in the Separate Rate Calculation Memorandum.⁷ The separate rate companies are listed in the “Preliminary Determination” section of this notice.

PRC-Wide Entity

The Department’s change in policy regarding conditional review of the PRC-wide entity applies to this administrative review.⁸ Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self-initiates, a review of the entity. Because no party requested a review of the PRC-wide entity in this review, the entity is not under review and the entity’s rate (*i.e.*, 238.95 percent) is not subject to change.⁹ Aside from the companies with no shipments, the separate rate companies discussed above, and the companies for which the review was previously rescinded,¹⁰ the Department considers all other companies for which a review was requested¹¹ to be part of the PRC-wide entity. For additional information, *see* the Preliminary Decision Memorandum.

Methodology

The Department conducted this review in accordance with section 751(a)(1)(B) of the Act. The Department calculated constructed export prices in

⁷ *See* the memorandum from Jeff Pedersen to Howard Smith entitled “2013–2014 Administrative Review of the Antidumping Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People’s Republic of China: Calculation of the Margin for Respondents Not Selected for Individual Examination,” dated concurrently with this notice.

⁸ *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013).

⁹ *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012–2013*, 80 FR 40998, 41002 (July 14, 2015) (“AR1 Final Results”).

¹⁰ *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People’s Republic of China: Partial Rescission of Antidumping Duty Administrative Review*, 80 FR 46245 (August 4, 2015).

¹¹ *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 80 FR 6041 (February 4, 2015) (“Initiation Notice”).

³ *See* the December 18, 2015 Memoranda from Jeff Pedersen to Abdelali Elouaradia concerning “Affiliation and Single Entity Status” (“Yingli Collapsing Memorandum”), and the December 18, 2015 Memoranda from Thomas Martin to Abdelali Elouaradia concerning “Affiliation and Single Entity Status” (“Trina Collapsing Memorandum”).

⁴ *See* the memorandum from Jeff Pedersen to Abdelali Elouaradia entitled “Unreported Factors of Production,” dated concurrently with these preliminary results (“Yingli Unreported FOP Memorandum”).

⁵ *See* the memorandum from Thomas Martin to Abdelali Elouaradia entitled “Unreported Factors of Production,” dated concurrent with these preliminary results (“Trina Unreported FOP Memorandum”).

⁶ *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 73 FR 52823, 52824 (September 11, 2008), and accompanying Issues and Decision Memorandum at Comment 16.

accordance with section 772 of the Act. Given that the PRC is a NME country, within the meaning of section 771(18) of the Act, the Department calculated NV in accordance with section 773(c) of the Act.

For a full description of the methodology underlying the preliminary results of this review, see the Preliminary Decision Memorandum. 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 <http://access.trade.gov>, and is available to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can

be found at <http://enforcement.trade.gov/frn/>. The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

The Department preliminarily determines that the following weighted-average dumping margins exist for the POR:

Exporter	Weighted-average dumping margin (percent)
Yingli Energy (China) Company Limited/Baoding Tianwei Yingli New Energy Resources Co., Ltd./Tianjin Yingli New Energy Resources Co., Ltd./Hengshui Yingli New Energy Resources Co., Ltd./Lixian Yingli New Energy Resources Co., Ltd./Baoding Jiasheng Photovoltaic Technology Co., Ltd./Beijing Tianneng Yingli New Energy Resources Co., Ltd./Hainan Yingli New Energy Resources Co., Ltd./Shenzhen Yingli New Energy Resources Co., Ltd.	11.47
Changzhou Trina Solar Energy Co., Ltd./Trina Solar (Changzhou) Science and Technology Co., Ltd./Yancheng Trina Solar Energy Technology Co., Ltd./Changzhou Trina Solar Yabang Energy Co., Ltd./Turpan Trina Solar Energy Co., Ltd./Hubei Trina Solar Energy Co., Ltd.	4.53
BYD (Shangluo) Industrial Co., Ltd.	7.27
Canadian Solar International Limited	7.27
Canadian Solar Manufacturing (Changshu) Inc.	7.27
Canadian Solar Manufacturing (Luoyang) Inc.	7.27
Dongguan Sunworth Solar Energy Co., Ltd.	7.27
ERA Solar Co., Ltd.	7.27
ET Solar Energy Limited	7.27
JA Solar Technology Yangzhou Co., Ltd.	7.27
Jiangsu High Hope Int'l Group	7.27
JingAo Solar Co., Ltd.	7.27
Ningbo Qixin Solar Electrical Appliance Co., Ltd.	7.27
Shanghai BYD Co., Ltd.	7.27
Shenzhen Glory Industries Co., Ltd.	7.27
Shenzhen Topray Solar Co., Ltd.	7.27
Wuxi Suntech Power Co., Ltd./Luoyang Suntech Power Co., Ltd.	7.27

Disclosure and Public Comment

The Department intends to disclose to parties the calculations performed for these preliminary results of review within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review.¹² Rebuttal briefs may be filed no later than five days after case briefs are due and may respond only to arguments raised in the case briefs.¹³ A table of contents, list of authorities used, and an executive summary of issues should accompany any briefs submitted to the Department. The summary should be limited to five pages total, including footnotes.¹⁴

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this

notice.¹⁵ Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. Oral argument presentations will be limited to issues raised in the briefs. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a date and time to be determined.¹⁶ Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

All submissions, with limited exceptions, must be filed electronically using ACCESS.¹⁷ An electronically filed document must be received successfully in its entirety by the Department's electronic records system, ACCESS, by 5 p.m. Eastern Time ("ET") on the due date. Documents excepted from the electronic submission requirements must be filed manually (*i.e.*, in paper form) with the APO/Dockets Unit in

Room 18022 and stamped with the date and time of receipt by 5 p.m. ET on the due date.¹⁸

Unless otherwise extended, the Department intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results of this review, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.¹⁹ The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. For each individually examined respondent in this review whose weighted-average dumping

¹⁸ See 19 CFR 351.303 (for general filing requirements); *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

¹⁹ See 19 CFR 351.212(b)(1).

¹² See 19 CFR 351.309(c)(ii).

¹³ See 19 CFR 351.309(d).

¹⁴ See 19 CFR 351.309(c)(2), (d)(2).

¹⁵ See 19 CFR 351.310(c).

¹⁶ See 19 CFR 351.310(d).

¹⁷ See generally 19 CFR 351.303.

margin in the final results of review is not zero or *de minimis* (i.e., less than 0.5 percent), the Department intends to calculate importer-specific assessment rates, in accordance with 19 CFR 351.212(b)(1).²⁰ Where the respondent reported reliable entered values, the Department intends to calculate importer-specific *ad valorem* assessment rates by aggregating the amount of dumping calculated for all U.S. sales to the importer and dividing this amount by the total entered value of the sales to the importer.²¹ Where the importer did not report entered values, the Department calculates an importer-specific assessment rates by dividing the amount of dumping for reviewed sales to the importer- by the total sales quantity associated with those transactions. In addition, the Department will calculate an estimated *ad valorem* importer-specific assessment rate to determine whether this rate is *de minimis*, however, the Department will direct CBP to assess importer-specific assessment rates based on the resulting per-unit rates.²² Where an importer-specific *ad valorem* is not zero or *de minimis*, the Department will instruct CBP to collect the appropriate duties at the time of liquidation. Where either the respondent's weighted average dumping margin is zero or *de minimis*, or an importer-specific *ad valorem* assessment rate is zero or *de minimis*, the Department will instruct CBP to liquidate appropriate entries without regard to antidumping duties.²³

On October 24, 2011, the Department announced a refinement to its assessment practice in NME antidumping duty proceedings.²⁴ Pursuant to this refinement in practice, for entries that were not reported in the U.S. sales database submitted by an exporter individually examined during this review, the Department will instruct CBP to liquidate such entries at the rate for the PRC-wide entity. Additionally, pursuant to this refinement, if the Department determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's CBP

case number will be liquidated at the rate for the PRC-wide entity.

In accordance with section 751(a)(2)(C) of the Act, 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 antidumping duties, where applicable.

Cash Deposit Requirements

The Department will instruct CBP to require a cash deposit for antidumping duties equal to the weighted-average amount by which the normal value exceeds U.S. price. The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice, as provided by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is *de minimis* (i.e., less than 0.5 percent), then the cash deposit rate will be zero for that exporter); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the PRC-wide entity (i.e., 238.95 percent²⁵) and (4) for all non-PRC exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These 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 and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties and/or countervailing duties has

occurred, and the subsequent assessment of double antidumping duties and/or increase the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213 and 351.221(b)(4).

Dated: December 18, 2015.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

1. Summary
2. Background
3. Scope of the Order
4. Duty Absorption
5. Preliminary Determination of No Shipments
6. Selection of Respondents
7. Single Entity Treatment
8. Discussion of the Methodology
 - a. NME Country
 - b. Separate Rates
 - c. Application of Partial FA and AFA
 - d. Surrogate Country
 - e. Date of Sale
 - f. Fair Value Comparisons
 - g. U.S. Price
 - h. Normal Value
 - i. Section 777A(f) of the Act
 - j. Currency Conversion
9. Conclusion

[FR Doc. 2015–32630 Filed 12–24–15; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–825]

Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce

SUMMARY: The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are being provided to producers and exporters of heavy walled rectangular welded carbon steel pipes and tubes (HWR pipes and tubes) from the Republic of Turkey (Turkey). The period of investigation is January 1, 2014, through December 31, 2014. Interested parties are invited to comment on this preliminary determination.

²⁰ See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012) (“*Final Modification*”).

²¹ See 19 CFR 351.212(b)(1).

²² *Id.*

²³ See *Final Modification*, 77 FR at 8103.

²⁴ See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

²⁵ See *AR1 Final Results*, 80 FR at 41002.

DATES: Effective Date: December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Reza Karamloo, Office II, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-1766 or (202) 482-4470, respectively.

Alignment of Final Countervailing Duty (CVD) Determination With Final Antidumping Duty (AD) Determination

On the same day the Department initiated this CVD investigation, the Department also initiated AD investigations of HWR pipes and tubes from the Republic of Korea, Mexico, and Turkey.¹ The CVD and AD investigations cover the same merchandise. On November 23, 2015, in accordance with section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the petitioners² requested alignment of the final CVD determination of HWR pipes and tubes from Turkey with the final AD determination of HWR pipes and tubes from Turkey. Therefore, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), we are aligning the final CVD determination with the final AD determination. Consequently, the final CVD determination will be issued on the same date as the final AD determination, which is currently scheduled to be issued no later than May 2, 2016, unless postponed.

Scope of the Investigation

The products covered by this investigation are HWR pipes and tubes from Turkey. For a full description of the scope of this investigation, see Appendix I.

Scope Comments

We did not receive any comments concerning the scope of this investigation.

Methodology

The Department is conducting this CVD investigation in accordance with

section 701 of the Act. For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy (*i.e.*, a financial contribution by an “authority” that gives rise to a benefit to the recipient) and that the subsidy is specific.³ For a full description of the methodology underlying our preliminary conclusions, see the Preliminary Decision Memorandum.⁴

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <http://access.trade.gov>, and is available to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/index.html>. The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content.

Preliminary Determination and Suspension of Liquidation

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated a CVD rate for each individually-investigated producer/exporter of the subject merchandise. For companies not individually investigated, we calculated an “all-others” rate as described below. We preliminarily determine the countervailable subsidy rates to be:

Company	Subsidy rate (percent)
MMZ Onur Boru Profil uretim San Ve Tic. A.S.	7.69
Ozdemir Boru Profil San ve Tic. Ltd Sti.	1.35
All-Others	4.39

In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection to suspend liquidation of all entries of HWR pipes and tubes from

Turkey that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit for such entries of merchandise in the amounts indicated above.

In accordance with sections 703(d) and 705(c)(5)(A) of the Act, for companies not investigated, we apply an “all-others” rate, which is normally calculated by weighting the subsidy rates of the individual companies selected as respondents by those companies’ exports of the subject merchandise to the United States.⁵ The “all-others” rate does not include zero and *de minimis* rates or any rates based solely on the facts available.

Verification

As provided in section 782(i)(1) of the Act, we intend to verify the information submitted by the respondents prior to making our final determination.

U.S. International Trade Commission

In accordance with section 703(f) of the Act, we will notify the U.S. International Trade Commission (ITC) of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Assistant Secretary for Enforcement and Compliance.

In accordance with section 705(b)(2) of the Act, if our final determination is affirmative, the ITC will make its final determination within 45 days after the Department makes its final determination.

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement.⁶ Interested parties may submit case briefs, rebuttal briefs, and hearing requests.⁷ For a schedule of the

¹ See *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Initiation of Countervailing Duty Investigation*, 80 FR 49207 (August 17, 2015) (*Initiation Notice*). See also *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea, Mexico, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations*, 80 FR 49202 (August 17, 2015).

² The petitioners in this investigation are Atlas Tube, a division of JMC Steel Group, Bull Moose Tube Company, EXLTUBE, Hannibal Industries, Inc., Independence Tube Corporation, Maruichi American Corporation, Searing Industries, Southland Tube, and Vest, Inc.

³ See Sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

⁴ See Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, “Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Decision Memorandum for the Preliminary Determination,” dated concurrently with this notice (Preliminary Decision Memorandum).

⁵ See Memorandum to the File, “Calculation of the “All-Others” Rate in the Preliminary Determination of the Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey” (December 18, 2015). We calculated a weighted average of the rates of MMZ and Ozdemir using publicly-ranged data so as not to disclose the respondents’ business proprietary information.

⁶ See 19 CFR 351.224(b).

⁷ See 19 CFR 351.309(c)–(d), 19 CFR 351.310(c).

deadlines for filing case briefs, rebuttal briefs, and hearing requests, *see* the Preliminary Decision Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: December 18, 2015.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products covered by this investigation are certain heavy walled rectangular welded steel pipes and tubes of rectangular (including square) cross section, having a nominal wall thickness of not less than 4 mm. The merchandise includes, but is not limited to, the American Society for Testing and Materials (ASTM) A-500, grade B specifications, or comparable domestic or foreign specifications.

Included products are those in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.0 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium (also called columbium), or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

The subject merchandise is currently provided for in item 7306.61.1000 of the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may also enter under HTSUS 7306.61.3000. While the HTSUS subheadings and ASTM specification are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope Comments
- IV. Scope of the Investigation
- V. Alignment
- VI. Respondent Selection
- VII. Injury Test
- VIII. Subsidies Valuation
- IX. Analysis of Programs
- X. ITC Notification
- XI. Disclosure and Public Comment
- XII. Verification
- XIII. Conclusion

[FR Doc. 2015-32631 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-020, C-570-021]

Melamine From the People's Republic of China: Antidumping Duty and Countervailing Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce

SUMMARY: Based on affirmative final determinations by the Department of Commerce ("Department") and the International Trade Commission ("ITC"), the Department is issuing antidumping duty ("AD") and countervailing duty ("CVD") orders on melamine from the People's Republic of China ("PRC").

DATES: *Effective Date:* December 28, 2015.

FOR FURTHER INFORMATION CONTACT:

James Terpstra at (202) 482-3965 or Brendan Quinn at (202) 482-5848, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 2015, the Department published its final affirmative determination of sales at less than fair value ("LTFV") and its final affirmative determination that countervailable subsidies are being provided to producers and exporters of melamine from the PRC.¹ On December 18, 2015, the ITC notified the Department of its final affirmative determination pursuant to section 735(b)(1)(A)(i) of the Tariff Act of 1930, as amended ("the Act"), that an industry in the United States is materially injured by reason of LTFV imports and subsidized imports of melamine from the PRC.²

Scope of the Orders

The merchandise subject to these orders is melamine (Chemical Abstracts Service ("CAS") registry number 108-78-01, molecular formula C₃H₆N₆).³

¹ *See Melamine From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 80 FR 68851 (November 6, 2015) ("AD Final Determination"). *See also Melamine From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 80 FR 68847 (November 6, 2015).

² *See* ITC Notification Letter to the Deputy Assistant Secretary for Enforcement and Compliance referencing ITC Investigation Nos. 701-TA-526-527 and 731-TA-1262-1263 (December 18, 2015) ("ITC Notification").

³ Melamine is also known as 2,4,6-triamino-s-triazine; 1,3,5-Triazine-2,4,6-triamine;

Melamine is a crystalline powder or granule typically (but not exclusively) used to manufacture melamine formaldehyde resins. All melamine is covered by the scope of these orders irrespective of purity, particle size, or physical form. Melamine that has been blended with other products is included within this scope when such blends include constituent parts that have been intermingled, but that have not been chemically reacted with each other to produce a different product. For such blends, only the melamine component of the mixture is covered by the scope of these orders. Melamine that is otherwise subject to these orders is not excluded when commingled with melamine from sources not subject to this investigation. Only the subject component of such commingled products is covered by the scope of these orders.

The subject merchandise is provided for in subheading 2933.61.0000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheading and CAS registry number are provided for convenience and customs purposes, the written description of the scope is dispositive.

Antidumping Duty Order

In accordance with sections 735(b)(1)(A)(i) and 735(d) of the Act, the ITC has notified the Department of its final determination in this investigation, in which it found that imports of melamine from the PRC are materially injuring a U.S. industry. Therefore, in accordance with section 735(c)(2) of the Act, we are publishing this antidumping duty order.

As a result of the ITC's final determination, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection ("CBP") to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise, for all relevant entries of melamine from the PRC. These antidumping duties will be assessed on unliquidated entries from the PRC entered, or withdrawn from warehouse, for consumption on or after June 18, 2015, the date on which the Department published the *AD Preliminary Determination*,⁴ but will

Cyanurotriamide; Cyanurotriamine; Cyanuramide; and by various brand names.

⁴ *See Melamine from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 80 FR 34891 (June 18, 2015) ("AD Preliminary Determination").

not include entries occurring after the expiration of the provisional measures period and before publication of the ITC's final injury determination, as further described below.

Continuation of Suspension of Liquidation (AD)

In accordance with section 735(c)(1)(B) of the Act, we will instruct CBP to continue to suspend liquidation on entries of subject merchandise from the PRC. We will also instruct CBP to require cash deposits equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart below, adjusted where appropriate for export subsidies.⁵ These instructions suspending liquidation will remain in effect until further notice.

Accordingly, effective on the date of publication of the ITC's final affirmative injury determination, CBP will require, at the same time as importers would normally deposit estimated duties on this subject merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins, adjusted where appropriate for export subsidies, as discussed above.⁶ The "PRC-wide" rate applies to all exporters of subject merchandise not specifically listed.

Provisional Measures (AD)

Section 733(d) of the Act states that instructions issued 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 the Department to extend that four-month period to no more than six months. At the request of exporters that accounted for a significant proportion of exports of melamine from the PRC, we extended the four-month period to no more than six months.⁷ In the

⁵ See *AD Final Determination*, 80 FR at 68852 (describing the adjustments to the AD margins in more detail); see also sections 772(c)(1)(C) and 777A(f) of the Act, respectively. Unlike in administrative reviews, the Department calculates the adjustment for export subsidies in investigations not in the margin calculation program, but in the cash deposit instructions issued to CBP. See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India*, 71 FR 45012 (August 8, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

⁶ See sections 736(a)(3), 772(c)(1)(C) and 777A(f) of the Act. Although the statute contemplates an adjustment for estimated domestic subsidy pass-through, as stated in the *AD Final Determination*, we are not adjusting the PRC-wide rate for estimated domestic subsidy pass-through in this case because we have no basis upon which to make such an adjustment.

⁷ See *Melamine from the People's Republic of China: Postponement of Final Determination of*

underlying investigation, the Department published the *AD Preliminary Determination* on June 18, 2015. Therefore, the six-month period beginning on the date of the publication of the *AD Preliminary Determination* will end on December 15, 2015. 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.

Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of melamine from the PRC entered, or withdrawn from warehouse, for consumption on or after December 15, 2015, the date the provisional measures expired, until and through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**.

Estimated Weighted-Average Dumping Margin

The Department determines that the estimated final weighted-average dumping margin is as follows:

Exporter	Weighted-average margin (percent)
PRC-Wide Entity ⁸	363.31

Countervailing Duty Order

In accordance with sections 705(b)(1)(A)(i) and 705(d) of the Act, the ITC has notified the Department of its final determination that the industry in the United States producing melamine is materially injured by reason of subsidized imports of melamine from the PRC.⁹ Therefore, in accordance with section 705(c)(2) and 706(a) of the Act, we are publishing this countervailing duty order.

Sales at Less Than Fair Value, 80 FR 38175 (July 2, 2015).

⁸ The PRC-wide entity includes, among other companies, the mandatory respondents Allied Chemicals Inc., Xinji Jiuyuan Chemical Co., Ltd., Sichuan Golden Elephant Sincerity Chemical Co., Ltd., and Zhongyuan Dahua Group Inc., which withdrew from the investigation prior to respondent selection. As stated previously, we will adjust cash deposit rates by the amount of export subsidies, where appropriate. In this LTFV investigation, with regard to PRC-wide entity, export subsidies constitute 9.66 percent of the final calculated countervailing duty rate in the concurrent countervailing duty investigation, and, thus, we will offset the PRC-wide rate of 363.31 percent by the countervailing duty rate attributable to export subsidies (i.e., 9.66 percent). As a result, the cash deposit rate for the PRC-wide entity will be 353.65 percent.

⁹ See ITC Notification.

Pursuant to section 706(a) of the Act, the Department will direct CBP to assess, upon further instruction by the Department, countervailing duties on unliquidated entries of melamine entered, or withdrawn from warehouse, for consumption on or after April 20, 2015, the date on which the Department published its affirmative preliminary countervailing duty determination in the **Federal Register**,¹⁰ and before August 18, 2015, the date on which the Department instructed CBP to discontinue the suspension of liquidation in accordance with section 703(d) of the Act. Section 703(d) of the Act states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Entries of melamine made on or after August 18, 2015, and prior to the date of publication of the ITC's final determination in the **Federal Register** are not liable for the assessment of countervailing duties, due to the Department's discontinuation, effective August 18, 2015, of the suspension of liquidation.

Provisional Measures (CVD)

In accordance with Section 703(d) of the Act, the provisional measures period for the countervailing duty investigation ended on August 18, 2015, and CBP was instructed to terminate the suspension of liquidation and to liquidate, without regard to countervailing duties, unliquidated entries of melamine from the PRC, entered, or withdrawn from warehouse, for consumption on or after August 18, 2015, the date the provisional measures expired, until and through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**.

Suspension of Liquidation (CVD)

In accordance with section 706 of the Act, the Department will direct CBP to reinstitute suspension of liquidation, effective on the date of publication of the ITC's notice of final determination in the **Federal Register**, and to assess, upon further instruction by the Department pursuant to section 706(a)(1) of the Act, countervailing duties for each entry of the subject merchandise in an amount based on the net countervailable subsidy rates for the subject merchandise. The Department will also direct CBP to require a cash deposit for each entry of subject merchandise in an amount equal to the

¹⁰ See *Melamine From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination*, 80 FR 21706 (April 20, 2015).

net countervailable subsidy rates listed below. The all-others rate applies to all producers and exporters of subject merchandise not specifically listed.

Company	Subsidy rate (percent)
Far-Reaching Chemical Co., Ltd.	154.00
M and A Chemicals Corp China	154.00
Qingdao Unichem International Trade Co., Ltd.	154.00
Shandong Liahed Chemical Industry Co., Ltd.	156.90
Zhongyuan Dahua Group Co., Ltd.	154.00
All Others	154.58

Notification to Interested Parties

This notice constitutes the AD and CVD orders with respect to melamine from the PRC pursuant to sections 736(a) and 706(a) of the Act. Interested parties can find an updated list of orders currently in effect by either visiting <http://enforcement.trade.gov/stats/iastats1.html> or by contacting the Department's Central Records Unit, Room B8024 of the main Commerce Building.

These orders are published in accordance with sections 706(a), 736(a), and 777(i) of the Act, and 19 CFR 351.211(b).

Dated: December 21, 2015.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2015-32632 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XE375

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Ecosystem and Ocean Planning Advisory Panel (AP) will hold a public webinar meeting.

DATES: The meeting will be held on Monday, January 11, 2016 from 1 p.m. to 5 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held via webinar with a with a telephone-only connection option. Connection details are available at: <http://www.mafmc.org>.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State

Street, Suite 201, Dover, DE 19901; telephone: (302) 674-2331; Web site: www.mafmc.org.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526-5255.

SUPPLEMENTARY INFORMATION: The MAFMC's Ecosystem and Ocean Planning AP will meet to provide input on the development of the Council's Unmanaged Forage Omnibus Amendment. This amendment will prohibit the development of new, or expansion of existing, directed fisheries on unmanaged forage species in Mid-Atlantic Federal waters until adequate scientific information is available to promote ecosystem sustainability. The webinar will include a discussion of development of the amendment to date. The AP will then be asked to provide input on preliminary management alternatives, a draft list of unmanaged forage species to be addressed in the amendment, and other aspects of the amendment.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526-5251, at least 5 days prior to the meeting date.

Dated: December 21, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015-32490 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the

following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Alaska Region Amendment 80 Permits and Reports.

OMB Control Number: 0648-0565.

Form Number(s): None.

Type of Request: Regular (extension of a currently approved information collection).

Number of Respondents: 33.

Average Hours per Response: 2 hours each for Application for Amend 80 QS; Application for Amend 80 Cooperative and CQ Permit; Application for Amend 80 limited access fishery; Application to transfer Amend 80 QS; Application for Amendment 80 Vessel Replacement and Application for inter-cooperative transfer Amend 80 CQ; 25 hours for Amend 80 cooperative report; 4 hours for Amend 80 appeals letter; 30 minutes for Flatfish Exchange Application.

Burden Hours: 181.

Needs and Uses: This request is for extension of a currently approved information collection.

Amendment 80 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area allocates several Bering Sea and Aleutian Islands Management Area non-pollock trawl groundfish fisheries among fishing sectors, established a limited access privilege program, and facilitated the formation of harvesting cooperatives in the non-American Fisheries Act (non-AFA) trawl catcher/processor sector. The Amendment 80 Fishery Management Plan applies retention standards on an aggregate basis to all activities of a cooperative, allowing participants within the cooperative to coordinate fishing and retention practices across the cooperative to meet the retention requirements.

Affected Public: Business or other for-profit organizations; individuals or households.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

This information collection request may be viewed at reginfo.gov. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to OIRA_Submission@omb.eop.gov or fax to (202) 395-5806.

Dated: December 21, 2015.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2015-32543 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: International Billfish Angler Survey.

OMB Control Number: 0648-0020.

Form Number(s): NOAA 88-10.

Type of Request: Regular (extension of a currently approved information collection).

Number of Respondents: 500.

Average Hours per Response: 5 minutes.

Burden Hours: 42.

Needs and Uses: This request is for extension of a currently approved information collection.

The International Billfish Angler Survey began in 1969 and is an integral part of the Billfish Research Program at the National Oceanic and Atmospheric Administration's (NOAA) Southwest Fisheries Science Center (SWFSC). The survey tracks recreational angler fishing catch and effort for billfish in the Pacific and Indian Oceans in support of the Pacific and Western Pacific Fishery Management Councils, authorized under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The data are used by scientists and fishery managers to assist with assessing the status of billfish stocks. The survey is intended for anglers cooperating in the Billfish Program and is entirely voluntary. This survey is specific to recreational anglers fishing

for Istiophorid and Xiphiid billfish in the Pacific and Indian Oceans; as such it provides the only estimates of catch per unit of effort for recreational billfish fishing in those areas.

Affected Public:

Frequency:

Respondent's Obligation:

This information collection request may be viewed at reginfo.gov. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to OIRA_Submission@omb.eop.gov or fax to (202) 395-5806.

Dated: December 21, 2015.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2015-32542 Filed 12-24-15; 8:45 am]

BILLING CODE 3510-22-P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC-2013-0025]

Agency Information Collection Activities; Submission for OMB Review; Comment Request—Safety Standard for Infant Swings

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act ("PRA") of 1995 (44 U.S.C. chapter 35), the Consumer Product Safety Commission ("Commission" or "CPSC") announces that the Commission has submitted to the Office of Management and Budget ("OMB") a request for extension of approval of a collection of information associated with the CPSC's Safety Standard for Infants Swings (OMB No. 3041-0155). In the **Federal Register** of October 8, 2015 (80 FR 60885), the CPSC published a notice to announce the agency's intention to seek extension of approval of the collection of information. The Commission received no comments. Therefore, by publication of this notice, the Commission announces that CPSC has submitted to the OMB a request for extension of approval of that collection of information, without change.

DATES: Written comments on this request for extension of approval of information collection requirements should be submitted by January 27, 2016.

ADDRESSES: Submit comments about this request by email: OIRA_submission@omb.eop.gov or fax: 202-395-6881. Comments by mail should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the CPSC, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503. In addition, written comments that are sent to OMB also should be submitted electronically at <http://www.regulations.gov>, under Docket No. CPSC-2013-0025.

FOR FURTHER INFORMATION CONTACT: For further information contact: Robert H. Squibb, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; (301) 504-7815, or by email to: rsquibb@cpsc.gov.

SUPPLEMENTARY INFORMATION: CPSC has submitted the following currently approved collection of information to OMB for extension:

Title: Safety Standard for Infant Swings.

OMB Number: 3041-0155.

Type of Review: Renewal of collection.

Frequency of Response: On occasion.

Affected Public: Manufacturers and importers of infant swings.

Estimated Number of Respondents: 9 firms that supply infant swings to the United States market have been identified; there are approximately 5 models per firm annually.

Estimated Time per Response: 1 hour/model associated with marking and labeling.

Total Estimated Annual Burden: 45 hours (9 firms × 5 models × 1 hour).

General Description of Collection: The Commission revised the CPSC standard for the safety standard for infant swings (16 CFR part 1223) on June 24, 2013 (78 FR 37706). The standard is intended to address hazards to children associated with infant swings. Among other requirements, the standard requires manufacturers, including importers, to meet the collection of information requirements for marking and labeling for infant swings.

Dated: December 22, 2015.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2015-32593 Filed 12-24-15; 8:45 am]

BILLING CODE 6355-01-P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE**Proposed Information Collection; Comment Request**

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. Sec. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning its proposed renewal of the AmeriCorps National Civilian Community Corps (NCCC) Project Sponsor Application. The AmeriCorps NCCC Project Sponsor Application is completed by organizations interested in sponsoring an AmeriCorps NCCC team. The NCCC is a full-time, residential, national service program whose mission is to strengthen communities and develop leaders through team-based national and community service.

A copy of the information collection request can be obtained by contacting the office listed in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by February 26, 2016.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, National Civilian Community Corps; Attention Barbara Lane, Director of Projects and Partnerships; 1201 New York Avenue NW., Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom, Room 8100, at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) By fax to: (202) 606-6867, Attention: Barbara Lane, Director of Projects and Partnerships.

(4) Electronically through www.regulations.gov. Individuals who use a telecommunications device for the deaf (TTY-TDD) may call 1-(800) 833-3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Barbara Lane, (202) 606-6867, or by email at blane@cns.gov.

SUPPLEMENTARY INFORMATION: CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

Background

The AmeriCorps NCCC Project Sponsor Application is completed by organizations interested in sponsoring an AmeriCorps NCCC team. Each year, AmeriCorps NCCC engages teams of members in projects in communities across the United States. Service projects, which typically last from six to eight weeks, address critical needs in natural and other disasters, infrastructure improvement, environmental stewardship and conservation, energy conservation, and urban and rural development. Members construct and rehabilitate low-income housing, respond to natural disasters, clean up streams, help communities develop emergency plans, and address other local needs.

Current Action

CNCS seeks to renew and revise the current application.

The application will be used in the same manner as the existing application. CNCS additionally seeks to continue using the current application until the revised application is

approved by OMB. The current application is due to expire on March 31, 2016.

Type of Review: Renewal.
Agency: Corporation for National and Community Service.

Title: AmeriCorps NCCC Project Sponsor Application.

OMB Number: 3045-0010.

Agency Number: None.

Affected Public: Current/prospective AmeriCorps NCCC Project Sponsors.

Total Respondents: 1,800 annually.

Frequency: Rolling application process.

Average Time per Response: Averages 9.5 hours.

Estimated Total Burden Hours: 17,100 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 22, 2015.

Jake Sgambati,

Director of Operations, National Civilian Community Corps.

[FR Doc. 2015-32619 Filed 12-24-15; 8:45 am]

BILLING CODE 6050-28-P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE**Proposed Information Collection; Comment Request**

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning its

proposed implementation of AmeriCorps NCCC's (National Civilian Community Corps) Sponsor Survey. This survey was developed to support NCCC performance measurement for use in program development, funding, and evaluation. The survey instrument will be completed by NCCC project sponsors for each NCCC team following completion of each NCCC project. Completion of this information collection is not required to be considered for or obtain grant or resource funding support from AmeriCorps NCCC.

Copies of the information collection request can be obtained by contacting the office listed in the addresses section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by February 26, 2016.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service National Civilian Community Corps; Attention Barbara Lane, Director Projects and Partnerships, Room 9805; 1201 New York Avenue NW., Washington, DC 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Monday through Friday, except Federal holidays.

(3) By fax to: (202) 606-3462, Attention: Barbara Lane, Director Projects and Partnerships.

(4) Electronically through www.regulations.gov. Individuals who use a telecommunications device for the deaf (TTY-TDD) may call (202) 606-3472 between 8:30 a.m. and 5:00 p.m. eastern time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Barbara Lane, (202) 606-6867, or by email at blane@cns.gov.

SUPPLEMENTARY INFORMATION: The Corporation is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

Background

This National Civilian Community Corps Sponsor Survey originally developed this Sponsor Survey to evaluate the program's performance impact on sponsoring organizations and communities. This measurement instrument works to capture outputs and outcomes of the NCCC program on the organizations and communities it serves. This information collection serves as part of an overall AmeriCorps NCCC logic model to help measure the degree to which the program is addressing the statutory areas of national and community needs in a way that strengthens communities and builds leaders. The survey will be administered electronically to all project sponsors after each project is completed.

Current Action

This is a revision of the information collection request. The NCCC Sponsor Survey consists of between 34 and 37 questions, depending on which responses the respondents specify. All sponsors will receive their survey as a single instrument. For each team on each project, the organization that partnered with AmeriCorps NCCC will receive an individual survey.

Type of Review: Revised.

Agency: Corporation for National and Community Service.

Title: NCCC Sponsor Survey.

OMB Number: 3045-01385.

Agency Number: None.

Affected Public: The NCCC sponsor survey will be administered to the project sponsor for any NCCC service project. These sponsors apply to receive a NCCC team, typically made up of 8-12 Members, for a period of approximately six-eight weeks to implement local service projects. There are approximately 1,200 projects that NCCC perform each year. The project sponsors are uniquely able to provide the information sought in the NCCC Sponsor Survey.

Total Respondents: Based on the number of projects completed last fiscal year, NCCC expects to administer 2,400 surveys each fiscal year. These may not be unique responders as many sponsors

receive teams on a rotating basis and thus may complete the survey more than once per year.

Frequency: Biweekly. Each sponsor will complete only one survey per team per project.

Average Time per Response: 30 minutes.

Estimated Total Burden Hours: 1,200 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 22, 2015.

Jake Sgambati,

Director of Operations, National Civilian Community Corps.

[FR Doc. 2015-32603 Filed 12-24-15; 8:45 am]

BILLING CODE 6050-28-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD-2015-OS-0141]

Privacy Act of 1974; System of Records

AGENCY: National Guard Bureau, DoD.

ACTION: Notice to add a new System of Records.

SUMMARY: The National Guard Bureau proposes to add a new system of records INGB 013, entitled "LeaveLog", matches information for each user to that user's military pay account. Once validated, the information collected is used to automate the submission of leave requests, approval and/or disapproval of leave, and submission of leave transactions to military pay systems.

DATES: Comments will be accepted on or before January 27, 2016. This proposed action will be effective the day following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

* Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit

Matters Office, 9010 Defense Pentagon, Washington, DC 20301-9010.

Instructions: All submissions received must include the agency name and document number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Nikolaisen, 111 South George Mason Drive, AH2, Arlington, VA 22204-1373 or telephone: (703) 601-6884.

SUPPLEMENTARY INFORMATION: The National Guard Bureau notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or from the Defense Privacy and Civil Liberties Division Web site at <http://dpcl.d.defense.gov/>. The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 15, 2015, 2014, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 22, 2015.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

INGB 013

SYSTEM NAME:

LeaveLog

SYSTEM LOCATION:

National Guard Bureau, Human Resources Manpower, 111 South George Mason Drive, Arlington, Virginia, 22204-1382.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

National Guard Service Members in an active duty status based on an individual order for active duty status. This includes Army National Guard and Air National Guard service members.

CATEGORIES OF RECORDS IN THE SYSTEM:

Full name, military rank, organization, type of leave, leave start and stop dates, address while on leave, phone number while on leave, leave balance, email address, and Social Security Number (SSN).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 10502, Chief, National Guard Bureau; Army Regulation 600-8-10, Leaves and Passes; Air Force Instruction 36-3003, Military Leave Program; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

The system matches information for each user to access their military pay account. Once validated, the information collected is used to automate the submission of leave requests, approval and/or disapproval of leave, and submission of leave transactions to military pay systems.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD Blanket Routine Uses set forth at the beginning of the National Guard Bureau's compilation of systems of records notices may apply to this system. The complete list of DoD blanket routine uses can be found online at: <http://dpcl.d.defense.gov/Privacy/SORNsIndex/BlanketRoutineUses.aspx>.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

All records are electronic and are stored in a database with encryption for data at rest.

RETRIEVABILITY:

Records are retrieved using the SSN, first and last name of the individual, or the organization to which the individual belongs.

SAFEGUARDS:

Records are protected from unauthorized disclosure by storage in areas accessible only to authorized personnel within buildings secured by locks or guards. Access to data by the users is restricted by the Web application itself and limited by user identification or authentication. User roles define user privileges and

functions within the application. In order to access the system, users must have a DoD Common Access Card (CAC) which contains a digital certificate and validates their identity.

RETENTION AND DISPOSAL:

Disposition pending (treat records as permanent until the National Archives and Records Administration has approved the retention and disposition schedule.

SYSTEM MANAGER(S) AND ADDRESS:

National Guard Bureau, Human Resources Manpower, 111 South George Mason Drive (2 East), Arlington, VA 22204-1382.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system can write to the National Guard Bureau, Human Capital Management Office, 111 South George Mason Drive (2 East), Arlington, VA 22204-1382.

Written requests must include his or her full name, period of duty, and full mailing address in order to receive a response.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).'

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).'

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system can write to the National Guard Bureau, Human Capital Management Office, 111 South George Mason Drive (2 East), Arlington, VA 22204-1382.

Written requests must include his or her full name, period of duty, and full mailing address in order to receive a response.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the

foregoing is true and correct. Executed on (date). (Signature)'.
 If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

CONTESTING RECORD PROCEDURES:

The National Guard Bureau rules for accessing records, for contesting contents, and appealing initial agency determinations are published at 32 CFR part 329 or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is obtained from the individual, the Defense Joint Military Pay System—Active Component (DJMS-AC), and the Defense Joint Military Pay System—Reserve Component (DJMS-RC).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2015-32557 Filed 12-24-15; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Federal Advisory Committee Meeting

AGENCY: DoD.

ACTION: Meeting notice.

SUMMARY: The Department of Defense is publishing this notice to announce the following Federal advisory committee meeting of the Defense Business Board. This meeting is open to the public.

DATES: The public meeting of the Defense Business Board ("the Board") will be held on Thursday, January 21, 2016. The meeting will begin at 9:30 a.m. and end at 11:00 a.m. (Escort required; see guidance in the **SUPPLEMENTARY INFORMATION** section, "Public's Accessibility to the Meeting.")

ADDRESSES: Room 3E863 in the Pentagon, Washington, DC (Escort required; see guidance in the **SUPPLEMENTARY INFORMATION** section, "Public's Accessibility to the Meeting.")

FOR FURTHER INFORMATION CONTACT: The Board's Designated Federal Officer (DFO) is Ms. Roma Laster, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301-1155, roma.k.laster.civ@mail.mil, 703-695-7563. For meeting information please contact Mr. Steven Cruddas, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington,

DC 20301-1155, steven.m.cruddas.civ@mail.mil, (703) 697-2168. For submitting written comments or questions to the Board, send via email to mailbox address: osd.pentagon.odam.mbx.defense-business-board@mail.mil. Please include in the Subject line "DBB Jan 2016 Meeting."

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102-3.140.

Purpose of the Meeting: The Board will review the findings and recommendations from the Task Groups on "Creating Virtual Consultancies: Engaging Talent (Innovative Culture Part II)" and "Evaluation of Position of Under Secretary of Defense for Business Management and Information."

The mission of the Board is to examine and advise the Secretary of Defense on overall DoD management and governance. The Board provides independent advice which reflects an outside private sector perspective on proven and effective best business practices that can be applied to the DoD. Availability of Materials for the Meeting: A copy of the agenda and the terms of reference for each Task Group study may be obtained from the Board's Web site at <http://dbb.defense.gov/meetings>. Copies will also be available at the meeting.

Meeting Agenda

9:30 a.m.–9:35 a.m.—Opening remarks
 9:35 a.m.–10:35 a.m.—Task Group briefings on "Creating Virtual Consultancies: Engaging Talent (Innovative Culture Part II)" and on "Evaluation of Position of Under Secretary of Defense, Business Management and Information."
 10:35 a.m.–10:45 a.m.—Public Comments (if time permits)
 10:45 a.m.–11:00 a.m.—Board Deliberations

Written public comments are strongly encouraged.

Public's Accessibility to the Meeting: Pursuant to FACA and 41 CFR 102-3.140, this meeting is open to the public. Seating is limited and is on a first-come basis. All members of the public who wish to attend the public meeting must contact Mr. Steven Cruddas at the number listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 12:00 p.m. on Friday, January 15, 2016 to register and make arrangements for a Pentagon escort, if

necessary. Public attendees requiring escort should arrive at the Pentagon Metro Entrance with sufficient time to complete security screening no later than 9:00 a.m. on January 21. To complete security screening, please come prepared to present two forms of identification of which one must be a pictured identification card.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Mr. Cruddas at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Procedures for Providing Public Comments

Pursuant to 41 CFR 102-3.105(j) and 102-3.140, and section 10(a)(3) of FACA, the public or interested organizations may submit written comments to the Board about its mission and topics pertaining to this public meeting.

Written comments should be received by the DFO at least five (5) business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written comments should be submitted via email to the email address for public comments given in the **FOR FURTHER INFORMATION CONTACT** section in either Adobe Acrobat or Microsoft Word format. Please include in the Subject line "DBB Jan 2016 Meeting." Please note that since the Board operates under the provisions of the FACA, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Board's Web site.

Dated: December 21, 2015.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2015-32504 Filed 12-24-15; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and Request for Comments

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection request with the Office of

Management and Budget (OMB). Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. This information collection request pertains to the Human Reliability Program (HRP). This information collection request consists of forms that will certify to DOE that respondents were advised of the requirements for occupying or continuing to occupy a HRP position. The forms include: Human Reliability Program Certification (DOE F 470.3), Acknowledgement and Agreement to Participate in the Human Reliability Program (DOE F 470.4), Authorization and Consent to Release Human Reliability Program (HRP) Records in Connection with HRP (DOE F 470.5), Refusal of Consent (DOE F 470.6), and Human Reliability Program (HRP) Alcohol Testing Form (DOE F 470.7). The HRP is a security and safety reliability program for individuals who apply for or occupy certain positions that are critical to the national security. It requires an initial and annual supervisory review, medical assessment, management evaluation, and a DOE personnel security review of all applicants or incumbents. It is also used to ensure that employees assigned to nuclear explosive duties do not have emotional, mental, or physical conditions that could result in an accidental or unauthorized detonation of nuclear explosives.

DATES: Comments regarding this proposed information collection must be received on or before February 26, 2016. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Regina Cano U.S. Department of Energy, Office of Corporate Security Strategy, Analysis and Special Operations (AU-1.2), 1000 Independence Ave SW., Washington, DC 20585, telephone at (202) 586-7079, by fax at (202) 586-3333, or by email at regina.cano@hq.doe.gov, or information

about the collection instruments may be obtained at <http://energy.gov/ehss/information-collection>.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to the person listed above in **ADDRESSES**.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. 1910-5122; (2) Information Collection Request Title: Human Reliability Program; (3) Type of Review: renewal; (4) Purpose: This collection provides for DOE management to ensure that individuals who occupy HRP positions meet program standards of reliability and physical and mental suitability; (5) Annual Estimated Number of Respondents: 43,960; (6) Annual Estimated Number of Total Responses: 43,999; (7) Annual Estimated Number of Burden Hours: 3,819; (8) Annual Estimated Reporting and Recordkeeping Cost Burden: \$332,253 (9) Response Obligation: Mandatory.

Statutory Authority: 42 U.S.C. 2165; 42 U.S.C. 2201; 42 U.S.C. 5814-5815; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; E.O. 10450, 3 CFR 1949-1953 Comp., p. 936, as amended; E.O. 10865, 3 CFR 1959-1963 Comp., p. 398, as amended; 3 CFR Chap. IV.

Issued in Washington, DC on December 21, 2015.

Stephanie K. Martin,

Acting Director, Office of Resource Management, Office of Environment, Health, Safety and Security.

[FR Doc. 2015-32587 Filed 12-24-15; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Submission of Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted an information collection request to the OMB for an extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of its Environment, Safety and Health reporting requirements, OMB Control Number 1910-0300. This information collection request covers information necessary for the DOE to exercise management oversight and control over Management and Operating (M&O) contractors of the DOE's Government-Owned Contractor-

Operated (GOCO) facilities, and offsite contractors. The contractor management oversight and control function concerns the ways in which the DOE's contractors provide goods and services for DOE organizations and activities in accordance with the terms of their contract(s); the applicable statutory, regulatory and mission support requirements of the DOE; and regulations in the functional area covered in this request.

DATES: Comments regarding this collection must be received on or before January 27, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202-395-4650.

ADDRESSES: Written comments should be sent to the DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503 and to Sandra Dentinger, AU-70, Germantown Building, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585-1290, by fax at 301-903-2194 or by email at Sandra.dentinger@hq.doe.gov, or information about the collection instruments may be obtained at <http://energy.gov/ehss/information-collection>:

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed at the addresses listed above in **ADDRESSES**.

SUPPLEMENTARY INFORMATION: The information collection request contains the following: (1) OMB No: 1910-0300; (2) Information Collection Request Title: Environment, Safety and Health; (3) Type of Review: renewal; (4) Purpose: The collections are used by DOE to exercise management oversight and control over its contractors in the ways in which the DOE's contractors provide goods and services for DOE organizations and activities in accordance with the terms of their contract(s); the applicable statutory, regulatory and mission support requirements of the Department. The collections are: Computerized Accident/ Incident Reporting System (CAIRS); Occurrence Reporting and Processing System (ORPS); Noncompliance Tracking System (NTS); Radiation Exposure Monitoring System (REMS); Annual Fire Protection Summary Application; Safety Basis Information System; and Lessons Learned System;

(5) Annual Estimated Number of Respondents: 1,004; (6) Annual Estimated Number of Total Responses: 79,634; (7) Response Obligation: Required, except for Noncompliance Tracking System (see Statutory Authority section below); (8) Annual Estimated Number of Burden Hours: 41,733; (9) Annual Estimated Reporting and Recordkeeping Cost Burden: \$0

Statutory Authority: Section 641 of the Department of Energy Organization Act, codified at 42 U.S.C. 7251, and the following additional authorities:

Computerized Accident/Incident Reporting System (CAIRS): DOE Order 231.1B (June 27, 2011).

Occurrence Reporting and Processing System (ORPS): DOE Order 232.2 (August 30, 2011).

Noncompliance Tracking System (NTS): 10 CFR part 820; 10 CFR part 851.

Radiation Exposure Monitoring System (REMS): 10 CFR part 835; DOE Order 231.1B (June 27, 2011).

Annual Fire Protection Summary Application: DOE Order 231.1B (June 27, 2011).

Safety Basis Information System: 10 CFR part 830; DOE O 231.1B (June 27, 2011).

Lessons Learned System: DOE Order 210.2A (April 8, 2011).

Issued in Washington, DC, on December 11, 2015.

Stephanie K. Martin,

Acting Director, Office of Resource Management, Office of Environment, Health, Safety and Security.

[FR Doc. 2015-32588 Filed 12-24-15; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16-517-000]

Shelby County Energy Center, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding Shelby County Energy Center, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice

and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 11, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: December 21, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32574 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16-31-000]

Columbia Gas Transmission, LLC;

Notice of Request Under Blanket Authorization

Take notice that on December 10, 2015 Columbia Gas Transmission, LLC (Columbia Gas), 5151 San Felipe, Suite 2500, Houston, Texas 77056 filed a prior

notice request pursuant to sections 157.205 and 157.210 of the Commission's regulations under the Natural Gas Act for authorization to convert existing compressor units from base load to standby mode at the Cleveland Compressor Station, located in Upshur County, WV and the Files Creek Compressor Station, located in Randolph County, WV. Columbia Gas states that there will be no impact on Columbia's overall capacity and certified horsepower, 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, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

Any questions regarding this Application should be directed to Tyler R. Brown, Senior Counsel, Columbia Gas Transmission, LLC, 5151 San Felipe, Suite 2500, Houston, Texas 77056, by calling (713) 386-3797, or by email at tbrown@cpg.com.

Any person may, within 60 days after the 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. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file 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 protest. If a protest is filed and not withdrawn within 30 days after the time allowed 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 final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record

for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (www.ferc.gov) under the "e-Filing" link. Persons unable to file electronically should submit original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: December 21, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32572 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11-1881-007; ER11-1894-007; ER11-1893-007; ER11-1892-007; ER11-1890-007; ER11-1889-007; ER11-1887-007; ER11-1886-007; ER11-1885-007; ER11-1883-007; ER11-1882-007.

Applicants: Burley Butte Wind Park, LLC, Golden Valley Wind Park, LLC,

Milner Dam Wind Park, LLC, Oregon Trail Wind Park, LLC, Pilgrim Stage Station Wind Park, LLC, Thousand Springs Wind Park, LLC, Tuana Gulch Wind Park, LLC, Camp Reed Wind Park, LLC, Payne's Ferry Wind Park, LLC, Salmon Falls Wind Park, LLC, Yahoo Creek Wind Park, LLC.

Description: Supplement to August 7, 2015 Notice of Non-Material Change in Status of the IWP Sellers.

Filed Date: 12/21/15.

Accession Number: 20151221-5141.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER15-1883-002; ER16-91-002; ER16-90-001; ER15-2477-001; ER15-1418-002; ER15-1375-002; ER15-1016-002; ER13-2112-004; ER13-1992-006; ER13-1991-006; ER12-631-009; ER12-2444-008; ER11-4678-009; ER11-4677-009; ER11-4462-014; ER11-2160-008; ER10-1989-008; ER10-1971-023; ER10-1962-008; ER10-1890-008 ER10-1856-008; ER10-1847-008.

Applicants: Adelanto Solar, LLC, Adelanto Solar II, LLC, Blythe Solar 110, LLC, Desert Sunlight 250, LLC, Desert Sunlight 300, LLC, Diablo Winds, LLC, FPL Energy Cabazon Wind, LLC, FPL Energy Green Power Wind, LLC, FPL Energy Montezuma Wind, LLC, Genesis Solar, LLC, Golden Hills Wind, LLC, Golden Hills Interconnection, LLC, High Winds, LLC, McCoy Solar, LLC, NEPM II, LLC, NextEra Energy Montezuma II Wind, LLC, NextEra Energy Power Marketing, LLC, North Sky River Energy, LLC, Shafter Solar, LLC, Sky River LLC, Vasco Winds, LLC, Windpower Partners 1993, LLC

Description: Notification of Change in Status of the NextEra Resources Entities.

Filed Date: 12/18/15.

Accession Number: 20151218-5311.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16-149-001.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Tariff Amendment: 2015-12-21_SA 2854 MDU-MDU Amended FCA (F109) to be effective 10/28/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5162.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-587-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original WMPA SA No. 4324, Queue No. Z2-115 to be effective 12/8/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5091.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-588-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Service Agreement No. 2975; Queue No. W1-082 to be effective 12/2/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5092.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-589-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to Florence Solar WMPA SA No. 3482, Queue No. W3-080 to be effective 5/8/2014.

Filed Date: 12/21/15.

Accession Number: 20151221-5104.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-590-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of WMPA SA No. 3248, Queue No. W2-083 to be effective 2/5/2016.

Filed Date: 12/21/15.

Accession Number: 20151221-5110.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-591-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of WMPA SA No. 3249, Queue No. W2-088 to be effective 2/5/2016.

Filed Date: 12/21/15.

Accession Number: 20151221-5133.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-592-000.

Applicants: Wisconsin Electric Power Company.

Description: Application of Wisconsin Electric Power Company of Depreciation Study and Change in Depreciation Rates.

Filed Date: 12/18/15.

Accession Number: 20151218-5300.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16-593-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of WMPA SA No. 4159, Queue No. AA1-131 to be effective 2/8/2016.

Filed Date: 12/21/15.

Accession Number: 20151221-5135.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-594-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Assignment of WMPA SA No. 3859, Queue No. Z1-082 to HD Project One, LLC to be effective 5/19/2014.

Filed Date: 12/21/15.

Accession Number: 20151221-5138.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-595-000.

Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.
Description: § 205(d) Rate Filing: 2015-12-21 SA 2879 Ameren Illinois-Wabash Valley Power Association WCA to be effective 12/16/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5139.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-596-000.

Applicants: Midcontinent Independent System Operator, Inc. Ameren Illinois Company.

Description: § 205(d) Rate Filing: 2015-12-21 SA 2880 Ameren Illinois-Wabash Valley Power Association UCA to be effective 12/16/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5142.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-597-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of WMPA SA No. 3201, Queue No. W3-076 to be effective 2/5/2016.

Filed Date: 12/21/15.

Accession Number: 20151221-5143.

Comments Due: 5 p.m. ET 1/11/16.

Docket Numbers: ER16-598-000.

Applicants: Louisville Gas and Electric Company.

Description: § 205(d) Rate Filing: 12 21 2015 EKPC NITSA Amendment to be effective 12/29/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5184.

Comments Due: 5 p.m. ET 1/11/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: December 21, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32569 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL13-62-002]

Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.; Notice of Compliance Filing

Take notice that on December 16, 2015, New York Independent System Operator, Inc. submits a compliance filing in response to the November 16, 2015 Data Request.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on January 11, 2016.

Dated: December 21, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32573 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP16-313-000.

Applicants: MMGS Inc., Mitsui & Co. Cameron LNG Sales, Inc.

Description: Petition for Temporary Waivers of Capacity Release Regulations and Related Pipeline Tariff Provisions of MMGS, Inc., et. al. under RP16-313.

Filed Date: 12/18/15.

Accession Number: 20151218-5152.

Comments Due: 5 p.m. ET 12/30/15.

Docket Numbers: RP16-137-002.

Applicants: Tallgrass Interstate Gas Transmission, L.

Description: Compliance filing per 154.203: Compliance Filing for Rate Case to be effective 12/1/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5001.

Comments Due: 5 p.m. ET 1/4/16.

Docket Numbers: RP16-54-001.

Applicants: Equitrans, L.P.

Description: Compliance filing per 154.203: AVC ADIT PLR Compliance Filing to be effective 12/1/2015.

Filed Date: 12/21/15.

Accession Number: 20151221-5088.

Comments Due: 5 p.m. ET 1/4/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: December 21, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32570 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Combined Notice of Filings #1**

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC16–36–000.

Applicants: LWP Lessee, LLC.

Description: Clarification to November 19, 2015 Application for Authorization Under Section 203 of the FPA and Request for Shortened Comment Period of LWP Lessee, LLC.

Filed Date: 12/18/15.

Accession Number: 20151218–5271.

Comments Due: 5 p.m. ET 12/28/15.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1276–005; ER10–1353–006; ER10–1319–006; ER10–1303–004; ER10–1292–004; ER10–1287–004.

Applicants: Consumers Energy Company, CMS Energy Resource Management Company, Grayling Generation Station Limited Partnership, Genesee Power Station Limited Partnership, CMS Generation Michigan Power, LLC, Dearborn Industrial Generation, L.L.C.

Description: Notice of Non-Material Change in Status of Consumer Energy Company, et al.

Filed Date: 12/18/15.

Accession Number: 20151218–5286.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER10–1285–006.

Applicants: Craven County Wood Energy Limited Partnership.

Description: Notice of Non-Material Change in Status of Craven County Wood Energy Limited Partnership.

Filed Date: 12/18/15.

Accession Number: 20151218–5287.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER10–2417–002; ER13–122–002.

Applicants: ExxonMobil Baton Rouge Complex, ExxonMobil Beaumont Complex.

Description: Supplement to June 29, 2015 Triennial Market-Power Analysis for the Central Region of ExxonMobil Baton Rouge Complex, et al.

Filed Date: 12/18/15.

Accession Number: 20151218–5042.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER13–2409–006

ER15–2620–001; ER15–2615–001;

ER14–2858–005; ER13–2409–006;

ER12–979–010; ER12–2448–010 ER11–

4501–011; ER11–4499–010; ER11–4498–

010.
Applicants: Buffalo Dunes Wind Project, LLC, Caney River Wind Project,

LLC, Chisholm View Wind Project, LLC, Goodwell Wind Project, LLC, Little Elk Wind Project, LLC, Origin Wind Energy, LLC, Rocky Ridge Wind Project, LLC, Smoky Hills Wind Farm, LLC, Smoky Hills Wind Project II, LLC.

Description: Updated Market Power Analysis and Order No. 697 Compliance Filing of Buffalo Dunes Wind Project, LLC, et al.

Filed Date: 12/18/15.

Accession Number: 20151218–5276.

Comments Due: 5 p.m. ET 2/16/16.

Docket Numbers: ER15–1332–002.

Applicants: Arbuckle Mountain Wind Farm LLC.

Description: Notice of Non-Material Change in Status of Arbuckle Mountain Wind Farm LLC.

Filed Date: 12/18/15.

Accession Number: 20151218–5288.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER15–2681–000.

Applicants: White Oak Energy LLC.

Description: Request for administrative cancellation of tariff ID 36, et. al. of White Oak Energy LLC.

Filed Date: 12/18/15.

Accession Number: 20151218–5296.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–91–001.

Applicants: Blythe Solar 110, LLC.

Description: Notification of Change in Status of Blythe Solar 110, LLC.

Filed Date: 12/18/15.

Accession Number: 20151218–5297.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–438–001; ER15–2211–006; ER13–1266–007.

Applicants: Marshall Wind Energy LLC, CalEnergy, LLC, MidAmerican Energy Services, LLC.

Description: Updated Market Power Analysis for Southwest Power Pool Region of Marshall Wind Energy LLC, et al.

Filed Date: 12/18/15.

Accession Number: 20151218–5290.

Comments Due: 5 p.m. ET 2/16/16.

Docket Numbers: ER16–553–001.

Applicants: San Diego Gas & Electric Company

Description: Tariff Amendment: SDGE Merchant OM Agreement-Baseline Filing to be effective 12/18/2015.

Filed Date: 12/18/15.

Accession Number: 20151218–5249.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–580–000.

Applicants: Nevada Power Company.

Description: § 205(d) Rate Filing: Rate Schedule 140 NPC RS 140 Concurrence with PacifiCorp RS 439 12.18.15 to be effective 1/1/2016.

Filed Date: 12/18/15.

Accession Number: 20151218–5241.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–581–000.

Applicants: ENGIE Portfolio Management, LLC

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 2/17/2016.

Filed Date: 12/18/15.

Accession Number: 20151218–5246.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–582–000.

Applicants: ENGIE Retail, LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 2/17/2016.

Filed Date: 12/18/15.

Accession Number: 20151218–5247.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–583–000.

Applicants: GDF SUEZ Energy Resources NA, Inc.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 2/17/2016.

Filed Date: 12/18/15.

Accession Number: 20151218–5248.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–584–000.

Applicants: Otter Tail Power Company.

Description: § 205(d) Rate Filing: Filings Related to 1986 Integrated Transmission Agreement Part I to be effective 7/30/2010.

Filed Date: 12/18/15.

Accession Number: 20151218–5250.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–584–001.

Applicants: Otter Tail Power Company.

Description: Tariff Amendment: Filings Related to 1986 Integrated Transmission Agreement Part II to be effective 7/30/2010.

Filed Date: 12/18/15.

Accession Number: 20151218–5251.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–585–000.

Applicants: Otter Tail Power Company.

Description: § 205(d) Rate Filing: Revisions to Service Agreement No. 3 Under the CASOT to be effective 1/1/2016.

Filed Date: 12/18/15.

Accession Number: 20151218–5253.

Comments Due: 5 p.m. ET 1/8/16.

Docket Numbers: ER16–586–000.

Applicants: Georgia Power Company.

Description: Georgia Power Company submits rate schedule update per 35.13(a)(2)(iii): reduction in transmission carrying charge to be effective 1/1/2015.

Filed Date: 12/18/15.

Accession Number: 20151218–5272.

Comments Due: 5 p.m. ET 1/8/16.

The filings are accessible in the Commission's eLibrary system by

clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: December 21, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32568 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16-29-000; Docket No. CP16-30-000]

Transcontinental Gas Pipe Line Company, LLC; UGI Mt. Bethel Pipeline Company, LLC; Notice of Applications

Take notice that on December 9, 2015, Transcontinental Gas Pipe Line Company, LLC (Transco), P.O. Box 1396, Houston, Texas 7725, filed an application pursuant to section 7(b) of the Natural Gas Act (NGA) requesting an order authorizing the abandonment by sale to UGI Mt. Bethel Pipeline Company, LLC of the Allentown Lateral, a 12.5 miles 12-inch-diameter pipeline and related appurtenances located in Northampton County, Pennsylvania.

Additionally, on December 9, 2015, UGI Mt. Bethel Pipeline Company, LLC (UGI), 5665 Leesport Ave, Reading, Pennsylvania 19605, filed an application pursuant to Section 7(c) of the NGA requesting a certificate of public convenience and necessity authorizing UGI to acquire and operate the Allentown Lateral, located in Northampton County, Pennsylvania, which are currently operated by Transco, and to provide open-access transportation services, with pre-granted abandonment approval. UGI's will continue to operate the facilities under open access certificates. UGI is also requesting approval for its proposed initial recourse rates for transportation

service and for its pro forma tariff, which includes the authority to enter into negotiated rate agreements, 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 or toll free at (866) 208-3676, or TTY, contact (202) 502-8659.

Any questions concerning this application may be directed to Ingrid Germany, Regulatory Analyst Lead, Transco Rates & Regulatory, P.O. Box 1396, Houston, Texas 77251 at (713) 215-4015, and/or to Frank H. Markle, Senior Counsel, UGI Corporation, 460 North Gulph Road, King of Prussia, PA 19482 at (610) 768-3625.

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 final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and

by all other parties. A party must submit original and 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

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 commentators will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentators will not be required to serve copies of filed documents on all other parties. However, the non-party commentators will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email

FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on January 11, 2016.

Dated: December 21, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32571 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP16-308-000.
Applicants: Gulfstream Natural Gas System, L.L.C.

Description: § 4(d) rate filing per 154.204: Cleanup Filing Dec2015—FOSA Index to be effective 1/18/2016.

Filed Date: 12/17/15.

Accession Number: 20151217-5118.

Comments Due: 5 p.m. ET 12/29/15.

Docket Numbers: RP16-309-000.
Applicants: Gulf South Pipeline Company, LP.

Description: § 4(d) rate filing per 154.204: Amendment to Neg Rate Agmt (Sequent 34693-39) to be effective 12/17/2015.

Filed Date: 12/17/15.

Accession Number: 20151217-5186.

Comments Due: 5 p.m. ET 12/29/15.

Docket Numbers: RP16-310-000.
Applicants: Kinder Morgan Louisiana Pipeline LLC.

Description: § 4(d) rate filing per 154.204: Tariff Filing to be effective 3/1/2016.

Filed Date: 12/17/15.

Accession Number: 20151217-5206.

Comments Due: 5 p.m. ET 12/29/15.

Docket Numbers: RP16-311-000.
Applicants: Enable Gas Transmission, LLC.

Description: § 4(d) rate filing per 154.204: Negotiated Rate Filing—December 2015 EOG 1008270 Removal to be effective 1/1/2016.

Filed Date: 12/17/15.

Accession Number: 20151217-5208.

Comments Due: 5 p.m. ET 12/29/15.

Docket Numbers: RP16-312-000.
Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) rate filing per 154.204: Negotiated Rate eff 11-1-2016 for NJNG Contract 910230 to be effective 11/1/2016.

Filed Date: 12/18/15.

Accession Number: 20151218-5072.

Comments Due: 5 p.m. ET 12/30/15.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: December 18, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015-32567 Filed 12-24-15; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2008-0719; FRL 9940-55-OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; National Pollutant Discharge Elimination System (NPDES) Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "National Pollutant Discharge Elimination System (NPDES) Program (Renewal)" (EPA ICR No. 0229.21, OMB Control No. 2040-0004) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through December 31, 2015. Public comments were previously requested via the **Federal Register** (80 FR 60142) on October 5, 2015 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public.

An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before January 27, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OW-2008-0719, to (1) EPA online using www.regulations.gov (our preferred method), by email to ow-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to oir_submission@omb.eop.gov. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Amelia Letnes, Office of Wastewater Management, Mail Code 4203M, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202-564-5627; email address: letnes.amelia@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit www.epa.gov/dockets.

Abstract: This consolidated ICR calculates the burden and costs associated with the NPDES program, identifies the types of activities regulated under the NPDES program, describes the roles and responsibilities of state governments and the Agency, and presents the program areas that address the various types of regulated activities. This renewal includes the addition of the burden and costs for the Airport Deicing Category previously contained in a separate ICR.

Form Numbers: None.

Respondents/affected entities: State and Local Governments, Private Entities.

Respondent's obligation to respond: Mandatory per Clean Water Act (CWA) section 402.

Estimated number of respondents: 532,523 (total).

Frequency of response: Varies by requirement from daily to annually or on occasion.

Total estimated burden: 21,041,107 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$121,797,877 (per year), includes \$20,234,453 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 283,634 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. Adjustments to the burden estimates include: The addition of the burden associated with the airport deicing category; changes in the burden associated with agency actions related to changes in the VGP; addition of burden associated with the issuance of the small vessels general permit (sVGP); and changes in the estimated burden associated with revised estimates of number of respondents.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015-32610 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2002-0059; FRL 9940-52-OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Safe Drinking Water Act State Revolving Fund Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) has submitted an information collection request (ICR), "Safe Drinking Water Act State Revolving Fund Program" (EPA ICR No. 1803.07, OMB Control No. 2040-0185) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA, 44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through December 31, 2015. Public comments were previously requested via the **Federal Register** (80 FR 57605) on September 24, 2015, during a 60-day

comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given in this renewal notice, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before January 27, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OW-2002-0059, to (1) EPA online using www.regulations.gov (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to oir_submission@omb.eop.gov. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Nick Chamberlain, Drinking Water Protection Division, Office of Ground Water and Drinking Water, 4606M, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202-564-1871; email address: Chamberlain.Nick@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit www.epa.gov/dockets.

Abstract: The Safe Drinking Water Act (SDWA) Amendments of 1996 (Pub. L. 104-182) authorized the creation of the Drinking Water State Revolving Fund (DWSRF; the Fund) program in each state and Puerto Rico to assist public water systems to finance the costs of infrastructure needed to achieve or maintain compliance with SDWA requirements and to protect public health. Section 1452 authorizes the Administrator of the EPA to award

capitalization grants to the states and Puerto Rico which, in turn, provide low-cost loans and other types of assistance to eligible drinking water systems. States can also reserve a portion of their grants to conduct various set-aside activities. The information collection activities will occur primarily at the program level through the (1) Capitalization Grant Application and Agreement/State Intended Use Plan; (2) Biennial Report; (3) Annual Audit; (4) Assistance Application Review; and (5) DWSRF National Information Management System and the Projects & Benefits Reporting System.

Form Numbers: None.

Respondents/affected entities: Entities affected by this action are states and local governments.

Respondent's obligation to respond: Required to obtain or retain a benefit per the Safe Drinking Water Act Section 1452(g)(1).

Estimated number of respondents: 1,035 (total).

Frequency of response: Varies by requirement (*i.e.*, quarterly, semi-annually and annually).

Total estimated burden: 88,881 hours (average per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$4,884,591 (average per year), which is solely for labor cost.

Changes in the Estimates: There is a net decrease of 180,916 hours in annual respondent burden hours from the previous ICR. This is partially attributable to the previous ICR's inclusion of burden hours from the American Recovery and Reinvestment Act (ARRA) signed by the President on February 17, 2009. ARRA's additional \$2 billion in funding for assistance agreements resulted in approximately twice the normal number of applications for assistance in 2009. There is also a net decrease in local respondent burden hours from the previous ICR, which included application preparation and submission burden hours for localities. This is a state need/requirement, not federal, and thus it is excluded from this ICR. Some of the decrease is offset by this ICR's inclusion of local burden for public awareness activities.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015-32614 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2008-0719; FRL 9940-56-OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Cooling Water Intake Structures New Facility Final Rule (Renewal)**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "Cooling Water Intake Structures New Facility Final Rule (Renewal)" (EPA ICR No. 1973.06, OMB Control No. 2040-0241) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through December 31, 2015. Public comments were previously requested via the **Federal Register** (80 FR 60142) on October 5, 2015 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before January 27, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OW-2008-0719, to (1) EPA online using www.regulations.gov (our preferred method), by email to ow-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to oira_submission@omb.eop.gov. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Amelia Letnes, Office of Wastewater Management, Mail Code 4203M,

Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202-564-5627; email address: letnes.amelia@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit www.epa.gov/dockets.

Abstract: Section 316(b) of the Clean Water Act (CWA) provides that "[a]ny standard established pursuant to [CWA section 301] or [CWA section 306] and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."

The section 316(b) New Facility Rule (66 FR 65256; December 18, 2001) and minor amendments (68 FR 36749; June 19, 2003) implement section 316(b) of the CWA as it applies to new facilities that use cooling water intake structures (CWISs). The rule requires new facilities to submit several distinct types of information as part of their National Pollutant Discharge Elimination System (NPDES) permit application. In addition, the rule requires new facilities to maintain monitoring and reporting data as outlined by the Director in their NPDES permits. The information requirements in this Information Collection Request (ICR) are necessary to ensure that new facilities are complying with the rule's provisions, and thereby minimizing adverse environmental impact resulting from impingement and entrainment losses due to the withdrawal of cooling water.

Form Numbers: None.

Respondents/affected entities: State Governments, Private Entities

Respondent's obligation to respond: Mandatory per Clean Water Act (CWA) section 316(b).

Estimated number of respondents: 145 (total).

Frequency of response: Annually, on occasion

Total estimated burden: 151,789 hours (per year). Burden is defined at 5 CFR 1320.03(b)

Total estimated cost: \$11,817,460 (per year), includes \$2,267,728 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 13,368 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to expected growth in the number of permitted facilities over the next three years.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015-32611 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2008-0719; FRL 9940-54-OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; National Pretreatment Program (Renewal)**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "National Pretreatment Program" (EPA ICR No. 0002.16, OMB Control No. 2040-0009) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through December 31, 2015. Public comments were previously requested via the **Federal Register** (80 FR 60142) on October 5, 2015 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before January 27, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OW-2008-0719, to (1) EPA online using www.regulations.gov (our preferred method), by email to ow-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to oira_submission@omb.eop.gov. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Amelia Letnes, Office of Wastewater Management, Mail Code 4203M, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202-564-5627; email address: letnes.amelia@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit www.epa.gov/dockets.

Abstract: This ICR calculates the burden and costs associated with managing and implementing the National Pretreatment Program as mandated under Clean Water Act (CWA) sections 402(a) and (b) and 307(b). This ICR includes all existing tasks under the National Pretreatment Program, as amended by the EPA's Streamlining Rule. EPA's Office of Wastewater Management (OWM) in the Office of Water (OW) is responsible for the management of the pretreatment program. The CWA requires EPA to develop national pretreatment standards to control discharges from Industrial Users (IUs) into POTWs. These standards limit the level of certain pollutants allowed in non-domestic wastewater that is discharged to a POTW. EPA administers the pretreatment program through the NPDES permit program. Under the NPDES permit program, EPA may approve State or individual POTW implementation of the pretreatment standards at their respective levels.

Form Numbers: None.

Respondents/affected entities: State & Local Governments, Private Entities
Respondent's obligation to respond: Mandatory per Clean Water Act (CWA) sections 402(a) and (b) and 307(b).

Estimated number of respondents: 95,462 (total).

Frequency of response: Annually, Semi-annually, on occasion

Total estimated burden: 1,744,406 hours (per year). Burden is defined at 5 CFR 1320.03(b)

Total estimated cost: \$77,907,187 (per year), includes \$2,515,470 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 62,110 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is due to updated estimates that account for changes in the respondent universe.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015-32609 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2008-0150; FRL 9940-49-OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Establishing No-Discharge Zones (NDZs) Under Clean Water Act Section 312 (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "Establishing No-Discharge Zones (NDZs) Under Clean Water Act § 312 (Renewal)" (EPA ICR No. 1791.07, OMB Control No. 2040-0187) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through December 31, 2015. Public comments were previously requested via the **Federal Register** (80 FR 50276) on August 19, 2015 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before January 27, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OW-2008-0150, to (1) EPA online

using www.regulations.gov (our preferred method), by email to OW-Docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB via email to oira_submission@omb.eop.gov. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Virginia Fox-Norse, Oceans and Coastal Protection Division, Office of Wetlands, Oceans and Watersheds, (4504T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202-566-1266; email address: fox-norse.virginia@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit www.epa.gov/dockets.

Abstract: EPA requires the collection of information by states interested in designating state waters under the Clean Water Act § 312(f) as areas prohibiting the discharge of treated or untreated sewage from vessels. There are two information collection activities covered by this ICR:

(A) Sewage No-discharge Zones: The need for EPA to obtain information for, or to support, the establishment of no-discharge zones (NDZs) for vessel sewage in state waters stems from CWA sections 312(f)(3), (f)(4)(A), and (f)(4)(B), and implementing regulations at 40 CFR 140.4. No-discharge zones are established to provide greater environmental protection of specified state waters from treated and untreated vessel sewage. This ICR addresses the information requirements associated with the establishment of NDZs for vessel sewage.

(B) UNDS No-discharge Zones: Under section 312(n) of the Clean Water Act ("Uniform National Discharge Standards

for Vessels of the Armed Forces” or “UNDS”) no-discharge zones for discharges from Armed Forces vessels may be established by either state prohibition or EPA prohibition following the procedures in 40 CFR part 1700. UNDS also provides that the Governor of any state may petition EPA and the Secretary of Defense to review any determination or standard promulgated under the UNDS program if there is significant new information that could reasonably result in a change to the determination or standard. This ICR discusses the information that is required from a state if it decides (1) to establish a NDZ by state prohibition or (2) to apply for a NDZ by EPA prohibition for the UNDS discharges for which EPA and DOD have determined that it is not reasonable or practicable to require a Marine Pollution Control Device to mitigate adverse effects on the marine environment. 40 CFR 1700.5. The ICR also discusses the information that is required from a state to submit a petition for review of EPA and DOD determinations that it is not reasonable or practicable to require a Marine Pollution Control Device for a particular UNDS discharge identified at 40 CFR 1700.5.

Form Numbers: None.

Respondents/affected entities: States

Respondent's obligation to respond:

The responses to this collection of information are required to obtain the benefit of a sewage NDZ (CWA sections 312(f)(3), (f)(4)(A), and (f)(4)(B), and subsequent regulations at 40 CFR 140.4. The responses to this collection of information are required to obtain the benefit of an UNDS NDZ or a review of an UNDS determination or standard (see 33 U.S.C. 1322(n)).

Estimated number of respondents: 20 (total).

Frequency of response: One time.

Total estimated burden: 1,083 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$54,938 (per year), includes \$998 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 1,183 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is due to adjustments to the estimates reflecting a reduction in expected program activity.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015-32613 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2015-0614; FRL 9940-24-OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; BEACH Act Grants (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), “BEACH Act Grants (Renewal)” (EPA ICR No. 2048.05, OMB Control No. 2040-0244) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR which is currently approved through December 31, 2015. Public comments were previously requested via the **Federal Register** (80 FR 61419) on October 13, 2015, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments must be submitted on or before January 27, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OW-2015-0614, to (1) EPA online using www.regulations.gov (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to oira_submission@omb.eop.gov. Address comments to OMB Desk Officer for EPA.

EPA’s policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Tracy Bone, OW, 4305T, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202-564-5257; email address: bone.tracy@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA’s public docket, visit <http://www.epa.gov/dockets>.

Abstract: The Beaches Environmental Assessment and Coastal Health (BEACH) Act amends the Clean Water Act (CWA) in part and authorizes the U.S. Environmental Protection Agency (EPA) to award BEACH Act Program Development and Implementation Grants to coastal and Great Lakes states, tribes, and territories (collectively referred to as states) for their beach monitoring and notification programs. The grants assist those states to develop and implement a consistent approach to monitor recreational water quality; assess, manage, and communicate health risks from waterborne microbial contamination; notify the public of pollution occurrences, and post beach advisories and closures to prevent public exposure to microbial pathogens. To qualify for a BEACH Act Grant, a state must submit information to EPA documenting that its beach monitoring and notification program is consistent with 11 performance criteria outlined in the *National Beach Guidance and Required Performance Criteria for Grants, 2014 Edition*.

Form Numbers: None.

Respondents/affected entities: Environmental and public health agencies in states, territories, and tribes.

Respondent's obligation to respond: Required (Environmental Assessment and Coastal Health (BEACH) Act amendment to the Clean Water Act (CWA)).

Estimated number of respondents: 38 (total).

Frequency of response: Annually & quarterly.

Total estimated burden: 91,276 hours (per year). Burden is defined at 5 CFR 1320.03(b)

Total estimated cost: \$15,453,308 (per year), includes \$11,353,146 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase of 2,464 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to an additional respondent qualifying for a grant, however this increase is partially

offset by efficiencies in data processing and reporting.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015-32612 Filed 12-24-15; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[WT Docket No. 12-354; DA 15-1398]

Wireless Telecommunications Bureau Extends Period To File Comments and Reply Comments in Response to a Public Notice on an Appropriate Method for Determining the Protected Contours for Grandfathered 3650-3700 MHz Band Licensees

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Wireless Telecommunications Bureau (Bureau) extends the deadline for an October 23, 2015 public notice seeking comment on the appropriate methodology for determining the contours for protecting existing 3650-3700 MHz wireless broadband licensees from Citizens Broadband Radio Service users during a fixed transition period (*3650-3700 MHz Band Protection Contours Public Notice*). The deadline for comments is extended from December 10, 2015 to December 28, 2015 and the deadline for reply comments is extended from December 28, 2015 to January 12, 2016.

DATES: Comments are due on or before December 28, 2015. Reply comments are due on or before January 12, 2016.

ADDRESSES: All filings in response to the notice must refer to WT Docket No. 12-354. The Wireless Telecommunications Bureau strongly encourages parties to file comments electronically. Comments may be submitted electronically by the following methods:

- *Federal Communications Commission's Web site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- *By email.* To obtain instructions for filing by email, filers should send an email to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by

first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Attn: WTB/MD, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. All envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street SW., Washington, DC 20554.

People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: fcc504@fcc.gov or phone: (202) 418-0530 or TTY: (202) 418-0432.

FOR FURTHER INFORMATION CONTACT: Paul Powell, Mobility Division, Wireless Telecommunications Bureau at (202) 418-1613 or via email at Paul.Powell@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of public notice (DA 15-1398) released on December 9, 2015. The complete text of the public notice is available for viewing via the Commission's ECFS Web site by entering the docket number, WT Docket No. 12-354. The complete text of the public notice is also available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW., Room CY-B402, Washington, DC 20554, telephone 202-488-5300, fax 202-488-5563, or you may contact BCPI at its Web site: <http://www.BCPIWEB.com>. When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 15-1398.

In the notice, the Bureau extends the comment deadline for a public notice seeking comment on the appropriate methodology for determining the protected interference contours for existing 3650-3700 MHz wireless broadband licensees during a fixed transition period. Interested parties will now have until December 28, 2015 to file comments and until January 12, 2016 to file reply comments.

On December 7, 2015, the Wireless Innovation Forum (WinnForum) filed a request to extend the comment and reply comment deadline for the *3650-3700 MHz Band Protection Contours Public Notice* from December 10, 2015 until December 28, 2015 for comments and from December 28, 2015 to January 12, 2016 for reply comments. WinnForum states that the forum's Spectrum Sharing Committee established a Task Group, comprised of both Part 90 incumbent licensees and potential Part 96 entities, to address the questions raised in the *3650-3700 MHz Band Protection Contours Public Notice*. WinnForum explains that the Task Group has reached general agreement on specific aspects for Part 90 protections but they will not be able to ballot comments prior to the comment filing deadline.

As set forth in section 1.46(a) of the Commission's rules, "it is the policy of the Commission that extensions of time shall not be routinely granted." However, in this case, we believe it is in the public interest to grant an extension to promote industry consensus and allow all interested to include their comments on the record at the comment deadline, as the WinnForum represents future Part 96 users and representatives of existing 3650-3700 MHz licensees. This will ensure that Commission has a complete record and all parties can fully address the complicated issues raised in the *3650-3700 MHz Band Protection Contours Public Notice*. A limited extension will not negatively affect existing operators or delay deployment of new systems in the 3650-3700 MHz band.

This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter

may provide citations to that data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where the data or arguments can be found) *in lieu* of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b) of the Commission's rules. In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations and all attachments to those documents must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

Katherine M. Harris,

Deputy Chief, Mobility Division, Wireless Telecommunications Bureau.

[FR Doc. 2015-32638 Filed 12-24-15; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers CMS-10079 and CMS-10564]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information

collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by January 27, 2016.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions:

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395-5806 *OR*, Email: *OIRA_omb.eop.gov*.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at <http://www.cms.hhs.gov/PaperworkReductionActof1995>.
2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to Paperwork@cms.hhs.gov.
3. Call the Reports Clearance Office at (410) 786-1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786-1326.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes

the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a currently approved collection;

Title of Information Collection: Hospital Wage Index Occupational Mix Survey and Supporting Regulations in 42 CFR, Section 412.64; *Use:* Section 304(c) of Public Law 106-554 amended section 1886(d) (3) (E) of the Social Security Act to require CMS to collect data every three years on the occupational mix of employees for each short-term, acute care hospital participating in the Medicare program, in order to construct an occupational mix adjustment to the wage index, for application beginning October 1, 2004 (the FY 2005 wage index). The purpose of the occupational mix adjustment is to control for the effect of hospitals' employment choices on the wage index. For example, hospitals may choose to employ different combinations of registered nurses, licensed practical nurses, nursing aides, and medical assistants for the purpose of providing nursing care to their patients. The varying labor costs associated with these choices reflect hospital management decisions rather than geographic differences in the costs of labor. The FY 2016 survey will provide for the collection of hospital-specific wages and hours data for calendar year 2016 (that is, payroll periods ending between January 1, 2016 and December 31, 2016). The 2016 Medicare occupational mix survey will be applied beginning with the FY 2019 wage index. *Form Number:* CMS-10079 (OMB control number: 0938-0907); *Frequency:* Yearly; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions), State, Local and Tribal Governments; *Number of Respondents:* 3,400; *Total Annual Responses:* 3,400; *Total Annual Hours:* 1,632,000. (For policy questions regarding this collection contact Noel Manlove at 410-786-5161.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Home Health Face-to-Face Encounter Clinical Templates; *Use:* The Centers for Medicare & Medicaid Services (CMS) is requesting the Office of Management and Budget (OMB) approval of the collection of data required to support the eligibility of Medicare home health services. Home health services are covered under the Hospital Insurance (Part A) and Supplemental Medical Insurance (Part B) benefits of the Medicare program. It consists of part-time, medically necessary skilled care

(nursing, physical therapy, occupational therapy, and speech-language therapy) that is ordered by a physician. The CMS has developed a list of clinical elements within a suggested electronic clinical template that would allow electronic health record vendors to create prompts to assist physicians when documenting the HH face-to-face encounter for Medicare purposes. Once completed by the physician, the resulting progress note or clinic note would be part of the medical record. The primary users of these new clinical templates will be physicians and/or allowed non-physician practitioners (NPPs). The templates will help users to capture the necessary information needed to complete the face-to-face encounter documentation. This will help physicians and/or allowed NPPs comply with Medicare policy requirements, thereby reducing the possibility of a home health claim not being paid because of failure to meet Medicare requirements. It should be noted that

this information collection request has been revised with non-substantive changes since the publication of the 60-day (80 FR 48320) notice. *Form Number:* CMS-10564 (OMB control number: 0938–New); *Frequency:* Occasionally; *Affected Public:* Private sector (Business or other For-profit and Not-for-profit institutions); *Number of Respondents:* 2,926,420; *Total Annual Responses:* 2,926,420; *Total Annual Hours:* 1,220,317. (For policy questions regarding this collection contact Kristal Vines at 410–786–0119).

Dated: December 21, 2015.
William N. Parham, III,
Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.
 [FR Doc. 2015–32435 Filed 12–24–15; 8:45 am]
BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Annual Survey of Refugees (Form ORR–9).
OMB No.: 0970–0033.

Description: The Annual Survey of Refugees collects information on the social and economic characteristics of a random sample of refugees, Amerasians, and entrants who arrived in the United States in the five years prior to the date of the survey. The survey focuses on employment and other training, labor participation, and welfare utilization rates. From the responses, the Office of Refugee Resettlement reports on the economic adjustment of refugees to the American economy.

Respondents: Refugees, Amerasians and entrants

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ORR–9 Annual Survey of Refugees	2,000	1	0.62	1240
Request for Participation Letter	2,000	1	0.05	100

Estimated Total Annual Burden Hours: 1,340.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201. Attention Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: infocollection@acf.hhs.gov.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: OIRA_SUBMISSION@OMB.EOP.GOV, Attn:

Desk Officer for the Administration for Children and Families.

Robert Sargis,
Reports Clearance Officer.
 [FR Doc. 2015–32604 Filed 12–24–15; 8:45 am]
BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Head Start Eligibility Verification.
OMB No.: 0970–0374.
Description: The Office of Head Start (OHS) within the Administration for Children and Families, United States Department of Health and Human Services, proposes to renew, with changes, its authority for record keeping requirements associated with Head Start eligibility verification. OHS revised the

Head Start Eligibility Verification form to reflect changes in the eligibility final rule published on February 10, 2015 (80 FR 7368). OHS initially developed the form to help programs determine eligibility. However, Head Start programs are not required to use this specific form. Programs may either adopt the form or design a new form to meet the eligibility requirements.

The Office of Head Start published a final rule on eligibility under the authority granted to the Secretary of Health and Human Services under the Head Start Act (Act) at sections 644(c), 645(a)(1)(A), and 645A(c). The final rule clarifies Head Start’s eligibility procedures and enrollment requirements, and reinforces Head Start’s overall mission to support low-income families and early learning. A program must maintain records as specified in sections 1305.4(d)(2), 1305.4(l), and 1305.4(h) through (j) of the final rule.

Respondents: Head Start and Early Head Start program grant recipients.

ANNUAL BURDEN ESTIMATES

Instruments	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
§ 1305.4(l) Eligibility determination records (<i>sample form</i>)	1,600	478	.10	76,480
§ 1305.4(d)(2)	20	1	2	40
§ 1305.4(h),(i), and (j)	1,600	1	15	24,000
§ 1305.4(l) Other Record Keeping	1,600	1	15	24,000
Estimated Total Annual Burden Hours				124,520

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: infocollection@acf.hhs.gov.

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of

publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202-395-7285, Email: OIRA_SUBMISSION@OMB.EOP.GOV.

Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2015-32565 Filed 12-24-15; 8:45 am]

BILLING CODE 4184-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Refugee Microenterprise and Refugee Home-Based Child Care Microenterprise Development.

OMB No.: 0970.

Description: New data collection tool for refugee microenterprise and Refugee Home-Based Child Care Microenterprise Program.

Respondents: Refugee Microenterprise Development Grantees and Refugee Home-Based Child Care Microenterprise Development.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Refugee Microenterprise Development	22	8	4	88
Refugee Home-Based Child Care Microenterprise Development	23	7	4	92
Total Burden				180

Estimated Total Annual Burden Hours: (180 hours × \$30 per hour) \$4,500 per year.

Explanation

The Refugee Microenterprise Development Program

- Currently, there are twenty two grantees (respondents) in the program and the semi-annual progress, which includes the data and information required, is submitted twice per year.

- The request covers one form (Form I. attached) which includes eight data points. Based on experience (the information was provided by technical assistance service provider in the past), it takes about two hours per respondent per six months (*i.e.*, four hours per year per grantee (respondent) or 88 hours per year for all respondents) to complete the form.

- No survey will be undertaken since the collection of this data (information) is part of the implementation process of the project and its collection and reporting does not constitute a separate and additional cost to the grantees (respondents). The cost is covered by the grant the grantee receives. The grantees have Down Home database which captures and stores the data required for reporting. The grantee uploads the semi-annual report in Grant Solution where it is stored. ORR derives the data it requires for reporting and management decision from Grant Solution.

The Refugee Home-Based Child Care Microenterprise Development Group

- Currently, there are twenty three grantees (respondents) in the program and the semi-annual progress.

- The request covers one form (Form II. attached) which includes seven data points. It takes about two hours per respondent per six months (*i.e.*, four hours per year grantee (respondent) or 92 hours per year for all respondents) to complete the form.

- The collection of this data (information) is part of the process and its collection and reporting does not include separate and additional cost to the grantees (respondents). The cost is covered by the grant the grantee receives. The grantees have database which captures and stores the data required for reporting. The grantee uploads the data required in Grant Solution where it is stored. ORR derives the data it requires for reporting and management decision from Grant Solution.

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: infocollection@acf.hhs.gov.

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: OIRA_SUBMISSION@OMB.EOP.GOV. Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2015-32580 Filed 12-24-15; 8:45 am]

BILLING CODE 4184-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA-2013-E-1692 and FDA-2013-E-1691]

Determination of Regulatory Review Period for Purposes of Patent Extension; KADCYLA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for KADCYLA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by February 26, 2016.

Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 27, 2016. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket Nos. FDA-2013-E-1692 and FDA-2013-E-1691 for "Determination of Regulatory Review Period for Purposes of Patent Extension; KADCYLA".

Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions", publicly viewable at

<http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION". The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential". Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years

so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product KADCYLA (ado-trastuzumab emtansine). KADCYLA is indicated as a single agent, for the treatment of patients with HER2-positive metastatic breast cancer who previously received trastuzumab and a taxane, separately or in combination. Subsequent to this approval, the USPTO received patent term restoration applications for KADCYLA (U.S. Patent Nos. 7,097,840 and 8,337,856) from Genentech, Inc., and the USPTO requested FDA's assistance in determining these patents' eligibility for patent term restoration. In a letter dated May 23, 2014, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of KADCYLA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for KADCYLA is 2,594 days. Of this time, 2,414 days occurred during the testing phase of the regulatory review period, while 180 days occurred during the

approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* January 18, 2006. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on January 18, 2006.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* August 27, 2012. The applicant claims August 24, 2012, as the date the biologics license application (BLA) for KADCYLA (BLA 125427) was initially submitted. However, FDA records indicate that BLA 125427 was submitted on August 27, 2012.

3. *The date the application was approved:* February 22, 2013. FDA has verified the applicant's claim that BLA 125427 was approved on February 22, 2013.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,277 or 60 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <http://www.regulations.gov> at Docket No. FDA-2013-S-0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Petitions that have not been made publicly available on <http://www.regulations.gov> may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 21, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–32475 Filed 12–24–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2015-P-1898]

Determination That KYTRIL (Granisetron Hydrochloride) Tablets, Equivalent 1 Milligram and 2 Milligram Base, Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that KYTRIL (granisetron hydrochloride) tablets, equivalent (EQ) 1 milligram (mg) and 2 mg base, were not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Daniel Orr, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6246, Silver Spring, MD 20993–0002, 240–402–0979.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the *listed drug*, which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the “Approved Drug Products With

Therapeutic Equivalence Evaluations," which is known generally as the "Orange Book." Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, are the subject of NDA 020305, held by Hoffmann-La Roche, Inc., and initially approved on March 16, 1995. KYTRIL is indicated for the prevention of nausea and/or vomiting associated with initial and repeat courses of emetogenic cancer therapy, including high-dose cisplatin, and for the prevention and treatment of postoperative nausea and vomiting in adults.

On April 30, 2012, Hoffman-La Roche notified FDA that KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, were being discontinued, and FDA moved the drug products to the "Discontinued Drug Product List" section of the Orange Book.

Kurt R. Karst, on behalf of Hyman, Phelps & McNamara, P.C., submitted a citizen petition dated May 27, 2015 (Docket No. FDA-2015-P-1898), under 21 CFR 10.30, requesting that the Agency determine whether KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, were withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, were not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, were withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, from sale. We have also independently

evaluated relevant literature and data for possible postmarketing adverse events. We have reviewed the available evidence and determined that the products were not withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, in the "Discontinued Drug Product List" section of the Orange Book. The "Discontinued Drug Product List" delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to KYTRIL (granisetron hydrochloride) tablets, EQ 1 mg and 2 mg base, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: December 21, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015-32496 Filed 12-24-15; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2015-N-0001]

Externally-Led Patient-Focused Drug Development Meetings

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the opportunity for externally-led patient-focused drug development meetings. The Patient-Focused Drug Development (PFDD) initiative is part of FDA's commitments under the fifth authorization of the Prescription Drug User Fee Act (PDUFA V). The PFDD initiative aims to more systematically obtain the patient perspective on specific diseases and their treatments. FDA recognizes that there are many more disease areas than can be addressed in the planned FDA meetings under PDUFA V. To help expand the benefits of FDA's PFDD initiative, FDA welcomes patient organizations to identify and organize patient-focused collaborations to generate public input on other disease

areas, using the process established through Patient-Focused Drug Development as a model.

ADDRESSES: FDA recommends that patient organizations who are interested in conducting an externally-led PFDD meeting initially engage with FDA by submitting a letter of intent (LOI) to patientfocused@fda.hhs.gov. Submission details are outlined on FDA's Web site: <http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm453856.htm>.

FOR FURTHER INFORMATION CONTACT:

Pujita Vaidya, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 1144, Silver Spring, MD 20993-0002, 301-796-0684.

SUPPLEMENTARY INFORMATION: As part of its commitments under the Prescription Drug User Fee Act reauthorization of 2012, FDA has taken several steps to inform the benefit-risk assessments that inform CDER's regulatory decisions concerning new drugs. Among these efforts is the PFDD initiative that aims to more systematically obtain the patient perspective on specific diseases and their treatments. FDA has committed to obtaining the patient perspective on at least 20 disease areas during the course of PDUFA V. PFDD meetings give FDA an important opportunity to hear directly from patients, patient advocates, and caretakers about the symptoms that matter most to them; the impact the disease has on patients' daily lives; and patients' experiences with currently available treatments. The patient perspective is critical in helping FDA understand the context in which regulatory decisions are made for new drugs. This patient input can inform FDA's decisions and oversight both during drug development and during our review of a marketing application.

The Agency recognizes that there has been growing external interest in expanding efforts to gather patient input in support of drug development and evaluation. To help expand the benefits of FDA's PFDD initiative, FDA welcomes patient organizations to identify and organize patient-focused collaborations to generate public input on other disease areas, using the process established through Patient-Focused Drug Development as a model. An externally-led PFDD meeting and any resulting products (e.g., surveys or reports) will not be considered FDA-sponsored or FDA-endorsed, and FDA does not guarantee specific involvement in such meetings. However, FDA will be

open to participating in a well-designed and well-conducted meeting on a case-by-case basis. Given the expanse of diseases affecting the U.S. patient population and the effort required to conduct a successful PFDD meeting, externally-led PFDD meetings should target disease areas where there is an identified need for patient input on topics related to drug development. FDA will determine its level of participation in these meetings on an individual basis, taking into account a number of factors, including any identified need for a better understanding of patient perspective, recent interactions with patient stakeholders, proposed meeting details, and FDA staff capacity. More information regarding considerations to take into account when deciding to plan an externally-led PFDD meeting can be found on this Web site: <http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm453856.htm>.

FDA recommends that patient organizations who are interested in conducting an externally-led PFDD meeting submit an LOI that communicates (1) the value of the proposed meeting in the context of drug development for a particular disease area, and (2) important details regarding the meeting plan. Guidelines for developing a letter of intent are provided here: <http://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM453857.pdf>. Please submit the letter of intent to patientfocused@fda.hhs.gov. FDA's CDER Office of Strategic Programs will receive and review the letter.

Dated: December 21, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015-32476 Filed 12-24-15; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the

Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this Information Collection Request must be received no later than February 26, 2016.

ADDRESSES: Submit your comments to paperwork@hrsa.gov or mail the HRSA Information Collection Clearance Officer, Room 10C-24, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email paperwork@hrsa.gov or call the HRSA Information Collection Clearance Officer at (301) 443-1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Sickle Cell Disease Treatment Demonstration Program—Quality Improvement Data Collection.

OMB No. 0915-xxxx-New

Abstract: In response to the growing need for resources devoted to sickle cell disease and other hemoglobinopathies, the United States Congress, under Section 712 of the American Jobs Creation Act of 2004 (Pub. L. 108-357) (42 U.S.C. 300b-1 note), authorized a demonstration program for the prevention and treatment of sickle cell disease (SCD) to be administered by the Maternal and Child Health Bureau (MCHB) of the Health Resources and Services Administration (HRSA) in the U.S. Department of Health and Human Services. The program is known as the *Sickle Cell Disease Treatment Demonstration Program* (SCDTDP). The SCDTDP is designed to improve access to services for individuals with sickle cell disease, improve and expand patient and provider education, and improve and expand the continuity and coordination of service delivery for individuals with sickle cell disease and sickle cell trait. The specific aims for the program are threefold: (1) Increase the number of providers treating persons with sickle cell disease, (2) increase the number of providers prescribing hydroxyurea, and (3) increase the number of providers knowledgeable

about treating sickle cell disease as well as increase the number of sickle cell patients that are seen by providers knowledgeable about sickle cell disease.

To achieve the goals and objectives of the program, the SCDTDP uses quality improvement (QI) methods in a collective impact model which supports cross-sector collaboration for achieving measurable effects on major social issues. The collective impact model requires shared measurement which facilitates tracking progress in a standardized method in order to promote learning and enhance continuous improvement.

Need and Proposed Use of the Information: The purpose of the proposed data collection strategy is to implement a system to monitor the progress of MCHB-funded activities in improving care and health outcomes for individuals living with sickle cell disease/trait and meeting the goals of the SCDTDP. Each regional grantee site will be asked to report on a core set of evidence-based measures related to healthcare utilization among individuals with sickle cell disease and the quality of care of the SCD population.

The data collected for the Sickle Cell Disease Treatment Demonstration Program will consist of administrative medical claims data collected from State Medicaid Programs and Medicaid Managed Care Organizations that administer Medicaid on behalf of states. The data is collected either for or by State Medicaid offices for delivery of services subject to Medicaid reimbursement.

The data collection strategy will provide an effective and efficient mechanism to do the following: (1) Assess the improvements in access to care for sickle cell patients provided by activities in the SCDTDP; (2) collect, coordinate, and distribute data, best practices, and findings from regional grantee sites to drive improvement on quality measures; (3) refine a common model protocol regarding the prevention and treatment of sickle cell disease; (4) examine/address barriers that individuals and families living with sickle cell disease face when accessing quality health care and health education; (5) evaluate the grantees' performance in meeting the objectives of the SCDTDP; and (6) provide HRSA and Congress with information on the overall progress of the program.

Likely Respondents: Four regional grantee sites funded by HRSA under the SCDTDP will be the respondents for this data collection activity and submit responses gathered from State Medicaid

Offices and State Medicaid Managed Care Organizations (MCOs).

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to

develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search

data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
SCDTDP Data form	4	Range:16–80	Range:64–320	Range:4–6	Range:256–1920
Total	4	Range:16–80	Range:64–320	Range:4–6	Range:256–1920.

HRSA specifically requests comments on (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Jackie Painter,
 Director, Division of the Executive Secretariat.
 [FR Doc. 2015–32549 Filed 12–24–15; 8:45 am]
 BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier HHS–OS–0945–0002–30D]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, has submitted an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB) for review and approval. The ICR is for renewal of the approved information collection assigned OMB control number 0945–0002, scheduled to expire on December 31, 2015. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public on this ICR during the review and approval period.

DATES: Comments on the ICR must be received on or before January 27, 2016.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting

information, please include the OMB control number 0945–0002 for reference.

Proposed Project: Complaint Forms for Discrimination; Health Information Privacy Complaints OMB No. 0945–0002—Extension—Office of Civil Rights

Abstract: The Office for Civil Rights is seeking an extension on an approval for a 3-year clearance on a previous collection. Individuals may file written complaints with the Office for Civil Rights when they believe they have been discriminated against by programs or entities that receive Federal financial assistance from the Health and Human Service or if they believe that their right to the privacy of protected health information has been violated. Annual Number of Respondents frequency of submission is record keeping and reporting on occasion.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Civil Rights Complaint Form	Individuals or households, Not-for-profit institutions.	3493	1	45/60	2620
Health Information Privacy Complaint Form.	Individuals or households, Not-for-profit institutions.	10,286	1	45/60	7715
Total .....	.....	.....	.....	.....	10,335

Terry S. Clark,
 Asst Information Collection Clearance Officer.

[FR Doc. 2015–32551 Filed 12–24–15; 8:45 am]
 BILLING CODE 4153–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier HHS–OS–0990–0406–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.
ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). The ICR is for extending the use of the approved information collection assigned OMB control number 0990–0406, which expires on April 30, 2016. Prior to submitting the ICR to OMB, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before February 26, 2016.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the

document identifier HHS–OS–0990–0406–60D for reference.

Information Collection Request Title: Evaluation of the National Partnership for Action to End Health Disparities
Abstract: Office of Minority Health (OMH) in the Office of the Assistant Secretary for Health (OASH), Office of the Secretary (OS) is requesting approval for an extension from the Office of Management and Budget (OMB) for a previously approved data collection activity for the Evaluation of the National Partnership for Action to End Health Disparities (NPA). The NPA was officially launched in April 2011 to mobilize a nationwide, comprehensive, community-driven, and sustained approach to combating health disparities and to move the nation toward achieving health equity. Using an approach that vests those at the front line with the responsibility of identifying and helping to shape core actions, new approaches and new partnerships are being established to help close the health gap in the United States.

OMH proposes to continue to conduct the evaluation of the NPA. The evaluation’s goal is to determine the extent to which the NPA has contributed to the elimination of health disparities and attainment of health equity in our nation. The evaluation will accomplish this goal by addressing the following questions: (1) To what extent has a multi-level structure been established to support actions that will contribute to the elimination of health disparities?; (2) How are leaders in the public, private, nonprofit, and

community sectors engaged in collaborative, efficient, and equitable working partnerships to eliminate health disparities?; (3) How many and what types of identifiable actions are being implemented at the community, state, tribal, regional, and national levels that relate directly to the five goals and 20 strategies in the *National Stakeholder Strategy (NSS)*; (4) How much is the work to end health disparities integrated into stakeholder strategies and mainstream systems (e.g., health care quality improvement, public and community health improvement, economic and community planning and development) in and beyond the health sector? (5) What are the promising practices for implementing actions that contribute to ending health disparities?

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
FIHET agency survey	Agency	48	1	.52	24.96
FIHET interviews	Agency	16	1	1.17	18.72
RHEC co-chairs interview	Individual	20	1	1.42	28.4
RHEC sub-chairs group interviews	Individual	50	1	1.5	75
Survey of all RHEC members	Individual	350	1	.67	234.5
Survey of key NPA partner organizations	Organizational	15	1	.44	6.6
Survey of State Minority Health Office Directors or Coordinators and officials from State Departments of Health.	Agency	110	1	.48	52.8
Total .....	.....	609	—	—	440.98

Terry S. Clark,
Assistant Information Collection Clearance Officer.

[FR Doc. 2015–32550 Filed 12–24–15; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Peer Review Meeting.

Date: January 19, 2016.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Room 3C100, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Thomas F. Conway, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G51, National Institutes of Health, NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892-9823, 240-507-9685, thomas.conway@nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Peer Review Meeting.

Date: January 21, 2016.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Room 3F 100, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call)

Contact Person: Paul A. Amstad, Ph.D., Scientific Review Officer Scientific Review Program, Division of Extramural Activities, Room 3G41, National Institutes of Health/ NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892-9823, 240-669-5067, pamstad@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 21, 2015.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015-32491 Filed 12-24-15; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Investigator Initiated Program Project Applications (P01).

Date: January 26, 2016.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 7H200 A&B, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Paul A. Amstad, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G41, NIAID/NIH/DHHS, 5601 Fishers Lane, Bethesda, MD 20892-7616, 240-669-5067, pamstad@niaid.nih.gov.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Clinical Trial Planning Grant (R34) and Implementation Cooperative Agreement (U01) Applications.

Date: January 27, 2016.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 3C100, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Nancy Vazquez-Maldonado, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3F52B National Institutes of Health/NIAID, 5601 Fishers Lane, MSC 9834, Bethesda, MD 20892-9834, (240) 669-5044, nvazquez@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology,

and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 21, 2015.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015-32492 Filed 12-24-15; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Peer Review Meeting.

Date: January 25, 2016.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Room 6C100, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Paul A. Amstad, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G41, National Institutes of Health/ NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892-9823, 240-669-5067, pamstad@niaid.nih.gov.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Investigator Initiated Program Project P01.

Date: January 25, 2016.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 3G61, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Eleazar Cohen, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G62A, National Institute of Health, NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 2089-9823, (240) 669-5081, ecohen@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 21, 2015.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015-32493 Filed 12-24-15; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Improvement of Animal Models for Stem Cell Based Regenerative Medicine.

Date: January 20, 2016.

Time: 1:00 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Jonathan Arias, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, 301-435-2406, ariasj@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: High Throughput Screening.

Date: January 21, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: David Filpula, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301-435-2902, filpuladr@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine;

93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 21, 2015.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2015-32495 Filed 12-24-15; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Dental and Craniofacial Research Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Dental and Craniofacial Research Council.

Date: January 22, 2016.

Open: 8:30 a.m. to 10:10 a.m.

Agenda: Report to the Director, NIDCR.

Place: National Institutes of Health, Building 31, 6th Floor, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Open: 10:25 a.m. to 12:30 p.m.

Agenda: Special session on Health Disparities.

Place: National Institutes of Health, Building 31, 6th Floor, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Closed: 2:00 p.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 6th Floor, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Alicia J. Dombroski, Ph.D., Director, Division of Extramural Activities,

National Institute of Dental and Craniofacial Research, National Institutes of Health, Bethesda, MD 20892, 301-594-4805, adombroski@nidcr.nih.gov.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: <http://www.nidcr.nih.gov/about>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 21, 2015.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015-32494 Filed 12-24-15; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276-1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; 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.

Proposed Project: Substance Abuse Prevention and Treatment Block Grant Synar Report Format, FFY 2017–2019—(OMB No. 0930–0222)—Revision

Section 1926 of the Public Health Service Act [42 U.S.C. 300x-26] stipulates that funding Substance Abuse Prevention and Treatment Block Grant (SABG) agreements for alcohol and drug abuse programs for fiscal year 1994 and subsequent fiscal years require states to have in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18. This section further requires that states conduct annual, random, unannounced inspections to ensure compliance with the law; that the state submit annually a report describing the results of the inspections, the activities carried out by the state to enforce the required law, the success the state has achieved in reducing the availability of tobacco products to individuals under the age of 18, and the strategies to be utilized by the state for enforcing such law during the fiscal year for which the grant is sought.

Before making an award to a State under the SABG, the Secretary must make a determination that the state has maintained compliance with these requirements. If a determination is made that the state is not in compliance, penalties shall be applied. Penalties ranged from 10 percent of the Block Grant in applicable year 1 (FFY 1997 SABG Applications) to 40 percent in applicable year 4 (FFY 2000 SABG Applications) and subsequent years. Respondents include the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, Palau, Micronesia, and the Marshall Islands.

Regulations that implement this legislation are at 45 CFR 96.130, are approved by OMB under control number 0930–0163, and require that each state submit an annual Synar report to the Secretary describing their progress in complying with section 1926 of the PHS Act. The Synar report, due December 31 following the fiscal year for which the state is reporting, describes the results of the inspections and the activities carried out by the state to enforce the required law; the success the state has achieved in reducing the availability of tobacco products to individuals under the age of 18; and the strategies to be utilized by the state for enforcing such law during the fiscal year for which the grant is sought.

SAMHSA's Center for Substance Abuse Prevention will request OMB approval of revisions to the current report format associated with Section 1926 (42 U.S.C. 300x-26). The report format is not changing significantly. Any changes in either formatting or content are being made to simplify the reporting process for the states and to clarify the information as the states report it; both outcomes will facilitate consistent, credible, and efficient monitoring of Synar compliance across the states. All of the information required in the new report format is already being collected by the states. Specific changes are listed below:

Clarification Changes

To decrease the need for supplemental questions and reporting, additional instruction has been included in 3 portions of the report.

In Section I (Compliance Progress), the following clarification changes are being made with respect to the Annual Synar Report:

Question 1b: Changes to state law— This question asks about changes in state laws that impact the state's protocol for conducting Synar inspections and has been edited to include an option for changes to state law concerning changes in the definition of tobacco products. Many states are changing the definition of tobacco products in their state laws to include electronic nicotine delivery systems, which would impact the types of products that could be included in Synar surveys.

Question 1c: Changes to state law— This question asks about changes to state youth access to tobacco laws and has been edited to include an option for changes to state law concerning additional product categories to their youth tobacco access law. While some states have changed the definition in the state law to include electronic nicotine delivery systems, smokeless tobacco, and other tobacco products, other states have added these products as additional product categories in addition to tobacco products.

Question 2: Describe how the Annual Synar Report and the state plan were made public prior to submission of the ASR. This question asks states to describe how they make their ASR public prior to submission. States have been asked to provide a Web address and the date the ASR was posted to that Web address if they choose to post the ASR on an agency Web site. The ASR format has been clarified to provide a separate text box to enter both of these pieces of information.

Questions 4d–f—Coordination with Agency that Receives the FDA State Enforcement Contract – These close-ended questions ask the state to list the agency that is under contract to the FDA to enforce federal youth access laws, to describe the relationship between the state's Synar program and this agency, and to identify if the state uses data from the FDA enforcement inspections for the Synar survey. This question has been edited to include skip logic and response options if a state does not have a current contract with the FDA.

Questions 5b, 5c, 5d, 5e, 5f: Enforcement Agencies, Evidence of Enforcement and Frequency of Enforcement— These questions have been clarified so it is clear that they refer to enforcement of state youth access laws, and not federal or local youth access laws. In addition, these questions have been re-ordered (but the wording has not been changed) to improve logical flow of the questions. In addition, question 5e has been edited to include separate response options to allow states to describe each of the additional activities listed in the question stem to encourage states to describe each of those activities fully.

In Section II (Intended Use), the following clarification change is being made:

Question 3—State Challenges: This question asks states to identify and describe their challenges in implementing the Synar program. This question has been edited to include separate response options to allow states to describe each of the challenges listed in the question stem to encourage states to describe each of the challenges fully and to make targeted technical assistance requests.

In Appendix C (Synar Survey Inspection Protocol Summary), the following change is being made:

Title: The title of this Appendix has been edited to reflect that it is the summary of the state's inspection protocol and that the Appendix itself is not detailed enough to serve as the entirety of the state's inspection protocol.

Questions 4—Type of Tobacco Products— These questions, which ask the state to define the type of tobacco products requested during Synar inspections and to describe the protocol for tobacco type selection, have been edited to separate the options of including small cigars and cigarillos and to add the option of including electronic nicotine delivery systems or electronic cigarettes.

Questions 5a and b— The previous question 5 has been separated into two sections to provide ensure states are

able to fully describe the methods used to recruit, select and train adult supervisors for the survey separately from the methods used to recruit, select, and train youth inspectors.

Content Changes

The content of the Synar Report has changed little. The content changes that have been made address the need to (1) clarify the intent of information requested via the addition of clarifying questions, (2) reduce the need for State Project Officers to ask additional questions to supplement the originally submitted Report. These additions and changes are essential to SAMHSA’s ability to adequately assess state and jurisdictional compliance with the Synar regulation.

In Section I (Compliance Progress), the following changes are being made with respect to the Annual Synar Report:

Question 6: Changes to the sampling methodology—This question asks states if their sampling methodology has changed from the previous year. If there has been a change, a sub-question has been added to document how that change was communicated to SAMHSA. Since this change requires prior approval, a state who has not received prior approval will have the opportunity to discuss the process that was used to determine a change needed to be made.

Question 9: Changes to the inspection protocol—This question asks states if their inspection protocol has changed from the previous year. If there has been a change, a sub-question has been added to document how that change was communicated to SAMHSA. Since this change requires prior approval, a state who has not received prior approval will have the opportunity to discuss the process that was used to determine a change needed to be made. Existing questions 9a, 9b, and 9c have been

renumbered to account for this new sub-question.

In Appendix B (Synar Survey Sampling Methodology), the following changes are being made:

Question 4—Vending machine inclusion in Synar Survey—This question, which asks if vending machines are included in the Synar survey and the reasons for their elimination if they are not included. Because many states have a contract with the FDA and is actively enforcing the vending machine requirements of the Family Smoking Prevention and Tobacco Control Act, some states that include vending machines in their sampling protocols do not sample any because there are few eligible vending machines remaining on their list frame. A second part has been added to this question to determine how vending machines are sampled.

There are no changes to Forms 1–5 or Appendix D.

ANNUAL REPORTING BURDEN

45 CFR Citation	Number of respondents ¹	Responses per respondents	Total number of responses	Hours per response	Total hour burden
Annual Report (Section 1—States and Territories) 96.130(e)(1–3)	59	1	59	15	885
State Plan (Section II—States and Territories) 96.130(e)(4,5) 96.130(g)	59	1	59	3	177
Total	59	.....	.....	.....	1,062

¹ Red Lake Indian Tribe is not subject to tobacco requirements.

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 2–1057, One Choke Cherry Road, Rockville, MD 20857 OR email a copy to summer.king@samhsa.hhs.gov. Written comments should be received by February 26, 2016.

Summer King,
Statistician.

[FR Doc. 2015–32558 Filed 12–24–15; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health

Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; 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.

Proposed Project: Now Is the Time (NITT)—Minority Fellowship Program (MFP) Evaluation—New

SAMHSA is conducting a national evaluation of the Now is the Time (NITT) initiative, which includes separate programs—the Minority Fellowship Program-Youth (MFP–Y), the Minority Fellowship Program-Addiction Counselors (MFP–AC), Project AWARE (Advancing Wellness and Resilience in Education)-State Educational Agency, and Healthy Transitions. These programs are united by their focus on capacity building, system change, and workforce development.

The NITT–MFP (Youth and Addiction Counselors) programs, which are the focus of this data collection, represent a response to the fourth component of President Obama’s NITT Initiative: increasing access to mental health/behavioral health services. The purpose of the NITT–MFP programs is to improve behavioral health care outcomes for underserved racially and ethnically diverse populations by

increasing the number of culturally competent master's level behavioral health professionals and addiction counselors serving children, adolescents, and populations in transition to adulthood (ages 16–25) in an effort to increase access to, and quality of, behavioral health care for these age groups. The NITT–MFP—Youth program funded five grantees to each support up to 48 master's level fellows per year committed to addressing the behavioral health needs of at risk children, adolescents, and transition-age youth (ages 16–25). The NITT–MFP—Addiction Counselors program funded two grantees to each support up to 30 master's level fellows per year in their final year of addiction counseling university programs, with a focus on providing culturally sensitive addiction counseling to underserved youth in the 16–25 age group.

The NITT–MFP evaluation is designed to assess the level of success of the grantees in meeting the programs' goals and identify the factors that contribute to differences among grantees in levels of success. The evaluation includes both process and outcome evaluation components and will be

supported by the data collection efforts described below. The information to be collected is necessary to (a) assess the effectiveness of the grantees' program recruitment strategies, (b) describe the services that the programs offer, and (c) assess whether NITT–MFP is meeting its goal of increasing the skilled workforce by increasing the number of behavioral health providers and addiction counselors providing services to underserved children, adolescents, and transition-age youth, particularly among racially/ethnically diverse populations.

About 4 to 5 months after completion of their fellowship, a subset of fellow alumni will be asked to participate in the *NITT–MFP Fellow Interview*. These telephone interviews will collect detailed qualitative information on fellows' experiences that are not possible to collect in a survey. The interview is timed to collect fellows' impressions of their fellowship experiences before too much time has passed, as well as their initial labor market outcomes. The information collected will be used to assess the NITT–MFP program factors associated with employment and other post-fellowship outcomes. The interviewees

will be asked to describe (1) their program, how they learned about it, and what led them to apply; (2) the effects of the program on their interest in working with at risk children, adolescents, and transition age youth from racially and ethnically diverse backgrounds (and for MFP–AC fellows, in the area of addiction counseling); (3) whether the program improved their understanding of and ability to provide culturally competent services; (4) whether they completed their fellowship and the effects of the stipend on their education and career; (5) their current employment setting, and, if in behavior health services, the characteristics of their client population; (6) the role that their fellowship played in their job interests and job search; and (7) their satisfaction with the fellowship program and assessment of its impact on their career and professional activities. A maximum of 66 fellow alumni are expected to complete the *NITT–MFP Fellow Interview* per year; respondents will complete the telephone interview one time.

ANNUALIZED BURDEN HOURS

Instrument	Number of respondents	Responses per respondent	Total number of responses	Hours per response	Total burden hours
NITT–MFP Fellow Interview	66	1	66	1	66

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 2–1057, One Choke Cherry Road, Rockville, MD 20857 OR email her a copy at summer.king@samhsa.hhs.gov. Written comments should be received by February 26, 2016.

Summer King,
Statistician.

[FR Doc. 2015–32559 Filed 12–24–15; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the

Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Violence Intervention To Enrich Lives (VITEL) Supplement—NEW

This data collection is to study the intersection of intimate partner violence (IPV) and trauma for women with HIV, at risk for HIV, and at risk for substance use disorders (SUDs) VITEL provides supplemental funding to existing SAMHSA Targeted Capacity Expansion: Substance Abuse Treatment for Racial/Ethnic Minority Women at High Risk for HIV/AIDS (TCE–HIV: Minority Women) grantees. These activities will be conducted with five grantees and include: (1) Administration of baseline, discharge and 6-month post-baseline surveys of clients receiving IPV screening and referral services, (2) focus groups with clients receiving IPV and SUD services, (3) documentation of IPV service and other referral service(s) engagement, and (4) semi-structured

interviews with VITEL program staff and partner/collaborating staff supporting IPV services.

The goals of the VITEL program are (1) reduce IPV through screening and referrals, (2) reduce risky behaviors that lead to new HIV infections and SUDs, (3) increase access to care and improve health outcomes for people living with HIV and AIDS, (4) reduce HIV-related health disparities resultant from IPV screening tool implementation, and (5) determine the feasibility of integrating IPV screening in behavioral health settings. A multi-stage approach has been used to develop the appropriate theoretical framework, conceptual model, evaluation design and protocols, and data collection instrumentation. Process and outcome measures have been developed to fully capture community and contextual conditions, the scope of the VITEL program implementation and activities, and client outcomes. A mixed-method approach (e.g., surveys, semi-structured interviews, focus groups) will be used, for example, to examine collaborative

community linkages established between grantees and other service providers (e.g., primary health care, SUD recovery), determine which program models and what type and amount of client exposure to services contribute to significant changes in IPV,

SUD, and HIV risk behaviors of the targeted populations, and determine the impact of VITEL services on providers, clients, and communities.

The data collection for this program will be conducted quarterly (during this one year supplemental period) and the

client outcome data collection will be ongoing throughout the program and will be collected at baseline, discharge and 6-months post baseline for all treatment clients. The respondents are clinic-based social workers, counselors, administrators, and clinic-based clients.

Instrument/Activity	Number of respondents	Responses per respondent	Total response numbers	Hours per response	Total burden hours
Baseline data collection (Clients)	500	1	500	.42	210
Discharge data collection (Clients)	400	1	400	.42	168
6-Month post Baseline data collection (Clients)	400	1	400	.42	168
Interaction Form (Client)	500	1	500	.42	210
Treatment Focus Group (Client)	45	2	90	1.0	90
<i>Client Sub-total</i>	<i>500</i>	.....	<i>1,890</i>	.....	<i>846</i>
Executives and Project Director/Program Manager (Semi-Structured Interviews)	10	1	10	.75	7.5
Executives and Project Director/Program Manager (Progress Report)	5	1	5	3.0	15
Direct Staff (Semi-Structured Interviews)	10	1	10	.75	7.5
Community Collaborators (Semi-Structured Interviews)	10	1	10	1.0	10
<i>Staff Sub-total</i>	<i>35</i>	.....	<i>35</i>	.....	<i>40</i>
Total	535	.....	1,925	.....	886

Written comments and recommendations concerning the proposed information collection should be sent by January 27, 2016 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: OIRA_Submission@omb.eop.gov. Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202-395-7285. Commenters may also mail them to: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Room 10102, Washington, DC 20503.

Summer King,
Statistician.

[FR Doc. 2015-32584 Filed 12-24-15; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2015-0629]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number: 1625-0003

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 an extension of its approval for the following collection of information: 1625-0003, Boating Accident Report. 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 27, 2016.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG-2015-0629] to the Coast Guard using the Federal eRulemaking Portal at <http://www.regulations.gov>. Alternatively, you may submit comments to OIRA using one of the following means:

(1) *Email:* 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 <http://www.regulations.gov>.

www.regulations.gov. Additionally, copies are available from: Commandant (CG-612), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd Street SW., Stop 7710, Washington, DC 20593-7710.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Smith, Office of Information Management, telephone 202-475-3532, or fax 202-372-8405, 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. 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–2015–0629], and must be received by January 27, 2016.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://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 <http://www.regulations.gov> and can be viewed by following that Web site'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 <http://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: 1625–0003.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (80 FR 45670, July 31, 2015) required by 44 U.S.C. 3506(c)(2). That Notice elicited five comments.

Comment #1: Mark Brown: Mr. Brown is the Boating Law Administrator in Oklahoma. He suggests that before the Boating Accident Report (BAR) is updated, items incorporated in the proposed rulemaking on Accident Reporting be included. The BAR form is approved by OMB on a triennial basis, and that approval expires soon. We are

seeking to renew the approval of the BAR form based on the current accident reporting requirements. The proposed rulemaking to which the commenter refers will likely change the requirements for accident reporting if it is adopted. However, since the proposed rulemaking on Accident Reporting is still being developed and no final resolution has been determined, we cannot use any potential changes that the accident reporting rulemaking may propose. Therefore the BAR will remain as is. If the accident reporting rulemaking proposes changes to accident reporting requirements that will necessitate changes to the BAR form, those changes will be incorporated in the rulemaking and will be submitted to OMB for its approval.

Comment #2: Clifford Inn: Mr. Inn represents a State and enters data into the Boating Accident Report Database (BARD). He's suggesting adding an additional field under the existing ACCIDENT DETAILS to allow a field for the registration number of another vessel (the 2nd in an accident involving two vessels). Although, a good suggestion, it is our feeling that the BAR need not be changed at this time as there are other means when inserting into BARD to do what Mr. Inn suggests.

Comments #3: National Association of State Boating Law Administrators (NASBLA): NASBLA represents the recreational boating law officials in the 50 states and six territories. They claim that at this time, two factors limit their ability to respond to this Notice in a more comprehensive and meaningful way. Firstly, they claim that terminology may change depending on the results of a notice of proposed rulemaking on Accident Reporting. However, until the notice of proposed rulemaking is published and finalized, no changes will be made to the BAR as explained under COMMENT #1. The next iteration of the BAR may need changes if the rulemaking, when finalized, makes it appropriate. Secondly, they refer to another **Federal Register** notice (docket number USCG–2015–0753) dealing with the updating of the Boating Accident Manual (COMDTINST M16782.1). However, this ICR must go on, in spite of any problems the COMDTINST may encounter. They further state that commenting on this particular docket would not be particularly useful and might even be rendered obsolete by the time the **Federal Register** Notice regarding BAR form changes is issued. As such, no changes will be made to the BAR ICR as a result of these comments.

Comment #4: Connecticut Department of Energy & Environmental Protection:

Connecticut supports an extension of the currently approved collection: 1625–0003, Boating Accident Report. However, they also feel the forms may need to be updated to ensure conformity with terminology and other changes to the casualty report content authorized in the final rule and consistent with COMDINST M16782.1. However, as stated in the response to NASBLA, the BAR will not be changed at this time.

Comment #5: Ohio Department of Natural Resources: Ohio's comments are consistent with those of the National Association of State Boating Law Administrators (ID: USCG–2015–0629–0004) and as such the comments above relative to NASBLA's submission apply to Ohio.

After considering all the above comments, no changes have been made to the collection for the reasons explained in the responses to the comments.

Information Collection Request

1. *Title:* Boating Accident Report.
OMB Control Number: 1625–0003.

Summary: The Coast Guard Boating Accident Report form is the data collection instrument that ensures compliance with the implementing regulations and Title 46 U.S.C. 6102(b) that requires the Secretary to collect, analyze and publish reports, information, and statistics on marine casualties.

Need: Title 46 U.S.C. 6102(a) requires a uniform marine casualty reporting system, with regulations prescribing casualties to be reported and the manner of reporting. The statute requires a State to compile and submit to the Secretary (delegated to the Coast Guard) reports, information, and statistics on casualties reported to the State. Implementing regulations are contained in Title 33, Code of Federal Regulations, SUBCHAPTER S—BOATING SAFETY, PART 173—VESSEL NUMBERING AND CASUALTY AND ACCIDENT REPORTING, Subpart C—Casualty and Accident Reporting and Part 174—STATE NUMBERING AND CASUALTY REPORTING SYSTEMS, Subpart C—Casualty Reporting System Requirements, and Subpart D—State reports.

States are required to forward copies of the reports or electronically transmit accident report data to the Coast Guard within 30 days of their receipt of the report as prescribed by 33 CFR 174.121 (Forwarding of casualty or accident reports). The accident report data and statistical information obtained from the reports submitted by the state reporting authorities are used by the Coast Guard

in the compilation of national recreational boating accident statistics.

Forms: CG–3865, Recreational Boating Accident Report; CG–3865–SP, Reporte Del Accident En Barcos De Recreación (Spanish Version).

Respondents: Federal regulations (33 CFR 173.55) require the operator of any uninspected vessel that is numbered or used for recreational purposes to submit an accident report to the State authority when:

- (1) A person dies; or
- (2) A person is injured and requires medical treatment beyond first aid; or
- (3) Damage to the vessel and other property total \$2,000 or more, or there is a complete loss of the vessel; or
- (4) A person disappears from the vessel under circumstances that indicate death or injury.

Frequency: On occasion.

Hour Burden Estimate: The estimated annual burden remains 2,500 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: December 21, 2015.

Thomas P. Michelli,

Deputy Chief Information Officer, U.S. Coast Guard.

[FR Doc. 2015–32644 Filed 12–24–15; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2015–0695]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number: 1625–0061

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 of a revision to the following collection of information: 1625–0061, Commercial Fishing Industry Vessel Safety Regulations. Our ICR describes 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 27, 2016.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2015–0695] to the Coast Guard using the Federal eRulemaking Portal at <http://www.regulations.gov>. Alternatively, you may submit comments to OIRA using one of the following means:

(1) *Email:* 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 <http://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 202–372–8405, 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. 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–2015–0695], and must be received by January 27, 2016.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://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 <http://www.regulations.gov> and can be viewed by following that Web site'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 <http://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: 1625–0061.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (80 FR 51290, August 24, 2015) required by 44 U.S.C. 3506(c)(2). That Notice elicited one comment. The comment was not related to the periodic renewal of this information collection. The comment was about the need to correct outdated organizational addresses and standards of certain materials incorporated by reference in the title 46 CFR part 28 Requirements for Commercial Fishing Industry Vessels. The Coast Guard will consider this comment in an ongoing rulemaking that will revise commercial fishing industry vessel standards. Accordingly,

no changes have been made to the Collection.

Information Collection Request

1. *Title:* Commercial Fishing Industry Vessel Safety Regulations.

OMB Control Number: 1625–0061.

Summary: This information collection is intended to improve safety on board vessels in the commercial fishing industry. The requirements apply to those vessels and to seamen on them.

Need: Under the authority of 46 U.S.C. 6104, the U.S. Coast Guard has promulgated regulations in 46 CFR part 28 to reduce the unacceptably high level of fatalities and accidents in the commercial fishing industry. The rules allowing the collection also provide means of verifying compliance and enhancing safe operation of fishing vessels.

Forms: None.

Respondents: Owners, agents, individuals-in-charge of commercial fishing vessels, and insurance underwriters.

Frequency: The frequency of reporting is “On occasion”.

Hour Burden Estimate: The estimated burden has decreased from 6,787 hours to 6,617 hours a year due to a decrease in the estimated annual number of respondents.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 21, 2015.

Thomas P. Michelli,

Deputy Chief Information Officer, U.S. Coast Guard.

[FR Doc. 2015–32662 Filed 12–24–15; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2015–0915]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0038

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of revisions to the following collection of information: 1625–0038, Plan Approval & Records for Tank,

Passenger, Cargo & Miscellaneous Vessels, Mobile Offshore Drilling Units, Nautical Schools Vessels & Oceanographic Research Vessels. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before February 26, 2016.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2015–0915] to the Coast Guard using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the “Public participation and request for comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the Internet at <http://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 202–372–8405, 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. In response to your comments, we may revise this ICR or decide not to seek approval of revisions of the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2015–0915], and must be received by February 26, 2016.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://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 <http://www.regulations.gov> and can be viewed by following that Web site’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 <http://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).

Information Collection Request

1. *Title:* Plan Approval & Records for Tank, Passenger, Cargo & Miscellaneous Vessels, Mobile Offshore Drilling Units, Nautical Schools Vessels & Oceanographic Research Vessels.

Omb Control Number: 1625–0038.

Place: This collection requires the shipyard, designer or manufacturer for the construction of a vessel to submit plans, technical information and operating manuals to the Coast Guard.

Need: Under 46 U.S.C. 3301 and 3306, the Coast Guard is responsible for enforcing regulations promoting the safety of life and property in marine transportation. The Coast Guard uses this information to ensure that a vessel meets the applicable standards for construction, arrangement and equipment under 46 CFR subchapter D, H, I, I–A, R, and U.

Forms: N/A.

Respondents: Shipyards, designers, and manufacturers of certain vessels.

Frequency: On occasion. There are no recordkeeping requirements for this information collection.

Hour Burden Estimate: The estimated burden has increased from 3,589 hours to 6,671 hours a year due to an increase in the estimated annual number of responses.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 21, 2015.

Thomas P. Michelli,

Deputy Chief Information Officer, U.S. Coast Guard.

[FR Doc. 2015-32656 Filed 12-24-15; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2015-0637]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number: 1625-0108

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 of a revision to the following collection of information: 1625-0108, Standard Numbering System for Undocumented Vessels. Our ICR describes 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 27, 2016.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG-2015-0637] to the Coast Guard using the Federal eRulemaking Portal at <http://www.regulations.gov>. Alternatively, you may submit comments to OIRA using one of the following means:

(1) Email: 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 <http://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 202-372-8405, 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. 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-2015-0637], and must be received by January 27, 2016.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://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 <http://www.regulations.gov> and can be viewed by following that Web site'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 <http://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: 1625-0108.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (80 FR 62080, October 15, 2015) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments. Accordingly, no changes have been made to the Collections.

Information Collection Request

1. *Title:* Standard Numbering System for Undocumented Vessels.

OMB Control Number: 1625-0108.

Summary: The Standard Numbering System collects information on undocumented vessels and vessel owners operating on waters subject to the jurisdiction of the United States. Federal, State, and local law enforcement agencies use information from the system for enforcement of boating laws or theft and fraud investigations. Since the September 11, 2001 terrorist attacks on the United States, the need has increased for identification of undocumented vessels to meet port security and other missions to safeguard the homeland.

Need: Subsection 12301(a) of title 46, United States Code, requires undocumented vessels equipped with propulsion machinery of any kind to be numbered in the State where the vessel is principally operated. In 46 U.S.C. 12302(a), Congress authorized the Secretary to prescribe, by regulation, a Standard Numbering System (SNS). The Secretary shall approve a State

numbering system if that system is consistent with the SNS. The Secretary has delegated his authority under 46 U.S.C. 12301 and 12302 to Commandant of the U.S. Coast Guard. DHS Delegation No. 0170.1. The regulations requiring the numbering of undocumented vessels are in 33 CFR part 173, and regulations establishing the SNS for States to voluntarily carry out this function are contained in part 174.

In States that do not have an approved system, the Federal Government (U.S. Coast Guard) must administer the vessel numbering system. Currently, all 56 States and Territories have approved numbering systems. The approximate number of undocumented vessels registered by the States in 2014 was nearly 12 million.

The SNS collects information on undocumented vessels and vessel owners. States submit reports annually to the Coast Guard on the number, size, construction, etc., of vessels they have numbered. That information is used by the Coast Guard in (1) publication of an annual "Boating Statistics" report required by 46 U.S.C. 6102(b), and (2) for allocation of Federal funds to assist States in carrying out the Recreational Boating Safety (RBS) Program established by 46 U.S.C. chapter 131.

On a daily basis or as warranted, Federal, State, and local law enforcement personnel use SNS information from the States' numbering system for enforcement of boating laws or theft and fraud investigations. In addition, when encountering a vessel suspected of illegal activity, information from the SNS increases officer safety by assisting boarding officers in determining how best to approach a vessel. Since the September 11, 2001 terrorist attacks on the United States, the need has increased for identification of undocumented vessels and their owners for port security and other missions to safeguard the homeland, although the statutory requirement for numbering of vessels dates back to 1918.

Forms: None.

Respondents: Owners of all undocumented vessels propelled by machinery are required by Federal law to apply for a number from the issuing authority of the State in which the vessel is to be principally operated. In addition, States may require other vessels, such as sailboats or even canoes and kayaks, to be numbered. "Owners" may include individuals or households, non-profit organizations, and small businesses (e.g., liveries that offer recreational vessels for rental by the public) or other for-profit organizations.

Frequency: On occasion. There are no recordkeeping requirements for this information collection.

Hour Burden Estimate: The estimated burden has decreased from 286,458 hours to 257,986 hours a year due to a change in methodology.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 21, 2015.

Thomas P. Michelli,

Deputy Chief Information Officer, U.S. Coast Guard.

[FR Doc. 2015-32661 Filed 12-24-15; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5837-N-06]

Notice of Proposed Information Collection for Public Comment on the Evaluation of the Jobs Plus Pilot Program

AGENCY: Office of Policy Development and Research, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 26, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410-5000; telephone 202-402-3400 (this is not a toll-free number) or email at Colette.Pollard@hud.gov for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877-8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at [\[hud.gov\]\(http://hud.gov\) or telephone 202-402-3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at \(800\) 877-8339.](mailto:Colette.Pollard@</p>
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Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Evaluation of the Jobs Plus Pilot Program.

OMB Approval Number: N/A.

Type of Request: New.

Form Number: N/A.

Description of the need for the information and proposed use: HUD's 2014 Appropriations included funding to support the implementation of the Jobs Plus Pilot Program, a place-based program designed to increase work and earnings among public housing residents. Nine public housing agencies (PHAs) were awarded grant funds in spring 2015, and will implement the Jobs Plus program over a period of four years. The program as designed includes three core components: 1) Employment-related services, 2) financial incentives—the Jobs Plus Earned Income Disregard (JPEID), and 3) community supports for work. The Jobs Plus program seeks to replicate the model tested under the Jobs Plus Demonstration back in the 1990s and early 2000, which led to sustained growth in earned income among residents at sites that fully implemented the program. This current generation of the Jobs Plus program, however, will differ from the Jobs Plus demonstration in some important ways—first, the current iteration of the program will benefit from a more robust financial incentive, in the form of an earned income disregard designed specifically for the Jobs Plus program, and second, the program will be implemented almost twenty years after the initial demonstration, in a very different employment market. Because of these important variations, HUD is supporting an evaluation of the Jobs Plus Pilot program, with the goal of documenting the programs established by the Jobs Plus Pilot Program grantees and laying the groundwork for a future outcomes evaluation that will seek to understand the impact of the program, both on the program participants, as well as the entire target development. Specific research objectives include, but are not

limited to: describing the set of activities and partnerships established by grantees under core program components; describing the amount and type of leveraged resources accessed by each grantee; describing the extent to which grantees are successful at engaging a high percentage of residents in some aspect of program participation; documenting the ease with which PHAs implemented the JPEID; and

documenting the costs of implementing and operating the Jobs Plus program. Data to be analyzed during the evaluation include administrative data, as well as data collected directly from PHAs, Jobs Plus program administrators, partners and staff, as well as residents of developments where Jobs Plus is being implemented. This request for OMB clearance includes the data collection instruments that will be

utilized during two separate rounds of site visits to each of the nine program sites, including a site visit interview guide and a focus group discussion guide.

Respondents (i.e. affected public): PHAs administering the Jobs Plus Pilot program, Jobs Plus Pilot program community partners, and residents of participating developments.

Form	Respondent sample	Number of respondents	Average time to complete (minimum, maximum) in minutes	Frequency	Total burden (hours)
Site Visit Interview Guide #1	12 staff and stakeholders from all 9 Jobs Plus sites.	108	90 (75–105)	1	162
Focus Group Discussion Guide #1 ..	15 residents at each of the 9 Jobs Plus sites.	135	60 (50–70)	1	202.5
Site Visit Interview Guide #1	12 staff and stakeholders from all 9 Jobs Plus sites.	108	90 (75–105)	1	162
Focus Group Discussion Guide #2 ..	15 residents at each of the 9 Jobs Plus sites.	135	60 (50–70)	1	202.5
Total Burden Hours .....	.....	.....	.....	.....	729

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency’s estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: December 16, 2015.

Katherine M. O’Regan,
Assistant Secretary, Office of Policy Development and Research.

[FR Doc. 2015–32602 Filed 12–24–15; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5838–N–10]

60-Day Notice of Proposed Information Collection: Public Housing Mortgage Program and Section 30

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, PIH, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 26, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at Colette.Pollard@hud.gov for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this

number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L’Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Public Housing Mortgage Program and Section 30.

OMB Approval Number: 2577–0265.

Type of Request: Extension of an approved collection.

Form Number: N/A—Because federal regulations have not been adopted for this program, no specific forms are required.

Description of the need for the information and proposed use: Section 516 of the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (Pub. L. 105–276, October 21, 1998)

added Section 30, Public Housing Mortgages and Security Interest, to the United States Housing Act of 1937 (1937 Act) (42 U.S.C. 1437z-2). Section 30 authorizes the Secretary of the Department of Housing and Urban Development (HUD) to approve a Housing Authority's (HA) request to mortgage public housing real property

or grant a security interest in other tangible forms of personal property if the proceeds of the loan resulting from the mortgage or security interest are used for low-income housing uses. Public Housing Agencies (PHAs) must provide information to HUD for approval to allow PHAs to grant a mortgage in public housing real estate or

a security interest in some tangible form of personal property owned by the PHA for the purposes of securing loans or other financing for modernization or development of low-income housing.

Respondents (i.e. affected public): Members of Affected Public: State, Local or Local Government and Non-profit organization.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
2577-0157	30	3	90	41.78	3,760	\$157.65	\$592,750
Total .....	.....	.....	.....	.....	.....	.....	.....

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) The accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: December 18, 2015.

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2015-32601 Filed 12-24-15; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FW-HQ-LE-2015-N243; FF09L00200-FX-LE1811090000]

Proposed Renewal of Information Collection; Declaration for Importation or Exportation of Fish or Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service, Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on April 30, 2016. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by February 26, 2016.

ADDRESSES: Send your comments on the IC to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803 (mail); or *hope_grey@fws.gov* (email). Please include "1018-0012" in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey at *hope_grey@fws.gov* (email) or 703-358-2482 (telephone).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Endangered Species Act (16 U.S.C. 1531 *et seq.*) makes it unlawful to import or export fish, wildlife, or plants without filing a declaration or report deemed necessary for enforcing the Act or upholding the Convention on International Trade in Endangered Species (CITES) (see 16 U.S.C. 1538(e)). With a few exceptions, businesses, individuals, or government agencies importing into or exporting from the United States any fish, wildlife, or wildlife product must complete and submit to the Service an FWS Form 3-

177 (Declaration for Importation or Exportation of Fish or Wildlife). This form as well as FWS Form 3-177a (Continuation Sheet) and instructions for completion are available for electronic submission at <https://edecs.fws.gov>. These forms are also available in fillable format at <http://www.fws.gov/forms/>.

The information that we collect is unique to each wildlife shipment and enables us to:

- Accurately inspect the contents of the shipment;
- Enforce any regulations that pertain to the fish, wildlife, or wildlife products contained in the shipment; and
- Maintain records of the importation and exportation of these commodities.

Businesses or individuals must file FWS Forms 3-177 and 3-177a with us at the time and port where they request clearance of the import or export of wildlife or wildlife products. Our regulations allow for certain species of wildlife to be imported or exported between the United States and Canada or Mexico at U.S. Customs and Border Protection ports, even though our wildlife inspectors may not be present.

In these instances, importers and exporters may file the forms with U.S. Customs and Border Protection. We collect the following information:

- (1) Name of the importer or exporter and broker.
- (2) Scientific and common name of the fish or wildlife.
- (3) Permit numbers (if permits are required).
- (4) Description, quantity, and value of the fish or wildlife.
- (5) Natural country of origin of the fish or wildlife.

In addition, certain information, such as the airway bill or bill of lading number, the location of the shipment containing the fish or wildlife for inspection, and the number of cartons containing fish or wildlife, assists our wildlife inspectors if a physical

examination of the shipment is necessary.

In 2009, we implemented a new user fee system intended to recover the costs of the compliance portion of the wildlife inspection program. Since that time, we have been made aware that we may have placed an undue economic burden on businesses that exclusively trade in small volumes of low-value, non-federally protected wildlife parts and products. To address this issue, we implemented a program that exempts certain businesses from the designated port base inspection fees as an interim measure while we reassess the current user fee system. Businesses that possess a valid Service import/export license may request to participate in the fee exemption program through our electronic filing system (eDecs). Qualified licensees must create an eDecs filer account as an importer or exporter, if they do not already have one, and file their required documents electronically. To be an approved participating business in the program and receive an

exemption from the designated port base inspection fee, the licensed business must certify that it will exclusively import or export nonliving wildlife that is not listed as injurious under 50 CFR part 16 and does not require a permit or certificate under 50 CFR parts 15 (Wild Bird Conservation Act), 17 (Endangered Species Act), 18 (Marine Mammal Protection Act), 20 and 21 (Migratory Bird Treaty Act), 22 (Bald and Golden Eagle Protection Act), or 23 (the Convention on International Trade in Endangered Species of Wild Fauna and Flora). The requesting business also must certify that it will exclusively import or export the above types of wildlife shipments where the quantity in each shipment of wildlife parts or products is 25 or fewer and the total value of each wildlife shipment is \$5,000 or less. Any licensed business that has more than two wildlife shipments that were refused clearance in the 5 years prior to its request is not eligible for the program. In addition, any licensees that have been assessed a civil

penalty, issued a Notice of Violation, or convicted of a misdemeanor or felony violation involving wildlife import or export will not be eligible to participate in the program.

II. Data

OMB Control Number: 1018-0012.

Title: Declaration for Importation or Exportation of Fish or Wildlife, 50 CFR 14.61-14.64 and 14.94.

Service Form Numbers: 3-177 and 3-177a.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Businesses or individuals that import or export fish, wildlife, or wildlife products; scientific institutions that import or export fish or wildlife scientific specimens; and government agencies that import or export fish or wildlife specimens for various purposes.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of respondents	Number of responses	Completion time per response (minutes)	Total annual burden hours
3-177 hard copy submission	3,148	28,332	15	7,083
3-177 electronic submission	17,593	154,971	10	25,829
Fee waiver certification	1,000	1,000	1	17
Totals	21,741	184,303	.....	32,929

Estimated Annual Nonhour Burden Cost: None.

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may

be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 21, 2015.

Tina A. Campbell,

Chief, Division of Policy, Performance, and Management Programs, U.S. Fish and Wildlife Service.

[FR Doc. 2015-32546 Filed 12-24-15; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-HQ-R-2016-N215; FXGO1664091HCC0-FF09D00000-167]

Wildlife and Hunting Heritage Conservation Council; Public Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a public

meeting of the Wildlife and Hunting Heritage Conservation Council (Council). The Council provides advice about wildlife and habitat conservation endeavors that benefit wildlife resources; encourage partnership among the public, the sporting conservation organizations, the States, Native American tribes, and the Federal Government; and benefit recreational hunting.

DATES: *Meeting:* Tuesday, January 26, 2016, from 8 a.m. to 4:30 p.m., and Wednesday, January 27, 2016, from 8 a.m. to 1 p.m. (Eastern Standard Time). For deadlines and directions on registering to attend, submitting written material, and giving an oral presentation, please see "Public Input" under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held at the National Wild Turkey Federation Visitor Center, 770 Augusta Road, Edgefield, South Carolina, 29824.

FOR FURTHER INFORMATION CONTACT: Joshua Winchell, Council Designated Federal Officer, U.S. Fish and Wildlife Service, National Wildlife Refuge System, 5275 Leesburg Pike, Falls

Church, VA 22041–3803; telephone: (703) 358–2639; or email: joshua_winchell@fws.gov.

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., we announce that Wildlife and Hunting Heritage Conservation Council will hold a meeting.

Background

Formed in February 2010, the Council provides advice about wildlife and habitat conservation endeavors that:

1. Benefit wildlife resources;
2. Encourage partnership among the public, the sporting conservation organizations, the states, Native American tribes, and the Federal Government; and
3. Benefit recreational hunting.

The Council advises the Secretary of the Interior and the Secretary of Agriculture, reporting through the Director, U.S. Fish and Wildlife Service (Service), in consultation with the Director, Bureau of Land Management (BLM); Director, National Park Service (NPS); Chief, Forest Service (USFS); Chief, Natural Resources Conservation Service (NRCS); and Administrator, Farm Services Agency (FSA). The Council’s duties are strictly advisory and consist of, but are not limited to, providing recommendations for:

1. Implementing the Recreational Hunting and Wildlife Resource Conservation Plan—A Ten-Year Plan for Implementation;
2. Increasing public awareness of and support for the Wildlife Restoration Program;
3. Fostering wildlife and habitat conservation and ethics in hunting and shooting sports recreation;
4. Stimulating sportsmen and women’s participation in conservation and management of wildlife and habitat resources through outreach and education;
5. Fostering communication and coordination among State, tribal, and Federal governments; industry; hunting and shooting sportsmen and women; wildlife and habitat conservation and management organizations; and the public;
6. Providing appropriate access to Federal lands for recreational shooting and hunting;
7. Providing recommendations to improve implementation of Federal conservation programs that benefit wildlife, hunting, and outdoor recreation on private lands; and
8. When requested by the Designated Federal Officer in consultation with the Council Chairperson, performing a variety of assessments or reviews of

policies, programs, and efforts through the Council’s designated subcommittees or workgroups.

Background information on the Council is available at <http://www.fws.gov/whhcc>.

Meeting Agenda

The Council will convene to consider issues including:

1. Wildlife habitat and health;
2. Funding for public lands and wildlife management;
3. Endangered Species Act; and
4. Other Council business.

The final agenda will be posted on the Internet at <http://www.fws.gov/whhcc>.

Public Input

If you wish to	You must contact the Council Coordinator (see FOR FURTHER INFORMATION CONTACT) no later than
Attend the meeting ... Submit written information or questions before the meeting for the council to consider during the meeting. Give an oral presentation during the meeting.	January 13, 2016. January 13, 2016. January 13, 2016.

Attendance

To attend this meeting, register by close of business on the dates listed in “Public Input” under **SUPPLEMENTARY INFORMATION**. Please submit your name, time of arrival, email address, and phone number to the Council Coordinator (see **FOR FURTHER INFORMATION CONTACT**).

Submitting Written Information or Questions

Interested members of the public may submit relevant information or questions for the Council to consider during the public meeting. Written statements must be received by the date above, so that the information may be made available to the Council for their consideration prior to this meeting. Written statements must be supplied to the Council Coordinator in both of the following formats: One hard copy with original signature, and one electronic copy via email (acceptable file formats are Adobe Acrobat PDF, MS Word, MS PowerPoint, or rich text file).

Giving an Oral Presentation

Individuals or groups requesting to make an oral presentation at the meeting will be limited to two minutes per speaker, with no more than a total of 30

minutes for all speakers. Interested parties should contact the Council Coordinator, in writing (preferably via email; see **FOR FURTHER INFORMATION CONTACT**), to be placed on the public speaker list for this meeting. Nonregistered public speakers will not be considered during the meeting. Registered speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, may submit written statements to the Council Coordinator up to 30 days subsequent to the meeting.

Meeting Minutes

Summary minutes of the conference will be maintained by the Council Coordinator (see **FOR FURTHER INFORMATION CONTACT**). They will be available for public inspection within 90 days of the meeting, and will be posted on the Council’s Web site at <http://www.fws.gov/whhcc>.

Stephen Guertin,
Deputy Director.

[FR Doc. 2015–32598 Filed 12–24–15; 8:45 am]
BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX16GG00995TR00]

Announcement of Scientific Earthquake Studies Advisory Committee Meeting

AGENCY: U.S. Geological Survey, Department of the Interior.
ACTION: Notice of meeting

SUMMARY: Pursuant to Public Law 106–503, the Scientific Earthquake Studies Advisory Committee (SESAC) will hold its next meeting in the Utah Department of Natural Resources Auditorium at the Utah Department of Natural Resources at 1594 West North Temple in Salt Lake City, Utah. The Committee is comprised of members from academia, industry, and State government. The Committee shall advise the Director of the U.S. Geological Survey (USGS) on matters relating to the USGS’s participation in the National Earthquake Hazards Reduction Program.

The Committee will receive reports on the status of activities of the Program and progress toward Program goals and objectives. The Committee will assess this information and provide guidance on the future undertakings and direction of the Earthquake Hazards Program. Focus topics for this meeting include a program review and strategic planning for 2016–2018.

DATES: The meeting will be held from 9:00 a.m. to 5:00 p.m. on February 4 and 5, 2016.

FOR FURTHER INFORMATION CONTACT: Dr. William Leith, U.S. Geological Survey, MS 905, 12201 Sunrise Valley Drive, Reston, Virginia 20192, (703) 648-6786, wleith@usgs.gov.

SUPPLEMENTARY INFORMATION: Meetings of the Scientific Earthquake Studies Advisory Committee are open to the public.

William Leith,

Senior Science Advisor for Earthquake and Geologic Hazards.

[FR Doc. 2015-32608 Filed 12-24-15; 8:45 am]

BILLING CODE 4338-11-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLID10000.L1020000.PH0000
LXSS024D0000 241A 4500088890]

Notice of Public Meeting, Idaho Falls District Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Idaho Falls District Resource Advisory Council (RAC), will meet as indicated below.

DATES: The RAC will next meet in Idaho Falls, Idaho, January 26-27, 2016. The first day will begin at 1:00 p.m. at the BLM Idaho Falls Office, 1405 Hollipark Drive, Idaho Falls, Idaho, with elections of a new chairman, vice chairman and secretary. The second day will be at the same location starting at 9:00 a.m. and adjourning at 12:30 p.m. Members of the public are invited to attend. A comment period will be held January 26, following introductions from 1:00-1:30. Other meeting topics includes, law enforcement efforts, travel management planning, district and field office updates, sage-grouse updates and resource management plan strategies. Additional topics will be scheduled as appropriate. All meetings are open to the public.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in the BLM Idaho Falls

District (IFD), which covers eastern Idaho.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided below.

FOR FURTHER INFORMATION CONTACT: Sarah Wheeler, RAC Coordinator, Idaho Falls District, 1405 Hollipark Dr., Idaho Falls, ID 83401. Telephone: (208) 524-7550. Email: sawheeler@blm.gov.

Dated: December 16, 2015.

Mary D'Aversa,

District Manager, Idaho Falls District.

[FR Doc. 2015-32589 Filed 12-24-15; 8:45 am]

BILLING CODE 4310-GG-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-939]

Certain Three-Dimensional Cinema Systems and Components Thereof; Notice of Request for Statements on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the presiding administrative law judge has issued a final initial determination and recommended determination on remedy and bonding in the above-captioned investigation. The Commission is soliciting comments on public interest issues raised by the recommended relief, specifically a limited exclusion order against certain three-dimensional cinema systems and components thereof imported by respondents MasterImage 3D, Inc. of Sherman Oaks, California, and MasterImage 3D Asia, LLC of Seoul, Republic of Korea, and a cease and desist order against the domestic respondent. This notice is soliciting public interest comments from the public only. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

FOR FURTHER INFORMATION CONTACT: Lucy Grace D. Noyola, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW.,

Washington, DC 20436, telephone (202) 205-3438. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>, and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on EDIS at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that if the Commission finds a violation it shall exclude the articles concerned from the United States:

unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease and desist orders. 19 U.S.C. 1337(f)(1).

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five pages, inclusive of attachments, concerning the public interest in light of the administrative law judge's recommended determination on remedy and bonding issued in this investigation on December 16, 2015. Comments should address whether issuance of a limited exclusion order and cease and desist order in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the recommended orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) identify like or directly competitive articles that complainant,

its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the recommended exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the limited exclusion order and cease and desist order would impact consumers in the United States.

Written submissions must be filed no later than by close of business on January 21, 2016. Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (Inv. No. 337-TA-939) in a prominent place on the cover page, the first page, or both. (See Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50).

By order of the Commission.

Dated: December 22, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015-32597 Filed 12-24-15; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Laser-Driven Light Sources, Subsystems Containing Laser-Driven Light Sources, and Products Containing Same, DN 3107*; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at EDIS,¹ and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at USITC.² The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at EDIS.³ Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Energetiq Technology, Inc. on December 15, 2015. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale

within the United States after importation of certain laser-driven light sources, subsystems containing laser-driven light sources, and products containing same. The complaint names as respondents ASML Netherlands B.V. of the Netherlands; ASML US, Inc. of Chandler, AZ; and Oioptiq Photonics GmbH & Co. KG of Germany. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

¹ Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

² United States International Trade Commission (USITC): <http://edis.usitc.gov>.

³ Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number ("Docket No. 3107") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures).⁴ Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.⁵

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Dated: December 16, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015-32594 Filed 12-24-15; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-928 Investigation No. 337-TA-937 (Consolidated)]

Certain Windshield Wipers and Components Thereof; Commission Determination To Review in Part and, on Review, To Reverse in Part and To Vacate in Part a Final Initial Determination Finding a Violation of Section 337, and To Remand the Investigation in Part to the Administrative Law Judge

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("the Commission") has determined to review in part and, on review, to reverse in part and to vacate in part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on October 22, 2015. The Commission has also determined to remand the investigation in part to the ALJ.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-3115. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Investigation No. 337-TA-928, *Certain Windshield Wipers and Components Thereof*, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337"), on September 2, 2014, based on a complaint filed by Valeo North America, Inc. of Troy, MI, and Delmex de Juarez S. de R.L. de C.V. of Mexico (collectively, "Valeo"). The complaint alleges a violation of section 337 by reason of infringement of certain claims of U.S. Patent Nos. 7,891,044 ("the '044 patent"); 7,937,798 ("the '798 patent"); and 8,220,106 by Federal-Mogul Corp. of Southfield, Michigan, Federal-Mogul Vehicle Component Solutions, Inc. of Southfield, Michigan, and Federal-Mogul of Aubange, Belgium (collectively, "Federal-Mogul"). 79 FR 52041-42 (Sep. 2, 2014).

On November 21, 2014, the Commission instituted Investigation No. 337-TA-937, *Certain Windshield Wipers and Components Thereof*, based on a complaint filed by Valeo. The complaint alleges a violation of section 337 by reason of infringement of certain claims of the '044 patent and the '798 patent by Trico Products Corporation of

Rochester Hills, Michigan, Trico Products of Brownsville, Texas, and Trico Componentes SA de CV of Tamaulipas, Mexico (collectively, "Trico"). 79 FR 69525-26 (Nov. 21, 2014).

On December 9, 2014, the ALJ consolidated investigations Nos. 337-TA-928 and 337-TA-937. See ALJ Order No. 8 in Inv. No. 337-TA-928. The Office of Unfair Import Investigations is not a party in these consolidated investigations.

On May 19, 2015, Valeo and Federal-Mogul reached a settlement agreement and filed a joint motion to terminate the Federal-Mogul Respondents from the consolidated investigations, which was granted on June 5, 2015. See ALJ Order No. 24, Inv. No. 337-TA-928 (June 5, 2015) (*not reviewed* June 29, 2015). The Trico respondents remained in the consolidated investigations.

The evidentiary hearing on the question of violation of section 337 was held in July of 2015. The final ID on violation was issued on October 22, 2015. The ALJ issued his recommended determination on remedy, the public interest and bonding on the same day. The ALJ found that a violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain windshield wipers and components thereof by reason of infringement of certain claims of the '798 patent. The ALJ recommended that the Commission issue a limited exclusion order directed to Trico's accused products that infringe the '798 patent. The ALJ did not recommend that the Commission issue a cease and desist order in this investigation. Both parties to this investigation filed timely petitions for review of various portions of the final ID, as well as timely responses to the petitions.

Having examined the record in this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission has determined to review the ID in part and, on review, to take certain actions. In particular, the Commission has determined as follows:

(1) To review the ALJ's determination in Order No. 36 (Jul. 16, 2015) precluding arguments and evidence relating to Trico's 618 and 596 connectors on the basis that they are obsolete and are irrelevant to the present investigation, see ALJ Order No. 36 at 1, and on review, to reverse this determination and to remand the investigation to the ALJ with respect to this issue, to make findings regarding whether Trico products with 618 and

⁴ Handbook for Electronic Filing Procedures: http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf.

⁵ Electronic Document Information System (EDIS): <http://edis.usitc.gov>

596 connectors infringe either asserted patent and to make any necessary related findings, as set forth in the accompanying Remand Order.

(2) To review the ALJ's finding that Valeo's indirect infringement claims are moot and, on review, to vacate it. The Commission finds it unnecessary to reach the issue of whether Trico induced infringement of the '798 patent with respect to the accused products considered by the ALJ because the Commission has determined not to review the ALJ's finding that Trico directly infringes the '798 patent.

(3) To review the ALJ's finding that Valeo established quantitatively and qualitatively significant investment in plant and equipment and thus satisfies economic prong of the domestic industry requirement under subsection (A) of section 337(a)(3) and, on review, to take no position with respect to this finding.

(4) To review the final ID with respect to footnote 7 on page 17 and, on review, to modify the subject footnote by striking its second sentence.

The Commission has determined not to review the remainder of the final ID. The Commission does not seek further briefing at this time.

In light of the remand, the ALJ shall set a new target date within thirty days of the date of this notice consistent with the Remand Order. The current target date for this investigation is February 23, 2016.

Any briefing on reviewed and remanded issues, and on remedy, bonding, and the public interest will follow Commission consideration of the remand ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 21, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015-32533 Filed 12-24-15; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-978]

Certain Chassis Parts Incorporating Movable Sockets and Components Thereof; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 19, 2015, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Federal-Mogul Motorparts Corporation of Southfield, Michigan. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain chassis parts incorporating movable sockets and components thereof by reason of infringement of certain claims of U.S. Patent No. 6,202,280 ("the '280 patent"). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order, and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205-2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205-2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2015).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 21, 2015, *ordered that—*

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain chassis parts incorporating movable sockets and components thereof by reason of infringement of one or more of claims 1-5 of the '280 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Federal-Mogul Motorparts Corporation, 27300 West 11 Mile Road, Southfield, MI 48034.

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served: Mevotech, L.P., 240 Bridgeland Avenue, Toronto, ON, Canada M6A 1Z4.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436; and (3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the

issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 21, 2015.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2015-32503 Filed 12-24-15; 8:45 am]

BILLING CODE 7020-02-P

JOINT BOARD FOR ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Executive Director of the Joint Board for the Enrollment of Actuaries gives notice of a teleconference meeting of the Advisory Committee on Actuarial Examinations (a portion of which will be open to the public) on January 11–12, 2016.

DATES: Monday, January 11, 2016, from 9:00 a.m. to 5:00 p.m. (EST), and Tuesday, January 12, 2016, from 8:30 a.m. to 5:00 p.m. (EST).

ADDRESSES: The meeting will be held by teleconference.

FOR FURTHER INFORMATION CONTACT:

Patrick W. McDonough, Executive Director of the Joint Board for the Enrollment of Actuaries, 703-414-2173.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will hold a teleconference meeting on Monday, January 11, 2016, from 9:00 a.m. to 5:00 p.m. (EST), and Tuesday, January 12, 2016, from 8:30 a.m. to 5:00 p.m. (EST).

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the November 2015 Pension (EA-2F) Examination in order to make recommendations relative thereto, including the minimum acceptable pass score. Topics for inclusion on the syllabus for the Joint Board's examination program for the May 2016 Basic (EA-1) Examination and the May 2016 Pension (EA-2L) Examination will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the portions of the meeting dealing with the discussion of questions that

may appear on the Joint Board's examinations and the review of the November 2015 Pension (EA-2F) Examination fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1:00 p.m. (EST) on January 11, 2016, and will continue for as long as necessary to complete the discussion, but not beyond 3:00 p.m. (EST). Time permitting, after the close of this discussion by Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should contact the Executive Director at Patrick.mcdonough@irs.gov and include the written text or outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. All persons planning to attend the public session should contact the Executive Director at Patrick.mcdonough@irs.gov to obtain teleconference access information. Notifications of intent to make an oral statement or to call in to the public session must be sent electronically to the Executive Director by no later than January 7, 2016. Any person also may file a written statement for consideration by the Joint Board and the Committee by sending it to: Internal Revenue Service; Attn: Patrick W. McDonough, Executive Director; Joint Board for the Enrollment of Actuaries SE:RPO; REFM, Park 4, Floor 4; 1111 Constitution Avenue NW.; Washington, DC 20224.

Dated: December 17, 2015.

Patrick W. McDonough,

Executive Director, Joint Board for Enrollment of Actuaries.

[FR Doc. 2015-32369 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF JUSTICE

Antitrust Division

United States, et al. v. AMC Entertainment Holdings, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the

District of Columbia in *United States of America, et al. v. AMC Entertainment Holdings, Inc., et al.*, Civil Action No. 1:15-cv-02181. On December 15, 2015, the United States and the State of Connecticut filed a Complaint alleging that AMC Entertainment Holdings, Inc. proposed acquisition of SMH Theatres, Inc. movie theatres and related assets would violate section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires AMC Entertainment Holdings, Inc. to divest certain theatre assets.

Copies of the Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site at <http://www.justice.gov/atr> and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's Web site, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to David C. Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice, 450 Fifth Street NW., Suite 4000, Washington, DC 20530 (telephone: 202-305-9969).

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Antitrust Division, 450 Fifth Street NW., Suite 4000, Washington, DC 20530, and STATE OF CONNECTICUT, Office of the Attorney General, 55 Elm Street, Hartford, CT 06106, Plaintiffs, v. AMC ENTERTAINMENT HOLDINGS, INC., One AMC Way, 11500 Ash Street, Leawood, KS 64105, and SMH THEATRES, INC., 12750 Merit Drive, Suite 800, Dallas, TX 75251, Defendants.

Civil Action No.: 1:15-cv-02181

Judge: Beryl A. Howell

Filed: 12/15/2015

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the State of Connecticut, acting by and through its Office of the Attorney General, bring this civil antitrust action to prevent the proposed acquisition by AMC Entertainment Holdings, Inc.

(“AMC”) of all of the outstanding voting securities of SMH Theatres, Inc. (“Starplex Cinemas”).

I. NATURE OF ACTION

1. AMC is a significant competitor to Starplex Cinemas in the exhibition of first-run, commercial movies in the area in and around East Windsor, New Jersey and in the area in and around Berlin, Connecticut. If AMC’s acquisition of Starplex Cinemas is permitted to proceed, it would give AMC direct control of its most significant competitor in these markets. The acquisition likely would substantially lessen competition in the exhibition of first-run, commercial movies in each of these markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. JURISDICTION AND VENUE

2. This action is filed by the United States pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to obtain equitable relief and to prevent a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

3. The State of Connecticut brings this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent the defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The State of Connecticut, by and through its Office of the Attorney General, brings this action as *parens patriae* on behalf of the citizens, general welfare, and economy of its state.

4. The distribution and theatrical exhibition of first-run, commercial films is a commercial activity that substantially affects, and is in the flow of, interstate trade and commerce. Defendants’ activities in purchasing equipment, services, and supplies as well as licensing films for exhibition substantially affect interstate commerce. The Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 25 and 28 U.S.C. §§ 1331, 1337(a), and 1345.

5. Defendants consent to personal jurisdiction and venue in this district. Therefore, this Court has personal jurisdiction over each Defendant and venue is proper under 28 U.S.C. § 1391(b) and (c). In addition, venue is proper under 15 U.S.C. § 22 because one defendant operates theatres in this District; the other transacts business by attracting patrons from and advertising in this District.

III. DEFENDANTS AND THE PROPOSED ACQUISITION

6. Defendant AMC is a Delaware corporation with its headquarters in Leawood, Kansas. AMC operates 349 theatres and 4,975 screens in locations

throughout the United States. Measured by number of screens and box office revenue, AMC is the second-largest theatre circuit in the United States.

7. Defendant Starplex Cinemas is a Texas corporation with its headquarters in Dallas, Texas. Starplex operates 33 movie theatres with a total of 346 screens in the United States, primarily located in small to midsize markets.

8. On July 13, 2015, AMC and Starplex Cinemas executed a stock purchase agreement. Under the agreement, AMC will acquire all outstanding voting securities of Starplex Cinemas for approximately \$172 million.

IV. BACKGROUND OF THE MOVIE THEATRE INDUSTRY

9. Viewing movies in the theatre is a popular pastime. Over one billion movie tickets were sold in the United States in 2014, with total box office revenue reaching approximately \$10 billion.

10. Companies that operate movie theatres are called “exhibitors.” Some exhibitors own a single theatre, whereas others own a circuit of theatres within one or more regions of the United States. AMC and Starplex Cinemas are exhibitors in the United States.

11. Exhibitors set ticket prices for a theatre based on a number of factors, including the age and condition of the theatre, the number and type of amenities the theatre offers (such as the range of snacks, food and beverages offered, the size of its screens and quality of its sound systems, and whether it provides stadium and/or reserved seating), competitive pressures facing the theatre (such as the price of tickets at nearby theatres, the age and condition of those theatres, and the number and type of amenities they offer), and the population demographics and density surrounding the theatre.

V. RELEVANT MARKET

A. Product Market

12. Movies are a unique form of entertainment. The experience of viewing a movie in a theatre is an inherently different experience from live entertainment (e.g., a stage production or attending a sporting event) or viewing a movie in the home (e.g., through streaming video, on a DVD, or via pay-per-view).

13. Reflecting the significant differences of viewing a movie in a theatre, ticket prices for movies generally differ from prices for other forms of entertainment. For example, live entertainment is typically significantly more expensive than a movie ticket, whereas home viewing

through streaming video, a DVD rental, or pay-per-view is usually significantly less expensive than viewing a movie in a theatre.

14. Viewing a movie at home typically lacks several characteristics of viewing a movie in a theatre, including the size of the screen, the sophistication of the sound system, and the social experience of viewing a movie with other patrons. In addition, the most popular newly released or “first-run” movies are not available for home viewing at the time they come out in theatres.

15. Movies are considered to be in their “first-run” during the four to five weeks following initial release in a given locality. If successful, a movie may be exhibited at other theatres after the first-run as part of a second or subsequent run (often called a “sub-run” or “second-run”). Moviegoers generally do not regard sub-run movies as an adequate substitute for first-run movies. Reflecting the significant difference between viewing a newly released, first-run movie and an older sub-run movie, tickets at theatres exhibiting first-run movies usually cost significantly more than tickets at sub-run theatres.

16. Art movies and foreign-language movies are also not reasonable substitutes for commercial, first-run movies. Art movies, which include documentaries, are sometimes referred to as independent films. Although art and foreign-language movies appeal to some viewers of commercial movies, art and foreign-language movies tend to have more narrow appeal and typically attract an older audience than commercial movies. Exhibitors consider the operation of theatres that exhibit art and foreign-language movies to be distinct from the operation of theatres that exhibit commercial movies.

17. The relevant product market within which to assess the competitive effects of this acquisition is the exhibition of first-run, commercial movies. A hypothetical monopolist controlling the exhibition of all first-run, commercial movies would profitably impose at least a small but significant and non-transitory increase in ticket prices.

B. Geographic Markets

18. Moviegoers typically are not willing to travel very far from their home to attend a movie. As a result, geographic markets for the exhibition of first-run, commercial movies are relatively local.

Area In and Around East Windsor, New Jersey

19. AMC and Starplex Cinemas account for the majority of the first-run, commercial movie tickets sold in and around East Windsor, New Jersey ("East Windsor"). The only theatres that predominantly show first-run commercial movies in the East Windsor area are the Starplex Town Center Plaza 10, the AMC MarketFair 10, and the AMC Hamilton 24. The Starplex theatre is located approximately 10 miles from each of the AMC theatres.

20. Moviegoers who reside in East Windsor are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in East Windsor would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. East Windsor constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Berlin, Connecticut

21. AMC and Starplex Cinemas account for the majority of the first-run, commercial movie tickets sold in and around Berlin, Connecticut ("Berlin"). Within the Berlin area are the Starplex Berlin 12 and the AMC Plainville 20. These two theatres are located approximately 8 miles apart. Only three other theatres in the Berlin area also show first-run, commercial movies.

22. Moviegoers who reside in Berlin are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in Berlin would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. Berlin constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

VI. COMPETITIVE EFFECTS

23. Exhibitors compete to attract moviegoers to their theatres over the theatres of their rivals. They do that by competing on price, knowing that if they charge too much (or do not offer sufficient discounted tickets for matinees, seniors, students, or children) moviegoers will begin to frequent their rivals. Exhibitors also compete by seeking to license the first-run movies that are likely to attract the largest

numbers of moviegoers. In addition, they compete over the quality of the viewing experience by offering moviegoers the most sophisticated sound systems, largest screens, best picture clarity, best seating (including stadium and reserved seating), and the broadest variety and highest quality snacks, food, and drinks at concession stands or cafés in the lobby or served to moviegoers at their seats.

24. AMC and Starplex Cinemas currently compete for moviegoers in the East Windsor and Berlin markets. These markets are concentrated, and in each market, AMC and Starplex Cinemas are the other's most significant competitor, given their close proximity. Their rivalry spurs each to improve the quality of its theatres and keeps ticket prices in check. Theatres operated by other exhibitors offer less attractive options for visitors to defendants' theatres because those theatres are located farther away or are smaller in size or poorer in quality.

25. In the relevant markets at issue, the acquisition of Starplex Cinemas likely will result in a substantial lessening of competition. In the East Windsor and Berlin markets, the transaction will lead to significant increases in concentration and eliminate existing competition between AMC and Starplex Cinemas.

26. Market concentration is often a useful indicator of the level of competitive vigor in a market and the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase that concentration, the more likely it is that the transaction would result in reduced competition, harming consumers. Market concentration commonly is measured by the Herfindahl-Hirschman Index ("HHI"), as discussed in Appendix A. Markets in which the HHI exceeds 2,500 points are considered highly concentrated, and transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed likely to enhance market power.

27. In East Windsor, the proposed acquisition would give AMC control of all of the first-run, commercial movie theatres, with 34 out of 34 total screens and a 100% share of the \$13 million annual box office revenues. The acquisition would yield a post-acquisition HHI of 10,000, representing an increase of roughly 2,300 points.

28. In Berlin, the proposed acquisition would give AMC control of three of the six first-run, commercial movie theatres, with 44 out of 79 total screens and an approximate 68% share of the \$11 million annual box office revenues. The

acquisition would yield a post-acquisition HHI of approximately 5,260, representing an increase of roughly 2,280 points.

29. Today, were one of defendants' theatres to unilaterally increase ticket prices in East Windsor or Berlin, the exhibitor that increased price would likely suffer financially as a substantial number of its customers would patronize the other exhibitor. The acquisition would eliminate this pricing constraint. Thus, the acquisition is likely to lead to higher ticket prices for moviegoers, which could take the form of a higher adult evening ticket price or reduced discounting for matinees, children, seniors, or students.

30. The proposed acquisition likely would also reduce competition between AMC and Starplex Cinemas over the quality of the viewing experience at their East Windsor or Berlin theatres. If no longer motivated to compete, AMC and Starplex Cinemas would have reduced incentives to maintain, upgrade, and renovate their theatres, to improve the theatres' amenities and services, or to license the most popular movies, thus reducing the quality of the viewing experience for moviegoers in East Windsor and Berlin.

VII. ENTRY

31. Sufficient, timely entry that would deter or counteract the anticompetitive effects alleged above is unlikely. Exhibitors are reluctant to locate new first-run, commercial theatres near existing first-run, commercial theatres unless the population density, demographics, or the quality of existing theatres makes new entry viable. Over the next two years, entry of new first-run, commercial movie theatres in East Windsor or Berlin would be unlikely to defeat a price increase by the merged firm.

VIII. VIOLATION ALLEGED

32. Plaintiffs hereby reincorporate paragraphs 1 through 28.

33. The likely effect of the proposed transaction would be to substantially lessen competition in the relevant product and geographic markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

34. The transaction would likely have the following effects, among others: (a) the prices of tickets at first-run, commercial movie theatres in East Windsor and Berlin would likely increase to levels above those that would prevail absent the acquisition; and (b) the quality of first-run, commercial theatres and the viewing experience at those theatres would

likely decrease below levels that would prevail absent the acquisition.

IX. REQUESTED RELIEF

35. Plaintiffs request: (a) adjudication that the proposed acquisition would violate Section 7 of the Clayton Act; (b) permanent injunctive relief to prevent the consummation of the proposed acquisition; (c) an award to each Plaintiff of its costs in this action; and (d) such other relief as is proper.

DATED: DECEMBER 15, 2015

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APPENDIX A

Herfindahl-Hirschman Index

The term “HHI” means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the relevant market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size, and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as

the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. See U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 5.3 (2010) (“Guidelines”). Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the Guidelines. *Id.*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Antitrust Division, 450 Fifth Street, NW., Suite 4000, Washington, D.C. 20530, and STATE OF CONNECTICUT, Office of the Attorney General, 55 Elm Street, Hartford, CT 06106, Plaintiffs, v. AMC ENTERTAINMENT HOLDINGS, INC., One AMC Way, 11500 Ash Street, Leawood, KS 64105, and SMH THEATRES, INC., 12750 Merit Drive, Suite 800, Dallas, TX 75251, Defendants.

Civil Action No.: 1:15-cv-02181

Judge: Beryl A. Howell

Filed: 12/15/2015

COMPETITIVE IMPACT STATEMENT

Plaintiff, United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On July 13, 2015, Defendant AMC Entertainment Holdings, Inc. (“AMC”) agreed to acquire all of the outstanding voting securities of SMH Theatres, Inc. (“Starplex Cinemas”). AMC and Starplex Cinemas are significant competitors in the exhibition of first-run, commercial movies in parts of New Jersey and Connecticut. Plaintiffs filed a civil antitrust complaint on December 15, 2015, seeking to enjoin the proposed acquisition and to obtain equitable relief. The Complaint alleges that the acquisition, if permitted to proceed, would give AMC direct control of its most significant competitor in the area in and around East Windsor, New Jersey and in the area in and around Berlin, Connecticut. The likely effect of this acquisition would be to substantially lessen competition in the exhibition of first-run, commercial movies in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, Plaintiffs also filed a Hold Separate Stipulation and Order (“Hold Separate”) and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, AMC and Starplex Cinemas are required to divest one theatre located in New Jersey and one theatre located in Connecticut to acquirer(s) acceptable to the United States, in consultation with the State of Connecticut.

Under the terms of the Hold Separate, Defendants will take all steps necessary to ensure that the two theatres to be divested are operated as competitively independent, economically viable, and ongoing business concerns, and that competition is maintained and not diminished during the pendency of the ordered divestitures.

Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Transaction

Defendant Starplex Cinemas is a Texas corporation with its headquarters in Dallas, Texas. Starplex operates 33 movie theatres with a total of 346 screens in 12 states throughout the United States, primarily located in small to midsize markets. Starplex earned domestic box office revenue of approximately \$57 million in 2014.

AMC is a Delaware corporation with its headquarters in Leawood, Kansas. It operates 349 theatres and 4,975 screens in locations primarily throughout the United States. Measured by number of screens and box office revenue, AMC is the second-largest theatre exhibitor in the United States and earned domestic box office revenues of approximately \$1.8 billion in 2014.

On July 13, 2015, AMC and Starplex Cinemas executed a stock purchase agreement under which AMC will acquire, for approximately \$172 million, all of the outstanding voting securities of Starplex Cinemas.

The proposed transaction, as initially agreed to by AMC and Starplex Cinemas

on July 13, 2015, would lessen competition substantially as a result of AMC's acquisition of Starplex Cinemas. This acquisition is the subject of the Complaint and proposed Final Judgment filed by Plaintiffs on December 15, 2015.

B. The Competitive Effects of the Transaction on the Exhibition of First-Run, Commercial Movies

1. The Relevant Product and Geographic Markets

The exhibition of first-run, commercial movies is a relevant product market under Section 7 of the Clayton Act. The experience of viewing a film in a theatre is an inherently different experience from live entertainment (e.g., a stage production or attending a sporting event), or viewing a movie in the home (e.g., through streaming video, on a DVD, or via pay-per-view).

Reflecting the significant differences between viewing a movie in a theatre and other forms of entertainment, ticket prices for movies are generally very different from prices for other forms of entertainment. Live entertainment is typically significantly more expensive than a movie ticket, whereas renting a DVD or ordering a pay-per view movie for home viewing is usually significantly cheaper than viewing a movie in a theatre.

Moviegoers generally do not regard theatres showing "sub-run" movies, art movies, or foreign language movies as adequate substitutes for commercial, first-run movies.

The transaction substantially lessens competition in two relevant geographic markets: the area in and around East Windsor, New Jersey ("East Windsor") and the area in and around Berlin, Connecticut ("Berlin").

East Windsor

The only theatres that predominantly show first-run commercial movies in the East Windsor area are the Starplex Town Center Plaza 10, the AMC MarketFair 10, and the AMC Hamilton 24. No other non-party theatres in this area predominantly show first-run, commercial movies.

Berlin

Within the Berlin area are the Starplex Berlin 12 and the AMC Plainville 20. These two theatres are located approximately 8 miles apart. Three non-party theatres in this area also show first-run, commercial movies.

The relevant markets in which to assess the competitive effects of this transaction are the first-run, commercial theatres in East Windsor and Berlin. A

hypothetical monopolist controlling the exhibition of first-run, commercial movies in East Windsor and Berlin would profitably impose at least a small but significant and non-transitory increase in ticket prices.

2. Competitive Effects in the Relevant Markets

Exhibitors that operate first-run, commercial theatres compete on multiple dimensions. Exhibitors compete on price, knowing that if they charge too much (or do not offer sufficient discounted tickets for matinees, seniors, students, or children), moviegoers will begin to frequent their rivals. Exhibitors also compete by seeking to license the first-run movies that are likely to attract the largest numbers of moviegoers. In addition, they compete over the quality of the viewing experience. They compete to offer the most sophisticated sound systems, largest screens, best picture clarity, best seating (including stadium and reserved seating), and the broadest range and highest quality snacks, food, and drinks at concession stands or cafés in the lobby or served to moviegoers at their seats.

AMC and Starplex Cinemas currently compete for moviegoers in East Windsor and Berlin. Each of these markets is concentrated, and AMC and Starplex Cinemas are each other's most significant competitor, given their close proximity. Their rivalry spurs each to improve the quality of its theatres and keeps ticket prices in check.

In East Windsor and Berlin, the acquisition by AMC of Starplex Cinemas' theatres likely will result in a substantial lessening of competition. The transaction will lead to significant increases in concentration and eliminate existing competition between AMC and Starplex Cinemas.

In East Windsor, the proposed acquisition would give the newly merged entity control of all of the first-run, commercial theatres, with 34 out of 34 total screens and a 100% share of annual box office revenues totaling approximately \$13 million. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), as discussed in Appendix A of the Complaint, the acquisition would yield a post-acquisition HHI of 10,000, representing an increase of roughly 2,300 points.

In Berlin, the proposed acquisition would give the newly-merged entity control of three of the six first-run, commercial theatres, with 44 out of 79 total screens and an approximate 68% share of annual box office revenues totaling approximately \$11 million. The

acquisition would yield a post-acquisition HHI of approximately 5,260, representing an increase of roughly 2,280 points.

In East Windsor and Berlin today, were one of Defendants' theatres to increase ticket prices unilaterally, the exhibitor that increased price would likely suffer financially as a substantial number of its customers would patronize the other exhibitor's theatre. Other theatres are smaller than and/or farther from the parties' theatres and unlikely to offer enough of a competitive constraint to prevent such a price increase. After the acquisition, AMC would recapture such losses, making price increases more profitable than they would have been pre-acquisition. The acquisition is, therefore, likely to lead to higher ticket prices for moviegoers, which could take the form of a higher adult evening ticket price or reduced discounting for matinees, children, seniors, and students.

Likewise, the proposed transaction would eliminate competition between AMC and Starplex Cinemas over the quality of the viewing experience at their theatres in East Windsor and Berlin. If no longer required to compete, AMC and Starplex Cinemas would have a reduced incentive to maintain, upgrade, and renovate their theatres, to improve the theatres' amenities and services, and to license the most popular movies, thus reducing the quality of the viewing experience for a moviegoer.

The entry of a first-run, commercial theatre sufficient to deter or counteract an increase in movie ticket prices or a decline in theatre quality is unlikely in either East Windsor or Berlin. Exhibitors are reluctant to locate new first-run, commercial theatres near existing first-run, commercial theatres, unless the population density, demographics, or the quality of existing theatres makes new entry viable. Over the next two years, entry of any new first-run, commercial movie theatres in East Windsor and Berlin would be unlikely to defeat a price increase by the merged firm.

For all of these reasons, the proposed transaction would lessen competition substantially in the exhibition of first-run, commercial movies in the East Windsor and Berlin markets, eliminate actual and potential competition between AMC and Starplex Cinemas, and likely result in increased ticket prices and lower quality theatres in those markets. The proposed transaction therefore violates Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisitions in each relevant geographic market, establishing new, independent, and economically viable competitors. The proposed Final Judgment requires Defendants within thirty (30) calendar days after the filing of the Complaint, or five (5) days after the notice of the entry of the Final Judgment by the Court, whichever is later, to divest as viable, ongoing businesses one theatre in each of the relevant markets.

The theatres must be divested in such a way as to satisfy Plaintiffs that they can and will be operated by the purchaser as viable, ongoing businesses that can compete effectively as first-run, commercial theatres. To that end, the proposed Final Judgment provides the acquirer(s) of the theatres with an option to enter into a transitional supply agreement with Defendants of up to 120 days in length, with the possibility of one or more extensions not to exceed six months in total, for the supply of any goods, services, support, including software service and support, and reasonable use of the name AMC, the name Starplex, and any registered service marks of AMC or Starplex, for use in operating those theatres during the period of transition. This ensures the acquirer(s) of the theatres can operate without interruption while long-term supply agreements are arranged and the theatres rebranded. Without the option to enter into a transitional supply agreement, the acquirer(s) might find itself temporarily without provisions, including concessions, necessary to operate the theatres.

Until the divestitures take place, AMC and Starplex Cinemas must maintain the sales and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations. In addition, AMC and Starplex Cinemas must not transfer or reassign to other areas within the company their employees with primary responsibility for the operation of the theatres, except for transfer bids initiated by employees pursuant to Defendants' regular, established job-posting policies. In the event that Defendants do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures.

If Defendants are unable to effect any of the divestitures required herein due

to its inability to obtain the consent of the landlord from whom a theatre is leased, Section VI.A of the proposed Final Judgment requires them to divest alternative theatre assets that compete effectively with the theatres for which the landlord consent was not obtained. These provisions will insure that any failure by Defendants to obtain landlord consent does not thwart the relief obtained in the proposed Final Judgment.

The proposed Final Judgment also prohibits Defendants, without providing at least thirty (30) days notice to the United States Department of Justice, from acquiring any other theatres in the following counties: Hartford County, Connecticut and Mercer County, New Jersey. These counties correspond to the relevant geographic markets in this case. Such acquisitions could raise competitive concerns but might be too small to be reported under the Hart-Scott-Rodino ("HSR") premerger notification statute.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of AMC's acquisition of Starplex Cinemas.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final

Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to: David C. Kully, Chief, Litigation III, Antitrust Division, United States Department of Justice, 450 5th Street NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. Plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against AMC's acquisition of Starplex Cinemas. Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the exhibition of first-run, commercial movies in East Windsor and Berlin. Thus, the proposed Final Judgment would achieve all or substantially all of the relief Plaintiffs would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In

making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. 15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (DC Cir. 1995); see generally *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) explaining that the "court's inquiry is limited" in Tunney Act settlements; *United States v. InBev N.V/S.A.*, No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.")¹

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the

government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See *Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).² In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; see also *U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of

the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also *U.S. Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; see also *U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to

¹ The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006); see also *SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

² Cf. *BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

make a mockery of judicial power.” *SBC Commc’ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2); see also *U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the Court’s “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F. Supp. 2d at 11. A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76.³

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 15, 2015
Respectfully submitted,

GREGG I. MALAWER (D.C. Bar #481685), MIRIAM R. VISHIO (D.C. Bar # 482282), *U.S. Department of Justice, Antitrust Division, 450 5th Street, NW, Suite 4000, Washington, DC 20530, Phone: Gregg Malawer (202) 616-5943, Phone: Miriam Vishio (202) 598-8091 Fax: (202) 514-7308, E-mail: gregg.malawer@usdoj.gov, E-mail: miriam.vishio@usdoj.gov, Attorneys for Plaintiff the United States*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, and STATE OF CONNECTICUT, *Plaintiffs*, v. AMC ENTERTAINMENT HOLDINGS, INC. and SMH THEATRES, INC., *Defendants*.

Civil Action No.: 1:15-cv-02181
Judge: Beryl A. Howell
Filed: 12/15/2015

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiffs United States of America and the State of Connecticut filed their Complaint on December 15, 2015, the Plaintiffs and Defendants, AMC Entertainment Holdings, Inc. (“AMC”), and SMH Theatres, Inc., (“Starplex Cinemas”), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

AND WHEREAS, Plaintiffs require Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to Plaintiffs that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. DEFINITIONS

As used in this Final Judgment:

A. “Acquirer” or “Acquirers” means the entity or entities to which Defendants divest the Divestiture Assets.

B. “AMC” means AMC Entertainment Holdings, Inc., a Delaware corporation with its headquarters in Leawood, Kansas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. “Starplex Cinemas” means Starplex Cinemas, Inc., a Texas Corporation with its headquarters in Dallas, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. “Divestiture Assets” means the following theatre assets:

Theatre	Address
1. Starplex Town Center Plaza 10	319 Route 130 North, East Windsor, NJ 08520.
2. Starplex Berlin 12	19 Frontage Rd, Berlin, CT 06037.

The term “Divestiture Assets” also includes:

1. All tangible assets that comprise the business of operating theatres that exhibit first-run, commercial movies, including, but not limited to real

property and improvements, research and development activities, all equipment, fixed assets, and fixtures, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used in

connection with the Divestiture Assets; all licenses, permits, and authorizations issued by any governmental organization relating to the Divestiture Assets; all contracts (including management contracts), teaming

³ See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); *United States v. Mid-Am. Dairyman, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade

Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (“Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to

determine whether those explanations are reasonable under the circumstances.”); S. Rep. No. 93-298, at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).

arrangements, agreements, leases, commitments, certifications, and understandings relating to the Divestiture Assets, including supply agreements (provided however, that supply agreements that apply to all of each Defendant's theatres may be excluded from the Divestiture Assets, subject to the transitional agreement provisions specified in Section IV (E)); all customer lists (including loyalty club data at the option of the Acquirer(s), copies of which may be retained by Defendants at their option), contracts, accounts, and credit records relating to the Divestiture Assets; all repair and performance records and all other records relating to the Divestiture Assets; and

2. All intangible assets relating to the operation of the Divestiture Assets, including, but not limited to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, (provided however, that the name Starplex, and any registered service marks of Starplex may be excluded from the Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(E)), technical information, computer software and related documentation (provided however, that Defendants' proprietary software may be excluded from the Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(E)), know-how and trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Starplex Cinemas provides to their own employees, customers, suppliers, agents, or licensees (except for the employee manuals that Starplex provides to all its employees), and all research data concerning historic and current research and development.

E. "Landlord Consent" means any contractual approval or consent that the landlord or owner of one or more of the Divestiture Assets, or of the property on which one or more of the Divestiture Assets is situated, must grant prior to the transfer of one of the Divestiture Assets to an Acquirer.

III. APPLICABILITY

A. This Final Judgment applies to AMC and Starplex Cinemas, as defined above, and all other persons in active concert or participation with any of

them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer(s) of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURES

A. Defendants are ordered and directed, within thirty (30) calendar days after the filing of the Complaint in this matter to divest the Divestiture Assets in a manner consistent with this Final Judgment to one or more Acquirer(s) acceptable to the United States in its sole discretion (after consultation with the State of Connecticut, as appropriate). The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed thirty (30) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestitures ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the Plaintiffs at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation and management of the applicable Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer(s) to employ or contract with any employee of any Defendant whose

primary responsibility relates to the operation or management of the applicable Divestiture Assets being sold by the Acquirer(s).

D. Defendants shall permit prospective Acquirer(s) of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. In connection with the divestiture of the Divestiture Assets pursuant to Section IV, or by a trustee appointed pursuant to Section V, of this Final Judgment, at the option of the Acquirer(s), Defendants shall enter into a transitional supply, service, support, and use agreement ("transitional agreement"), of up to 120 days in length, for the supply of any goods, services, support, including software service and support, and reasonable use of the name AMC, the name Starplex, and any registered service marks of AMC or Starplex, that the Acquirer(s) request for the operation of the Divestiture Assets during the period covered by the transitional agreement. At the request of the Acquirer(s), the United States in its sole discretion (after consultation with the State of Connecticut, as appropriate), may agree to one or more extensions of this time period not to exceed six (6) months in total. The terms and conditions of the transitional agreement must be acceptable to the United States in its sole discretion (after consultation with the State of Connecticut, as appropriate). The transitional agreement shall be deemed incorporated into this Final Judgment and a failure by Defendants to comply with any of the terms or conditions of the transitional agreement shall constitute a failure to comply with this Final Judgment.

F. Defendants shall warrant to the Acquirer(s) of the Divestiture Assets that each asset will be operational on the date of sale.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestitures of the Divestiture Assets.

H. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Divestiture Assets. Following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other

permits relating to the operation of the Divestiture Assets.

I. Unless the United States otherwise consents in writing, the divestitures made pursuant to Section IV, and/or by a trustee appointed pursuant to Section V of this Final Judgment, shall include the entire Divestiture Assets and shall be accomplished in such a way as to satisfy the United States, in its sole discretion (after consultation with the State of Connecticut, as appropriate) that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business of operating theatres that exhibit first-run, commercial movies. Divestiture of the Divestiture Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States (after consultation with the State of Connecticut, as appropriate) that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to Acquirers that, in the United States' sole judgment (after consultation with the State of Connecticut, as appropriate) have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of theatres exhibiting first-run, commercial movies; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion (after consultation with the State of Connecticut, as appropriate) that none of the terms of any agreement between Acquirers and Defendants gives Defendants the ability unreasonably to raise the Acquirers' costs, to lower the Acquirers' efficiency, or otherwise to interfere in the ability of any Acquirer to compete effectively.

V. APPOINTMENT OF TRUSTEE

A. If Defendants have not divested the Divestiture Assets within the time period specified in Section IV(A), Defendants shall notify the United States of that fact in writing, specifically identifying the Divestiture Assets that have not been divested. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestitures of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the

divestitures to Acquirer(s) acceptable to the United States (after consultation with the State of Connecticut, as appropriate) at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, VI, and VII of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee and reasonably necessary in the trustee's judgment to assist in the divestiture(s). Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VII.

D. The trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The trustee shall account for all monies derived from the sale of the applicable Divestiture Assets and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets subject to sale by the trustee and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished, but timeliness is paramount. If the trustee and Defendants are unable to reach agreement on the trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of appointment of the trustee, the United States may, in its sole discretion (after consultation with the State of Connecticut, as appropriate), take appropriate action, including making a recommendation to the Court. The trustee shall, within

three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the assets and business to be divested, and Defendants shall develop financial and other information relevant to such assets and business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it

shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

H. If the United States determines that the trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute trustee.

VI. LANDLORD CONSENT

A. If Defendants are unable to effect any of the divestitures required herein due to the inability to obtain the Landlord Consent for any of the Divestiture Assets, Defendants shall divest alternative theatre assets that compete effectively with the theatre or theatres for which the Landlord Consent was not obtained. The United States shall, in its sole discretion (after consultation with the State of Connecticut, as appropriate) determine whether such theatre assets compete effectively with the theatres for which Landlord Consent was not obtained.

B. Within five (5) business days following a determination that Landlord Consent cannot be obtained for any of the Divestiture Assets, Defendants shall notify the United States, and Defendants shall propose an alternative divestiture pursuant to Section VI(A). The United States (after consultation with the State of Connecticut, as appropriate) shall have then ten (10) business days in which to determine whether such theatre assets are a suitable alternative pursuant to Section VI(A). If Defendants' selection is deemed not to be a suitable alternative, the United States shall in its sole discretion (after consultation with the State of Connecticut, as appropriate) select alternative theatre assets to be divested from among those theatre(s) that the United States has determined, in its sole discretion, compete effectively with the theatre(s) for which Landlord Consent was not obtained.

C. If a trustee is responsible for effecting divestiture of the Divestiture Assets, it shall notify the United States and Defendants within five (5) business days following a determination that Landlord Consent cannot be obtained for one or more of the Divestiture Assets. Defendants shall thereafter have five (5) business days to propose an alternative divestiture pursuant to Section VI(A). The United States (after consultation with the State of Connecticut, as appropriate) shall then have ten (10) business days to determine whether the proposed theatre assets are a suitable competitive alternative pursuant to Section VI(A). If

Defendants' selection is deemed not to be a suitable competitive alternative, the United States shall in its sole discretion (after consultation with the State of Connecticut, as appropriate) select alternative theatre assets to be divested from among those theatre(s) that the United States has determined, in its sole discretion, compete effectively with the theatre(s) for which Landlord Consent was not obtained.

VII. NOTICE OF PROPOSED DIVESTITURES

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the trustee, whoever is then responsible for effecting the divestitures required herein, shall notify the United States and, as appropriate, the State of Connecticut, of any proposed divestitures required by Sections IV, V, or VI of this Final Judgment. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestitures and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, in its sole discretion (after consultation with the State of Connecticut, as appropriate) may request from Defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestitures, the proposed Acquirer(s), and any other potential Acquirer(s). Defendants and the trustee shall furnish any additional information requested to the United States within fifteen (15) calendar days of receipt of the request, unless the parties otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants, and the trustee, if there is one, stating whether it objects to the proposed divestitures. If the United States provides written notice that it does not object, the divestitures may be consummated, subject only to the Defendants' limited right to object to the sale under Section V(C) of this Final Judgment.

Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VIII. FINANCING

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

IX. HOLD SEPARATE

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

X. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures have been completed under Sections IV, V, or VI, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Sections IV, V, or VI of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitations on information, shall be made within fourteen (14) calendar days of receipt of each such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions taken and all steps implemented on an

ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in their earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestitures have been completed.

XI. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, or an authorized representative of the State of Connecticut, as appropriate, except in the course of legal proceedings to which the United States is a party (including

grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. NO REACQUISITION

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____, 2015

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16

United States District Judge

[FR Doc. 2015-32629 Filed 12-24-15; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—UHD Alliance, Inc.

Notice is hereby given that, on November 27, 2015, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), UHD Alliance, Inc. ("UHD Alliance") filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Orange, Seville, FRANCE; Shenzhen TCL New Technology Co., Ltd., Shenzhen, PEOPLE'S REPUBLIC OF CHINA; Koninklijke Philips N.V., Eindhoven, NETHERLANDS; DreamWorks Animation L.L.C., Glendale, CA; THX Ltd., San Francisco, CA; and Hisense Electric Co., Ltd., Qingdao, PEOPLE'S REPUBLIC OF CHINA, have been added as parties to this venture.

Also, MediaTek Inc., Hsinchu, TAIWAN, was mistakenly reported as a member of UHD Alliance on the initial filing.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UHD Alliance intends to file additional written notifications disclosing all changes in membership.

On June 17, 2015, UHD Alliance filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 17, 2015 (80 FR 42537).

The last notification was filed with the Department on September 10, 2015. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 29, 2015 (80 FR 58506).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2015-32621 Filed 12-24-15; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE**Antitrust Division****Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASSE International Chapter of IAPMO, LLC**

Notice is hereby given that, on December 7, 2015, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), ASSE International Chapter of IAPMO, LLC (“ASSE”) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act’s provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the name and principal place of business of the standards development organization is: ASSE International Chapter of IAPMO, LLC, Mokena, IL. The nature and scope of ASSE’s standards development activities are: The creation, promotion, and issuance of standards with respect to plumbing, water supply, sewage disposal, water purification, drainage, fire protection, and medical gases.

Patricia A. Brink,
Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2015–32627 Filed 12–24–15; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0080]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Annuity Broker Qualification Declaration Form

AGENCY: Civil Division, Department of Justice.

ACTION: 30-day notice.

SUMMARY: The Department of Justice (DOJ), Civil Division, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** 80 FR

63840, on October 21, 2015, allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until January 27, 2016.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact James G. Touhey, Jr., Director, Torts Branch (FTCA), Civil Division, P.O. Box 888, Benjamin Franklin Station, Washington, DC 20044 (phone: 202–616–4400). Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

1 *Type of Information Collection:* Extension of a currently approved collection.

2 *The Title of the Form/Collection:* Annuity Broker Qualification Declaration Form.

3 *The agency form number:* CIV–FTCA–2.

4 *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals.

Abstract: This declaration is to be submitted annually to determine whether a broker meets the qualifications to be listed as an annuity broker pursuant to Section 11015(b) of Public Law 107–273.

5 *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 300 respondents will complete the form annually within approximately 1 hour.

6 *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden hours to complete the certification form is 300 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E.405B, Washington, DC 20530.

Dated: December 22, 2015.

Jerri Murray,
Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2015–32553 Filed 12–24–15; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF LABOR**Employment and Training Administration****Change of Address for the Office of Foreign Labor Certification National Office**

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department) is providing notice that the Office of Foreign Labor Certification (OFLC) National Office has relocated within Washington, DC effective November 23, 2015.

DATES: *Effective Date:* This notice is effective on November 23, 2015.

FOR FURTHER INFORMATION CONTACT: William W. Thompson, II, Acting Administrator, Office of Foreign Labor Certification, U.S. Department of Labor, 200 Constitution Avenue NW., Box 12–200, Washington, DC 20210–0001; Telephone: (202) 513–7350 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Immigration and Nationality Act (INA) assigns specific responsibilities to

the U.S. Secretary of Labor for the administration of certain employment-based immigration programs that require a labor certification, a labor condition application, or a labor attestation. In the case of a labor certification, these statutory responsibilities include, determining that there are not able, willing, qualified, and available U.S. workers for a position and location for which certification is being requested, and that the employment of the foreign worker(s) will not have an adverse impact on similarly employed U.S. workers.

Employers seeking to hire foreign workers in the D-1, E-3, H-1B, H-1B1, H-2A, H-2B, or the permanent/"green card" visa programs must first apply to the Secretary of Labor to obtain a labor certification or for the approval of a labor condition application, or a labor attestation. The Secretary has delegated the responsibilities for the administration of these programs to the Employment and Training Administration's (ETA) Office of Foreign Labor Certification (OFLC). The OFLC National Office is responsible for overall program management, policy and operational coordination, as well as budget, performance, and all other administrative functions supporting the organization.

The purpose of this Notice is to inform the public that the OFLC National Office has relocated within Washington, DC and to provide the new physical and mailing address for the OFLC National Office.

II. OFLC National Office Address

Mailing Address: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, 200 Constitution Avenue NW.; Box 12-200; Washington, DC 20210; Telephone: (202) 513-7350; Facsimile (202) 513-7395

Physical Address: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, 375 3rd Street SW., Patriots Plaza II, Suite 12-200, Washington, DC 20024.; Telephone: (202) 513-7350; Facsimile (202) 513-7395. **Note:** Mail will not be delivered to this physical address. All mail of any kind must be sent to the mailing address.

These changes of address became effective November 23, 2015. Affected stakeholders should direct any mailed correspondence addressed to the OFLC National Office to the new mailing address beginning immediately. Any correspondence addressed to the old address has and will continue to be

forwarded to the proper location by the Department of Labor's mailroom.

Portia Wu,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2015-32595 Filed 12-24-15; 8:45 am]

BILLING CODE 4510-FP-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; OSHA Strategic Partnership Program for Worker Safety and Health

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, "OSHA Strategic Partnership Program (OSPP) for Worker Safety and Health," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 27, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201512-1218-001 (this link will only become active on the day following publication of this notice) or by contacting Seleda Perryman by telephone at 202-693-4131, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn:

Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Contact Seleda Perryman by telephone at 202-693-4131, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the OSHA Strategic Partnership Program (OSPP) for Worker Safety and Health information collection. Employers who voluntarily participate in the OSPP for Worker Safety and Health are required to monitor and to assess the impact of partnership. An OSHA strategic partnership aims to have a measurable positive impact on workplace safety and health that goes beyond what traditionally has been achievable through traditional enforcement method and focuses on individual work sites. Occupational Safety and Health Act section 2 authorizes this information collection. *See* 29 U.S.C. 651.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1218-0244.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2015. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 19, 2015 (80 FR 35402).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES**

section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1218–0244. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OSHA.

Title of Collection: OSHA Strategic Partnership Program for Worker Safety and Health.

OMB Control Number: 1218–0244.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 4,371.

Total Estimated Number of Responses: 10,509.

Total Estimated Annual Time Burden: 67,518 hours.

Total Estimated Annual Other Costs Burden: \$0.00

Dated: December 19, 2015.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2015–32624 Filed 12–24–15; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO): Meeting

AGENCY: Veterans' Employment and Training Service (VETS), Department of Labor.

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the ACVETEO. The ACVETEO will discuss the DOL core programs and services that assist veterans seeking employment and raise

employer awareness as to the advantages of hiring veterans. There will be an opportunity for individuals or organizations to address the committee. Any individual or organization that wishes to do so should contact Mr. Gregory Green at 202–693–4734.

Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistive listening devices, and/or materials in alternative format) should notify the Advisory Committee no later than Friday, January 15, 2016 by contacting Mr. Gregory Green at 202–693–4734. Requests made after this date will be reviewed, but availability of the requested accommodations cannot be guaranteed. The meeting site is accessible to individuals with disabilities. This Notice also describes the functions of the ACVETEO. Notice of this meeting is required under Section 10(a) (2) of the Federal Advisory Committee Act. This document is intended to notify the general public.

Date And Time: Thursday January 21, 2016 beginning at 9:00 a.m. and ending at approximately 4:00 p.m. (EST).

ADDRESSES: The meeting will take place at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC 20210, C–5320 Conference Room Six. Members of the public are encouraged to arrive early to allow for security clearance into the Frances Perkins Building.

SECURITY INSTRUCTIONS: Meeting participants should use the visitors' entrance to access the Frances Perkins Building, one block north of Constitution Avenue at 3rd and C Streets, NW. For security purposes meeting participants must:

1. Present a valid photo ID to receive a visitor badge.

2. Know the name of the event being attended: the meeting event is the Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO).

3. Visitor badges are issued by the security officer at the Visitor Entrance located at 3rd and C Streets NW. When receiving a visitor badge, the security officer will retain the visitor's photo ID until the visitor badge is returned to the security desk.

4. Laptops and other electronic devices may be inspected and logged for identification purposes.

5. Due to limited parking options, Metro's Judiciary Square station is the easiest way to access the Frances Perkins Building.

Notice of Intent To Attend the Meeting: All meeting participants are being asked to submit a notice of intent

to attend by Friday, January 15, 2016, via email to Mr. Gregory Green at green.gregory.b@dol.gov, subject line "January 2016 ACVETEO Meeting."

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Green, Assistant Designated Federal Official for the ACVETEO, (202) 693–4734.

SUPPLEMENTARY INFORMATION: The ACVETEO is a Congressionally mandated advisory committee authorized under Title 38, U.S. Code, Section 4110 and subject to the Federal Advisory Committee Act, 5 U.S.C. App. 2, as amended. The ACVETEO is responsible for: assessing employment and training needs of veterans; determining the extent to which the programs and activities of the U.S. Department of Labor meet these needs; assisting to conduct outreach to employers seeking to hire veterans; making recommendations to the Secretary, through the Assistant Secretary for VETS, with respect to outreach activities and employment and training needs of Veterans; and carrying out such other activities necessary to make required reports and recommendations. The ACVETEO meets at least quarterly.

Agenda

9:00 a.m. Welcome and remarks, Mike Michaud, Assistant Secretary for Veterans Employment and Training Service

9:30 a.m. Administrative Business, Gregory Green, Assistant Designated Federal Official

9:35 a.m. Discussion and review of Fiscal Year 2015 Annual Report, J. Michael Haynie, ACVETEO Chairman

10:00 a.m. Break

10:15 a.m. Continued discussion and review of Fiscal Year 2015 Annual Report, J. Michael Haynie, ACVETEO Chairman

11:30 p.m. Lunch

1:00 p.m. Veterans Employment and Training Service FY 2016 Strategic Plan, Tim Green, Designated Federal Official

2:00 p.m. Break

2:15 p.m. Discussion on ACVETEO's history and transition of new committee members. J. Michael Haynie ACVETEO Chairman

3:00 p.m. Introduction of Mika Cross, Director of Strategic Communications and Public Engagement, VETS

3:30 p.m. Public Forum, Gregory Green Assistant Designated Federal Official

4:00 p.m. Adjourn

Signed in Washington, DC, this 18th day of December, 2015.

Teresa W. Gerton,

Deputy Assistant Secretary for Veterans' Employment and Training Service.

[FR Doc. 2015-32620 Filed 12-24-15; 8:45 am]

BILLING CODE 4510-79-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Institutional Analysis of American Job Centers Study

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the information collection request (ICR) proposal titled, "Institutional Analysis of American Job Centers," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 27, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201506-1225-001 (this link will only become active on the day following publication of this notice) or by contacting Seleda Perryman by telephone at 202-693-4131 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-DM, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Contact Seleda Perryman by telephone at 202-693-4131 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks PRA authority for the Institutional Analysis of American Job Centers (AJCs) Study information collection. The DOL, Office of the Assistant Secretary for Policy is sponsoring a comprehensive study to better understand the spectrum of institutional features that shape AJC day-to-day operations and customer experiences in order systematically to document key institutional characteristics of AJCs; present a comprehensive description of AJC funding, organization, administration and management, and service delivery structures and processes; and develop typologies of AJCs that capture the institutional variations documented. To achieve these goals, an in-depth institutional analysis will be conducted that documents AJC operations across 10 research domains: (1) Administrative structure; (2) partnerships; (3) performance and strategic management; (4) staffing; (5) physical environment; (6) Management Information System capacity and the use of technology—including electronic tools and resources; (7) service delivery structure and linkages; (8) the program and service mix provided; (9) outreach; and (10) funding. In addition, the study will consider external factors that are particularly important for understanding AJC structure, operations, policies, and processes. These include LWIBs and state-level workforce agencies that have administrative and oversight responsibilities over AJCs.

This ICR seeks clearance for (1) site visits to AJCs; (2) telephone interviews with state workforce administrators in states where site visits are conducted; and (3) a network analysis survey of selected study AJC partner organizations. To select AJCs for site visits, the study team will employ a two-stage sampling approach that will yield a purposive sample of AJCs. This approach aims to capture geographic diversity and variation in the types of administrative entities that operate AJCs. In the first stage of site selection, the study team will randomly select 80 comprehensive AJCs. In the second stage, the study team will select AJCs using purposive sampling based on variation in the types of administrative entities that manage AJC operations, geographic location, and urbanity.

This proposed information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notice published in the **Federal Register** on August 1, 2014.

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB ICR Reference Number 1225-001. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL-DM.

Title of Collection: Institutional Analysis of American Job Centers Study.
OMB ICR Reference Number: 1225-001.

Affected Public: State, Local, and Tribal Governments and Private Sector—businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 2459.

Total Estimated Number of Responses: 2459.

Total Estimated Annual Time Burden: 2978 hours.

Total Estimated Annual Other Costs Burden: \$0.

Dated: December 19, 2015.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2015-32625 Filed 12-24-15; 8:45 am]

BILLING CODE 4510-04-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employment and Training Administration Financial Reporting, Form ETA-9130

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) revision titled, "Employment and Training Administration Financial Reporting, Form ETA-9130," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 27, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201510-1205-008 (this link will only become active on the day following publication of this notice) or by contacting Seleda Perryman by telephone at 202-693-4131, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-ETA, Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of

the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman by telephone at 202-693-4131, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to DOL_PRA_PUBLIC@dol.gov.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Employment and Training Administration Financial Reporting, Form ETA-9130, information collection. The ETA awards approximately \$8 billion in formula and discretionary grants each year to an average of 1,000 recipients. Financial reports for each of these grants must be submitted quarterly on the financial report form ETA-9130. Recipients include but are not limited to: State Employment Security Agencies, which are comprised of three components: Wagner Peysner Employment Service, Unemployment Insurance program, and Trade Program Grant Agreements; and grantees under the following programs: Workforce Innovation and Opportunity Act (WIOA) Youth, Adult, and Dislocated Worker programs; National Dislocated Worker Grants; National Farmworker Jobs Program; Indian and Native American programs; Senior Community Service Employment Program; WIOA discretionary grants; and H-1B Job Training Grants.

This information collection has been classified as a revision, because OMB prescribed financial reporting requirements for Federal programs have changed with the implementation of Uniform Guidance that went into effect on December 26, 2014, replacing numerous previously applicable Circulars. These changes affect Form ETA-9130 and its instructions by updating certain key terms and definitions.

In addition, WIOA enactment brings new statutory requirements affecting financial reporting, including but not limited to, new and/or revised limitations and baselines that require the addition of new and modification of existing reporting line items on ETA-9130 Financial. Other reporting line items have been added and removed in an effort to streamline Federal financial reporting and make form ETA-9130 more closely resemble Form SF-425 (cleared under OMB Control Number 0348-0061), which is the standard financial reporting form for Federal grant recipients.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205-0461. The current approval is scheduled to expire on December 31, 2015; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 04, 2015 (80 FR 46337).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205-0461. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL-ETA.

Title of Collection: Employment and Training Administration Financial Reporting Form, ETA-9130.

OMB Control Number: 1205–0461.
Affected Public: State, Local, and Tribal Governments, and Private Sector—businesses or other for-profits and not for profit institutions.

Total Estimated Number of Respondents: 1,000.

Total Estimated Number of Responses: 20,000.

Total Estimated Annual Time Burden: 15,000 hours.

Total Estimated Annual Other Costs Burden: \$0.

Dated: December 19, 2015.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2015–32622 Filed 12–24–15; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Overpayment Recovery Questionnaire

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, "Overpayment Recovery Questionnaire," to the Office of Management and Budget (OMB) for review and approval for use, without change, in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 27, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201507-1240-002 (this link will only become active on the day following publication of this notice) or by contacting Seleda Perryman by telephone at 202–693–4131 (this is not a toll-free number) or sending an email to DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a

toll-free number), email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor–OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman by telephone at 202–693–4131 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Overpayment Recovery Questionnaire, Form OWCP–20, which is necessary to determine whether the recovery of any Black Lung, Energy Employees Occupational Illness Compensation Program Act or Federal Employees' Compensation overpayment may be waived, compromised, terminated, or collected in full.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0051. The current approval is scheduled to expire on December 31, 2015; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on July 23, 2015 (80 FR 43800).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0051. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
 - Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
 - Enhance the quality, utility, and clarity of the information to be collected; and
 - Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.
- Agency:** DOL–OWCP.
Title of Collection: Overpayment Recovery Questionnaire.
OMB Control Number: 1240–0051.
Affected Public: Individuals or Households.
Total Estimated Number of Respondents: 3,393.
Total Estimated Number of Responses: 3,393.
Total Estimated Annual Burden Hours: 3,393.
Total Estimated Annual Other Costs Burden: \$1,954.

Dated: December 19, 2015.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2015–32626 Filed 12–24–15; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; National Guard Youth ChalleNge Job ChalleNge Evaluation

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the information collection request (ICR) proposal titled, "the National Guard Youth ChalleNge Job ChalleNge Evaluation" to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 27, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201509-1291-002 (this link will only become active on the day following publication of this notice) or by contacting Seleda Perryman by telephone at 202-693-4131 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OASP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Contact Seleda Perryman by telephone at 202-693-4131 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks PRA authority for the National Guard Youth ChalleNge Job ChalleNge Evaluation information collection. The National Guard Youth ChalleNge program is one of a handful of interventions that have demonstrated positive, sustained impacts on the educational attainment and labor market outcomes of youth who are not in school or the labor force. The goal of Youth ChalleNge, a residential program, is to build confidence and maturity, teach practical life skills, and help youth obtain a high school diploma or GED. The program's numerous activities address its eight core pillars: leadership/followership, responsible citizenship, service to community, life-coping skills, physical fitness, health and hygiene, job skills, and academic excellence. To build on the success of Youth ChalleNge, the Employment and Training Administration issued \$12 million in grants in early 2015 for three Youth ChalleNge programs to: (1)

expand the program's target population to include youth who have been involved with the courts and (2) add an occupational training component, known as Job ChalleNge. The addition of the Job ChalleNge component will expand the residential time by five months and offer the following activities: (1) Occupation skills training, (2) individualized career and academic counseling, (3) work-based learning opportunities, and (4) leadership development activities.

The National Guard Youth ChalleNge Job ChalleNge Evaluation will help policymakers and program administrators determine the impacts of expanding Youth ChalleNge to court-involved youth and adding the Job ChalleNge component to the existing Youth ChalleNge model. The study will evaluate how these program enhancements are implemented and how effective they are, both for youth overall and for court-involved youth in particular. The study will address four research questions: (1) How were the programs implemented?, (2) What impacts did Youth ChalleNge and Job ChalleNge have on the outcomes of participants?, (3) To what extent did participation in Job ChalleNge change the overall impact of Youth ChalleNge on program participants?, and (4) To what extent did impacts vary for selected subpopulations of participants? The first research question will be addressed through an implementation study of the three grantee demonstrations. The remaining three questions will be addressed through an impact study of the Youth ChalleNge and Job ChalleNge programs. For the impact study, the feasibility of using randomized controlled trials to estimate program effectiveness will be assessed; if needed, a comparison group of youth from Youth ChalleNge sites that did not receive grants will be included in the study. Only youth who agree to participate in the study will be allowed to participate in the Youth ChalleNge and Job ChalleNge programs at the grantees included in the study; active consent will be obtained from youth 18 years of age or older and from a parent or guardian of youth under the age of 18.

This ICR consists of two types of proposed data collection instruments to be used in the National Guard Youth ChalleNge Job ChalleNge evaluation. The first is a Baseline Information Form that will be included in the Youth ChalleNge application packet and completed by youth. The form will collect demographic information as well as baseline measures of major outcome variables, including: current

employment, past delinquency, expectations about future education, work experience and other topics, and detailed contact information. The second is a set of site visit protocols. Site visits will occur twice. The first will occur early in the study period and will collect information about grantees' plans and procedures, the backgrounds and experiences of youth served, the nature of employers' involvement in the programs, and other topics. The second visit will occur later in the grant and evaluation periods and will collect information on whether and how plans and activities for the Youth ChalleNge and Job ChalleNge programs have changed since the first visit. Workforce Investment Act section 171(c)(2) authorizes this information collection. See 29 U.S.C. 2916(c)(2). A future ICR will include an 18-month follow up survey of youth in the Job ChalleNge treatment and control or comparison groups.

This proposed information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notice published in the **Federal Register** on July 23, 2015 (80 FR 43796).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB ICR Reference Number 201509-1291-002. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: DOL–OASAM.

Title of Collection: National Guard Youth Challenge Job Challenge Evaluation.

OMB ICR Reference Number: 201509–1291–002.

Affected Public: Individuals or Households and Private Sector—not-for-profit institutions.

Total Estimated Number of Respondents: 1769.

Total Estimated Number of Responses: 1769.

Total Estimated Annual Time Burden: 308 hours.

Total Estimated Annual Other Costs Burden: \$0.

Dated: December 19, 2015.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2015–32623 Filed 12–24–15; 8:45 am]

BILLING CODE 4510–04–P<

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Main Fan Operation and Inspection (I–A, II–A, III, and V–A Mines)

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, “Main Fan Operation and Inspection (I–A, II–A, III, and V–A Mines),” to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 27, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden

may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201508–1219–005 (this link will only become active on the day following publication of this notice) or by contacting Seleda Perryman by telephone at 202–693–4131, TTY 202–693–8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor–OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT:

Contact Seleda Perryman by telephone at 202–693–4131, TTY 202–693–8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Main Fan Operation and Inspection (I–A, II–A, III, and V–A Mines) information collection. Potentially gassy (explosive) conditions underground are largely controlled by main fans. When accumulations of explosive gases, such as methane, are not swept from the mine by the main fans, they may reasonably be expected to contact an ignition source. The results of such contacts are usually disastrous, and multiple fatalities may be reasonably expected to occur. The Main Fan Operation and Inspection standard contains significantly more stringent requirements for main fans in gassy mines than for main fans in other mines. Regulations 30 CFR 57.22204, which only applies to gassy metal and nonmetal underground mines, requires main fans to have pressure-recording systems. The standard also requires main fans to be inspected daily while operating if persons are underground and certification made of such inspections by signature and date. Certifications and pressure recordings must be retained for one year and made available to authorized representatives

of the Secretary. Federal Mine Safety and Health Act of 1977 sections 101(a) and 103(h) authorize this information collection. See 30 U.S.C. 811 and 30 U.S.C. 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0030.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2015. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 23, 2015 (80 FR 57396).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0030. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Main Fan Operation and Inspection (I–A, II–A, III, and V–A Mines).

OMB Control Number: 1219–0030.

Affected Public: Private Sector—businesses or other for profits.

Total Estimated Number of Respondents: 6.

Total Estimated Number of Responses: 5,940.

Total Estimated Annual Time Burden: 2,046 hours.

Total Estimated Annual Other Costs Burden: \$2,400.

Dated: December 19, 2015.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2015–32552 Filed 12–24–15; 8:45 am]

BILLING CODE 4510–02–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 15–119]

Notice of Availability of Partnerships for Commercial Optical Communication Systems

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Announcement for Partnerships for Commercial Optical Communication Systems.

SUMMARY: This notice is issued in accordance with the Federal Technology Transfer Act (FTTA), 15 U.S.C. 3710a, to enter into Cooperative Research and Development Agreements. These CRADAs will serve as a mechanism for NASA and its partners to agree to a series of mutually beneficial activities, which are expected to be consistent with NASA's 2014 Strategic Plan. There must be specific, identifiable alignment with one or more elements of Strategic Goal 2, Objective 2.3 to optimize Agency technology investments, foster open innovation, and facilitate technology infusion, ensuring the greatest national benefit. This effort also aligns with the Presidential Memorandum of October 28, 2011, on Accelerating Technology Transfer and Commercialization of Federal Research in Support of High Growth Businesses.

DATES: Proposal Executive Summaries are due January 22, 2016, 5:00 p.m. EST.

FOR FURTHER INFORMATION CONTACT:

Requests for more information should

be directed to Enidia Santiago-Arce, (301) 286–5810, gsfc-partnerships@mail.nasa.gov, NASA Goddard Space Flight Center, 8800 Greenbelt Road GSFC: 504, 022:290J, Greenbelt, MD, 20771.

SUPPLEMENTARY INFORMATION: NASA is in the early stages of developing new and innovative technologies in the area of optical communications. This new initiative is a collaboration activity to provide an opportunity to partner with NASA and is not intended to preclude ongoing or future partnerships discussions directly with NASA Centers or Mission Directorates for use of NASA personnel services or facilities. Entities with existing Agreements with NASA Centers or Mission Directorates are not required to respond to this Announcement to retain those Agreements. Participation in one initiative does not preclude participation in any of the others. Companies are free to interact with NASA in any or all of the initiatives that support their organization's goals. A copy of this Announcement of Partnerships (AFP) could be obtained at <http://partnerships.gsfc.nasa.gov/pcocs> or by contacting Enidia Santiago-Arce. Proposal Executive Summaries should be submitted to NASA–GSFC on January 22, 2016 by 5:00 p.m. EST.

NASA is soliciting executive summaries for proposals from all interested U.S. private sector enterprises that wish to enter into a Reimbursable Cooperative Research and Development Agreements (CRADA) for Partnerships for Commercial Optical Communication Systems (PCOCS). The purpose of these agreements is to advance commercial space-related efforts by facilitating access to NASA's spaceflight resources including technical expertise, assessments, lessons learned, and data. With this activity, NASA intends to focus on facilitating the development of integrated optical communications space capabilities. Examples of these capabilities include, but are not limited to, ground station management; flight and ground optical systems; ground network deployment; and space and ground terminal facilities operations.

Cheryl E. Parker,

Federal Register Liaison Officer.

[FR Doc. 2015–32292 Filed 12–24–15; 8:45 am]

BILLING CODE 7510–13–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2016–44 and CP2016–59; Order No. 2905]

New Postal Product

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Priority Mail & First-Class Package Service Contract 9 negotiated service agreement to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: Comments are due: December 29, 2015.

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. Notice of Commission Action
- III. Ordering Paragraphs

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*, the Postal Service filed a formal request and associated supporting information to add Priority Mail & First-Class Package Service Contract 9 to the competitive product list.¹

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. Request, Attachment B.

To support its Request, the Postal Service filed a copy of the contract, a copy of the Governors' Decision authorizing the product, proposed changes to the Mail Classification Schedule, a Statement of Supporting Justification, a certification of compliance with 39 U.S.C. 3633(a), and an application for non-public treatment of certain materials. It also filed supporting financial workpapers.

¹ Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 9 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, December 18, 2015 (Request).

II. Notice of Commission Action

The Commission establishes Docket Nos. MC2016-44 and CP2016-59 to consider the Request pertaining to the proposed Priority Mail & First-Class Package Service Contract 9 product and the related contract, respectively.

The Commission invites comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than December 29, 2015. The public portions of these filings can be accessed via the Commission's Web site (<http://www.prc.gov>).

The Commission appoints Kenneth R. Moeller to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2016-44 and CP2016-59 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as an officer of the Commission to represent the interests of the general public in these proceedings (Public Representative).

3. Comments are due no later than December 29, 2015.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,

Secretary.

[FR Doc. 2015-32530 Filed 12-24-15; 8:45 am]

BILLING CODE 7710-FW-P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2016-46 and CP2016-61; Order No. 2909]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Global Expedited Package Services—Non-Published Rates Contract 9 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 29, 2015.

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. Notice of Commission Action
- III. Ordering Paragraphs

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et. seq.* and Order No. 2774,¹ the Postal Service filed a formal request and associated supporting information to add Global Expedited Package Services—Non-Published Rates Contract 9 (GEPS—NPR 9) to the competitive product list.² The Postal Service states the addition of GEPS—NPR 9 to the competitive product list is necessary due to its creation of a Management Analysis of the Prices and Methodology for Determining Prices for Negotiated Service Agreements under Global Expedited Package Services—Non-Published Rates 9 (GEPS—NPR 9 Management Analysis), and an accompanying financial model that revises the previously filed Global Expedited Package Services—Non-Published Rates Contract 8 (GEPS—NPR 8) Management Analysis and its financial model. Request at 2-3.

To support its Request, the Postal Service filed the following attachments:

- Attachment 1, an application for non-public treatment of materials filed under seal;
- Attachment 2A, a redacted version of Governors' Decision No. 11-6;
- Attachment 2B, a revised version of the Mail Classification Schedule section 2510.8 GEPS—NPR;
- Attachment 2C, a redacted version of GEPS—NPR 9 Management Analysis;
- Attachment 2D, Maximum and Minimum Prices for Global Express Guaranteed (GXG), Priority Express Mail International (PMEI), Priority Mail International (PMI), and First-Class

¹ Docket Nos. MC2016-5 and CP2016-5, Order Adding Global Expedited Package Services—Non-Published Rates Contract 8 to the Competitive Product List, October 23, 2015, at 7 (Order No. 2774).

² Request of the United States Postal Service to Add Global Expedited Package Services—Non-Published Rates 9 (GEPS—NPR 9) to the Competitive Products List and Notice of Filing GEPS—NPR 9 Model Contract and Application for Non-Public Treatment of Materials Filed Under Seal, December 18, 2015 (Request).

Package International (FCPIS) under GEPS—NPR 9 Contracts;

- Attachment 2E, the certified statement concerning the prices for applicable negotiated service agreements under GEPS—NPR 9, required by 39 CFR 3015.5(c)(2);
- Attachment 3, a Statement of Supporting Justification, which is filed pursuant to 39 CFR 3020.32; and
- Attachment 4, a redacted version of the GEPS—NPR 9 model contract. *Id.* at 3-4.

In the Statement of Supporting Justification, Giselle Valera, Managing Director and Vice President, Global Business, asserts the product is designed to increase efficiency of the Postal Service's processes, as well as enhance its ability to compete in the marketplace. Request, Attachment 3 at 1. She contends GEPS—NPR 9 belongs on the competitive product list as it is part of a market over which the Postal Service does not exercise market dominance,³ is not subsidized by market dominant products, covers costs attributable to it, and does not cause competitive products as a whole to fail to make the appropriate contribution to institutional costs. Request, Attachment 3 at 1.

The Postal Service included a redacted version of the GEPS—NPR 9 model contract with the Request. *Id.* Attachment 4. The Postal Service represents the GEPS—NPR 9 model contract is similar to the GEPS—NPR 8 model contract approved by the Commission in Order No. 2774. Request at 6.

The Postal Service represents it will notify each GEPS—NPR 9 customer of the contract's effective date no later than 30 days after receiving the signed agreement from the customer. *Id.* Attachment 4 at 4. Unless terminated sooner, each contract will expire the one calendar year from its effective date (if the effective date is the first of the month) or from the last day of the month in which its effective date falls (if the effective date is not the first of the month). *Id.* The Postal Service represents that the contract is in compliance with 39 U.S.C. 3633. Request at 4, 9; *id.* Attachment 3 at 2-3.

The Postal Service filed much of the supporting materials, including an unredacted model contract, under seal. Request at 8. It maintains that the

³ The Postal Service claims it does not exercise sufficient market power to set the price of GXG, PMEI, PMI, and FCPIS substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products. *See id.* at 3-4; *see also* 39 U.S.C. 3642(b).

redacted portions of the materials should remain confidential as sensitive business information. *Id.* This information includes sensitive commercial information concerning the incentive discounts and their formulation, applicable cost coverage, non-published rates, as well as some customer-identifying information in future signed agreements. *Id.* Attachment 1 at 4–8. The Postal Service asks the Commission to protect customer-identifying information from public disclosure for 10 years after the date of filing with the Commission, unless an order is entered to extend the duration of that status. *Id.* at 11.

II. Notice of Commission Action

The Commission establishes Docket Nos. MC2016–46 and CP2016–61 to consider the Request pertaining to the proposed GEPS—NPR 9 product and the related model contract, respectively.

The Commission invites comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than December 29, 2015. The public portions of these filings can be accessed via the Commission's Web site (<http://www.prc.gov>).

The Commission appoints Curtis E. Kidd to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2016–46 and CP2016–61 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Curtis E. Kidd is appointed to serve as an officer of the Commission to represent the interests of the general public in these proceedings (Public Representative).

3. Comments are due no later than December 29, 2015.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,
Secretary.

[FR Doc. 2015–32532 Filed 12–24–15; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2016–45 and CP2016–60; Order No. 2908]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Priority Mail Express & Priority Mail Contract 25 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 29, 2015.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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- I. Introduction
- II. Notice of Commission Action
- III. Ordering Paragraphs

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*, the Postal Service filed a formal request and associated supporting information to add Priority Mail Express & Priority Mail Contract 25 to the competitive product list.¹

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. Request, Attachment B.

To support its Request, the Postal Service filed a copy of the contract, a copy of the Governors' Decision authorizing the product, proposed changes to the Mail Classification Schedule, a Statement of Supporting Justification, a certification of compliance with 39 U.S.C. 3633(a), and an application for non-public treatment of certain materials. It also filed supporting financial workpapers.

II. Notice of Commission Action

The Commission establishes Docket Nos. MC2016–45 and CP2016–60 to consider the Request pertaining to the proposed Priority Mail Express & Priority Mail Contract 25 product and the related contract, respectively.

¹ Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 25 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, December 18, 2015 (Request).

The Commission invites comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than December 29, 2015. The public portions of these filings can be accessed via the Commission's Web site (<http://www.prc.gov>).

The Commission appoints Kenneth R. Moeller to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2016–45 and CP2016–60 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as an officer of the Commission to represent the interests of the general public in these proceedings (Public Representative).

3. Comments are due no later than December 29, 2015.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,
Secretary.

[FR Doc. 2015–32531 Filed 12–24–15; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2016–58; Order No. 2904]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning an additional Global Expedited Package Services 3 negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 29, 2015.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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- I. Introduction
- II. Notice of Commission Action
- III. Ordering Paragraphs

I. Introduction

On December 18, 2015, the Postal Service filed notice that it has entered into an additional Global Expedited Package Services 3 (GEPS 3) negotiated service agreement (Agreement).¹

To support its Notice, the Postal Service filed a copy of the Agreement, a copy of the Governors' Decision authorizing the product, a certification of compliance with 39 U.S.C. 3633(a), and an application for non-public treatment of certain materials. It also filed supporting financial workpapers.

II. Notice of Commission Action

The Commission establishes Docket No. CP2016–58 for consideration of matters raised by the Notice.

The Commission invites comments on whether the Postal Service's filing is consistent with 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than December 29, 2015. The public portions of the filing can be accessed via the Commission's Web site (<http://www.prc.gov>).

The Commission appoints Curtis E. Kidd to serve as Public Representative in this docket.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2016–58 for consideration of the matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, Curtis E. Kidd is appointed to serve as an officer of the Commission to represent the interests of the general public in this proceeding (Public Representative).

3. Comments are due no later than December 29, 2015.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,

Secretary.

[FR Doc. 2015–32529 Filed 12–24–15; 8:45 am]

BILLING CODE 7710–FW–P

¹ Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, December 18, 2015 (Notice).

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List. **DATES:** *Effective date:* December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 18, 2015, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 9 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2016–44, CP2016–59.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2015–32489 Filed 12–24–15; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

International Product Change—Global Expedited Package Services—Non-Published Rates

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add Global Expedited Package Services—Non-Published Rates 9 (GEPS—NPR 9) to the Competitive Products List.

DATES: *Effective date:* December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Christopher C. Meyerson, 202–268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642, on December 18, 2015, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to add Global Expedited Package Services—Non-Published Rates 9 (GEPS—NPR 9) to the Competitive Products List, and Notice of Filing*

GEPS—NPR 9 Model Contract and Application for Non-Public Treatment of Materials Filed Under Seal.

Documents are available at www.prc.gov, Docket Nos. MC2016–46 and CP2016–61.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2015–32498 Filed 12–24–15; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List. **DATES:** *Effective date:* December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 18, 2015, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 25 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2016–45, CP2016–60.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2015–32497 Filed 12–24–15; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 28, 2015.

FOR FURTHER INFORMATION CONTACT: Maria W. Votsch, 202–268–6525.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 22, 2015, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 40 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2016–51, CP2016–66.

Stanley F. Mires,
Attorney, Federal Compliance.
 [FR Doc. 2015–32499 Filed 12–24–15; 8:45 am]
BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76710; File No. SR–BOX–2015–39]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule To Update Certain Fees Assessed Under Section V (Connectivity Fees)

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 15, 2015, BOX Options 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,³ and Rule 19b–4(f)(2) thereunder,⁴ 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 update certain fees assessed under Section V (Connectivity Fees) on the BOX Market LLC (“BOX”) options facility. Changes to the fee schedule pursuant to this proposal will be effective upon filing. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission’s Public Reference Room and also on the Exchange’s Internet Web site at <http://boxexchange.com>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 Fee Schedule for trading on BOX to update the connectivity fees that are assessed on market participants.

Section V.A. of the BOX Fee Schedule “Connectivity Fees”, was created to detail the fees applicable to market participants who connect to the BOX market network at Point of Presence (“PoP”) sites.⁵ These sites are owned and operated by third-party external vendors, and the fees listed in this section are meant to encompass the fees that could be charged based on each market participant’s particular configuration. BOX does not assess Connectivity Fees; these fees are assessed by the datacenters and are billed directly to the market participant. Connectivity fees can include one-time set-up fees and monthly fees charged by the third-party vendor in exchange for the services provided to the market participant.

The Exchange proposes to update the fees applicable for the datacenters where market participants may connect to the BOX network: NY4, owned and operated by Equinix; and 65 Broadway, owned and operated by 365 Main; and the connectivity fees applicable, depending upon connection type. Market participants are currently assessed the following fees when connecting to the BOX network:

Connection type	NY4		65 Broadway	
	One-time set-up	Monthly	One-time set-up	Monthly
POTS	\$100	\$25	\$50	\$25
Ethernet	N/A	N/A	250	225
T1	500	100	N/A	N/A
Cat 5/6	500	245	250	225
COAX	500	245	250	200
Single & Multi Mode Fiber	500	350	325	500
Extended Cross Connect	850	1000	N/A	N/A

The Exchange proposes to add the Intra-Customer Cross Connect Connection Type for NY4 datacenter

and to update the applicable fees as follows:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b–4(f)(2).

⁵ See Securities Exchange Act Release No. 69909 (July 2, 2013) 78 FR 41174 (July 9, 2013) (SR–BOX–2013–35).

Connection type	NY4		65 Broadway	
	One-time set-up	Monthly	One-time set-up	Monthly
POTS	\$100	\$25	\$50	\$25
Ethernet	N/A	N/A	250	175
T1	500	100	250	175
Cat 5/6	500	245	250	175
COAX	500	245	250	200
Single & Multi Mode Fiber	500	350	500	250
Extended Cross Connect	1000	750	500	400
Intra-Customer Cross Connect	500	0	N/A	N/A

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,⁶ 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.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to state that connectivity fees are assessed on all market participants that establish connections to BOX through a third-party and that these fees will be billed directly to the market participant. The Exchange believes that the proposed amendments to Section V.A. of the Fee Schedule are reasonable as they simply reflect the fee changes made by the datacenters, changes which the Exchange has no control over.

Further, the Exchange believes that the proposed Connectivity Fees constitute an equitable allocation of fees, and are not unfairly discriminatory, as all similarly situated market participants are charged the same amount depending on the services they receive.

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 the proposed amendments to the Fee Schedule will not impose a burden on competition among various Exchange Participants. The proposed change is designed to provide greater specificity and clarity within the Fee Schedule and does not place any Participants at a disadvantage compared to other Participants. Further, the Exchange does not believe this rule

change will have an impact on intermarket competition.

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 Act⁷ and Rule 19b-4(f)(2) thereunder,⁸ 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. Please include File Number SR-BOX-2015-39 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-2015-39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BOX-2015-39, and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Brent J. Fields,
Secretary.

[FR Doc. 2015-32538 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

⁶ 15 U.S.C. 78f(b)(4) and (5).

⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

⁸ 17 CFR 240.19b-4(f)(2).

⁹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76714; File No. SR-EDGX-2015-64]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rule 11.6(n)(1), Routing/Posting Instructions, To Amend the Aggressive Instruction

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 16, 2015, EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the Aggressive instruction under Exchange Rule 11.6(n)(1) to route such orders where that order has been locked or crossed by other Trading Centers. The proposed rule change is based on recently filed proposed rule changes by BATS Exchange, Inc. ("BZX") and BATS Y-Exchange, Inc. ("BYX").⁵

The text of the proposed rule change is available at the Exchange's Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

In early 2014, the Exchange and its affiliate, EDGA Exchange, Inc. ("EDGA") received approval to effect a merger (the "Merger") of the Exchange's parent company, Direct Edge Holdings LLC, with BATS Global Markets, Inc., the parent of BZX and BYX (together with BZX, EDGA and EDGX, the "BGM Affiliated Exchanges").⁶ In the context of the Merger, the BGM Affiliated Exchanges are working to align their rules and functionality, retaining only intended differences between the BGM Affiliated Exchanges. Thus, the Exchange proposes to amend the Aggressive instruction under Exchange Rule 11.6(n)(1) in order to conform with recently filed proposed rule changes by BYX and BZX⁷ to provide a consistent rule set across each of the BGM Affiliated Exchanges.⁸

Users⁹ may submit Limit Orders¹⁰ to the Exchange that are processed pursuant to Exchange Rules 11.10(a) and 11.11, as set forth below. Rule 11.10(a) describes the process by which an incoming order would execute against the EDGX Book.¹¹ To the extent an order has not been executed in its entirety against the EDGX Book, Rule 11.11 then describes the process of routing marketable Limit Orders to one or more Trading Centers, including a description of how the Exchange treats any unfilled balance that returns to the Exchange following the first attempt to fill the order through the routing process. If not filled through routing, and based on the order instructions, the

unfilled balance of the order may be posted to the EDGX Book.

The Aggressive instruction subjects an order to the routing process after being posted to the EDGX Book only if the order is subsequently crossed by another Trading Center (rather than if the order is locked or crossed). Further, a routable Limit Order with a Non-Displayed¹² instruction posted to the EDGX Book that is crossed by another accessible Trading Center will be automatically routed to the crossing Trading Center. The Exchange proposes to modify the Aggressive instruction to also provide that, where the order is locked by another accessible Trading Center, it would be automatically routed to the locking Trading Center. The proposed amendment would also apply to orders with a Non-Displayed instruction and Aggressive instruction.¹³

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act¹⁴ and furthers the objectives of Section 6(b)(5) of the Act¹⁵ because it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and, in general, to protect investors and the public interest. Specifically, the proposed changes are designed to provide Users with additional control over their orders in the context of a national market system where quotations may lock or cross orders posted to the EDGX Book and to facilitate executions on the Exchange consistent with User instructions. Thus, the proposals are directly targeted at removing impediments to and perfecting the mechanism of a free and

¹² See Exchange Rule 11.6(e)(2).

¹³ The Exchange also provides the Super Aggressive instruction which directs the System to route the order if an away Trading Center locks or crosses the limit price of the order resting on the EDGX Book. See Exchange Rule 11.6(n)(2). When any order with a Super Aggressive instruction is locked by an incoming order with a Post Only instruction that does not remove liquidity pursuant to Rule 11.6(n)(4) below, the order with a Super Aggressive instruction is converted to an executable order and will remove liquidity against such incoming order ("liquidity swap functionality"). *Id.* Once amended, the only difference between the Aggressive and Super Aggressive instructions would be that the liquidity swap functionality described above would be available to an order subject to the Super Aggressive instruction and not available to an order subject to the Aggressive instruction.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

⁵ See Securities Exchange Act Release Nos. 76623 (December 11, 2015) (SR-BATS-2015-112), and 76625 (December 11, 2015) (SR-BYX-2015-49) (amending the Aggressive Re-Route instruction under BYX and BZX Rules 11.13(b)(4)(A) to route such orders where that order has been locked or crossed by other Trading Centers).

⁶ See Securities Exchange Act Release No. 71449 (January 30, 2014), 79 FR 6961 (February 5, 2014) (SR-EDGX-2013-43; SR-EDGA-2013-34).

⁷ See *supra* note 5.

⁸ The Exchange notes that EDGA intends to file an identical proposal with the Commission.

⁹ The term "User" means "any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3." See Exchange Rule 1.5(ee).

¹⁰ See Exchange Rule 11.8(b).

¹¹ See Exchange Rule 1.5(d).

open market and national market system. The proposed rule change also is designed to support the principles of Section 11A(a)(1)¹⁶ of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. Lastly, the Exchange notes that the proposed amendments to the Aggressive instruction previously existed on BZX and BYX as the RECYCLE routing option.¹⁷

Consistent with Section 6(b)(5) of the Act,¹⁸ the proposed rule change, combined with the planned filing for EDGA, would allow the BGM Affiliated Exchanges to provide a consistent set of rules as it relates to the routing of orders that are locked or crossed by a Trading Center. Consistent rules, in turn, will simplify the regulatory requirements for Members of the Exchange that are also participants on EDGA, BYZ and/or BZX. The proposed rule change would provide greater harmonization between rules of similar purpose on the BGM Affiliated Exchanges, resulting in greater uniformity and less burdensome and more efficient regulatory compliance and understanding of Exchange Rules. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that proposed amendment to the Aggressive functionality encourages competition by increasing the likelihood of executions of orders that have been posted to the Exchange. The increased likelihood of

an execution where the order is locked by a quotation on a Trading Center should attract additional order flow to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 Act¹⁹ and Rule 19b-4(f)(6) thereunder.²⁰

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act²¹ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)²² permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that waiver of the operative delay will allow the Exchange to immediately provide Users with additional control over their orders in the context of a national market system where quotations may lock or cross orders posted to the EDGX Book and to facilitate executions on the Exchange consistent with User instructions.²³ The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and

designates the proposal operative upon filing.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-EDGX-2015-64 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-EDGX-2015-64. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official

¹⁶ 15 U.S.C. 78k-1(a)(1).

¹⁷ See Securities Exchange Act Release Nos. 59967 (May 21, 2009), 74 FR 25793 (May 29, 2009) (SR-BATS-2009-015) (proposing to allow the designation of an order as eligible for re-routing after being posted to the BATS Book if another Trading Center has locked or crossed the posted order); 62404 (June 30, 2010), 75 FR 39303 (July 8, 2010) (SR-BATS-2010-017) (naming the designation of an order as eligible for re-routing after being posted to the BATS Book if another Trading Center has locked or crossed the posted order as the RECYCLE routing option); and 63097 (October 13, 2010), 75 FR 64767 (October 20, 2010) (SR-BATS-2010-002)[sic] (naming the designation of an order as eligible for re-routing after being posted to the BATS Book if another Trading Center has locked or crossed the posted order as the RECYCLE routing option).

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

²¹ 17 CFR 240.19b-4(f)(6).

²² 17 CFR 240.19b-4(f)(6)(iii).

²³ The Exchange further stated that it will provide Members with reasonable advance notice of the proposed rule change's implementation date.

²⁴ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EDGX-2015-64, and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Brent J. Fields,

Secretary.

[FR Doc. 2015-32523 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76709; File No. SR-BATS-2015-115]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 17, 2015, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the Market Data section of its fee schedule to: (i) Adopt definitions for the terms “Non-Display Usage” and “Trading Platforms”; and (ii) amend the fees for TCP Depth and Multicast Depth data products,⁵ also known as BZX Depth, to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

The text of the proposed rule change is available at the Exchange’s Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Market Data section of its fee schedule to: (i) adopt definitions for the terms “Non-Display Usage” and “Trading Platforms”; and (ii) amend the fees for BZX Depth to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

Definitions

The Exchange proposes to adopt definitions for the terms “Non-Display Usage” and “Trading Platforms”. The proposed definitions are designed to provide greater transparency with regard to how the Exchange assesses fees for market data. Non-Display Usage would be defined as “any method of accessing a Market Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.”⁶ The term Trading Platform

would be defined as “any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).”⁷

BZX Depth Fees

BZX Depth is an uncompressed market data feed that provides depth-of-book quotations and execution information based on equity orders entered into the System.⁸

Internal Distributor Fee. Currently, the Exchange charges fees for both internal and external distribution of BZX Depth. The cost of BZX Depth for an Internal Distributor⁹ is currently \$1,000 per month. The Exchange also separately charges an External Distributor¹⁰ of BZX Depth a flat fee of \$5,000 per month. The Exchange does not charge Internal and External Distributors separate display User¹¹ fees. The Exchange now proposes to increase the fee for Internal Distributors from \$1,000 per month to \$1,500 per month. The Exchange does not propose to amend its fees for External Distributors.

Non-Display Usage Fee. The Exchange also proposes to adopt a new fee for Non-Display Usage by Trading Platforms, which is similar to fees currently being charged by Nasdaq and the New York Stock Exchange, Inc. (“NYSE”).¹² As proposed, subscribers to

(“Nasdaq”) Rule 7023(a)(2)(B), which defines Non-Display Usage as “any method of accessing Depth-of-Book data that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.

⁷ The proposed definition of Trading Platform is identical to the definition of Trading Platform under Nasdaq Rule 7023(a)(7).

⁸ See Exchange Rule 11.22(a) and (c).

⁹ An “Internal Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor’s own entity.” See the Exchange Fee Schedule available at http://batstrading.com/support/fee_schedule/bzx/. A “Distributor” is defined as “any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.” *Id.*

¹⁰ An “External Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.” *Id.*

¹¹ A “User” is defined as “a natural person, a proprietorship, corporation, partnership, or entity, or device (computer or other automated service), that is entitled to receive Exchange data.” *Id.*

¹² See Nasdaq Rule 7023(d) (setting forth a Trading Platform Fee of \$5,000 per trading platform up to a maximum of three trading platforms for depth-of-book data). See also NYSE Market Data

Continued

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ See Exchange Rule 11.22(a) and (c).

⁶ The proposed definition of Non-Display Usage is substantially similar to Nasdaq Stock Market LLC

BZX Depth would pay a fee of \$5,000 per month for Non-Display Usage of BZX Depth by its Trading Platforms. Trading Platforms, as defined above, include registered National Securities Exchanges, Alternative Trading Systems (“ATSS”), and Electronic Communications Networks (“ECNs”) as those terms are defined in the Exchange Act and regulations and rules thereunder. The fee would be assessed in addition to existing Distributor fees. The fee of \$5,000 per month would represent the maximum charge per subscriber regardless of the number of Trading Platforms the subscriber operates and receive the data for Non-Display Usage. For example, if a subscriber operates three Trading Platforms that receives BZX Depth for Non-Displayed Usage, that subscriber would continue to pay a total fee of \$5,000 per month, rather than paying \$15,000 per month for its three Trading Platforms (\$5,000 for each Trading Platform).

Implementation Date

The Exchange proposes to implement the proposed changes to its fee schedule on January 4, 2016.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹³ in general, and furthers the objectives of Section 6(b)(4),¹⁴ 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 believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all recipients of Exchange data. The Exchange believes the proposed fees are competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients. Lastly, the Exchange also believes that the proposed fees are reasonable and non-discriminatory because they will apply uniformly to all recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act¹⁵ in that it 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. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,¹⁶ 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 self-regulatory organizations 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.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange’s subscribers will be subject to the proposed fees on an equivalent basis. BZX Depth is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation to make this data available. Accordingly, Distributors and Users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Moreover, the Exchange is not required to make any proprietary data products available or to offer any specific pricing alternatives to any customers.

In addition, the fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange’s Statement on Burden on Competition, the existence of alternatives to BZX Depth further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. If another exchange (or its affiliate) were to charge less to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute BZX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, BZX Depth.

The Exchange notes that the Commission is not required to undertake a cost-of-service or rate-making approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.¹⁷

The proposed amendment to the Internal Distributor fee for BZX Depth is also equitable and reasonable as, despite the increase, the fee proposed continues to be less than similar fees currently charged by Nasdaq and NYSE for their depth-of-book data products.¹⁸ In addition, the proposed Non-Display Usage fee by Trading Platforms for BZX Depth is equitable and reasonable as the fees proposed are equal to, and in some cases less than, similar fees currently charged by Nasdaq for its depth-of-book data. Like as proposed by the Exchange, Nasdaq charges subscribers to its depth-of-book data utilized by trading platforms on a non-displayed basis \$5,000 per month.¹⁹ However, unlike the Exchange, a subscriber utilizing Nasdaq depth-of-book data on more than one Trading Platform would pay

¹⁷ The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress’s direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE’s comments to the Commission’s 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission’s Web site at <http://www.sec.gov/rules/concept/s72899/buck1.htm>. See also Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (SR-NYSE-2014-64) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish an Access Fee for the NYSE Best Quote and Trades Data Feed, Operative December 1, 2014).

¹⁸ See Nasdaq Rule 7023(c) (providing for fees of \$25,000 to \$500,000 to internal distributors of Nasdaq Depth-of-Book products). See also NYSE Market Data Fees, November 2015 (providing a \$5,000 per month access fee for NYSE OpenBook).

¹⁹ See Nasdaq Rule 7023(d). See also NYSE Market Data Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78k-1.

¹⁶ See 17 CFR 242.603.

\$5,000 per month for each up to a maximum fee of \$15,000. The Exchange proposes to charge the same rate regardless of the number of Trading Platforms receiving the data for Non-Display Usage operated by that subscriber.

The Trading Platform fee is also equitable and reasonable in that it ensures that heavy users of the BZX Depth pay an equitable share of the total fees. Currently, External Distributors pay higher fees than Internal Distributors based upon their assumed higher usage levels. The Exchange believes that Trading Platforms are generally high users of the data, using it to power a matching engine for millions or even billions of trading messages per day.

Lastly, the Exchange believes that the proposed definitions are reasonable because they are designed to provide greater transparency to Members with regard to how the Exchange would assess the proposed fee for Non-Display Usage of BZX Depth by Trading Platforms. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing the manner in which it assess fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and eliminate potential investor confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest. Lastly, the proposed definitions are based on existing rules of Nasdaq.²⁰

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's ability to price BZX Depth is constrained by: (i) competition among exchanges, other trading platforms, and Trade Reporting Facilities ("TRF") that compete with each other in a variety of dimensions; (ii) the existence of inexpensive real-time consolidated data and market-specific data and free delayed data; and (iii) the inherent contestability of the market for proprietary data.

The Exchange and its market data products are subject to significant competitive forces and the proposed fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It

competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.

In addition, BZX Depth competes with a number of alternative products. For instance, BZX Depth does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce depth-of-book information products, and many currently do, including Nasdaq and NYSE.

In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on Exchange data products and the Exchange's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting the proposed data product fees. The proposed data product fees are, in part, responses to that pressure. The Exchange believes that the proposed fees would reflect an equitable allocation of its overall costs to users of its facilities.

In addition, when establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all Users. The existence of alternatives to BZX Depth, including existing similar feeds by other exchanges, consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

The Exchange believes the proposed increase to the Internal Distributor fee and adoption of the fee for Non-Display Usage by Trading Platforms for BZX Depth would increase competition amongst the exchanges that offer depth-of-book products. The Exchange notes

that, despite the proposed increase, the Internal Distribution fee for BZX Depth continues to be less than similar fees currently charged by Nasdaq and NYSE for its depth-of-book data.²¹ In addition, the proposed Non-Display Usage fee by Trading Platforms is equal to, and in some cases less than, similar fees currently charged by Nasdaq for its Depth-of-Book data.²²

Lastly, the proposed definitions will not result in any burden on competition. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing the manner in which it assess fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and are not designed to have a competitive impact.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²³ and paragraph (f) of Rule 19b-4 thereunder.²⁴ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-BATS-2015-115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

²¹ See *supra* note 18.

²² See *supra* note 19.

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 17 CFR 240.19b-4(f).

²⁰ Nasdaq Rules 7023(a)(2)(B) and (a)(7).

Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-BATS-2015-115. 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 Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BATS-2015-115, and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Brent J. Fields,
Secretary.

[FR Doc. 2015-32537 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76716; File No. SR-MIAX-2015-72]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

December 21, 2015.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4

thereunder,² notice is hereby given that on December 11, 2015, Miami International Securities Exchange LLC ("MIAX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the "Fee Schedule").

The text of the proposed rule change is available on the Exchange's Web site at http://www.miaxoptions.com/filter/wotitle/rule_filing, at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to: (i) Reduce the transaction fee for options overlying EEM, GLD, IWM, QQQ, and SPY executed by non-MIAX Market Makers; and (ii) modify the transaction fee for options overlying EEM, GLD, IWM, QQQ and SPY assessed to non-MIAX Market Makers that achieve certain Priority Customer Rebate Program³ volume tiers.⁴

The Exchange proposes to decrease the per contract transaction fee for non-MIAX Market Makers for options overlying EEM, GLD, IWM, QQQ, and

SPY from \$0.55 to \$0.50. The Exchange notes that the transaction fees for non-MIAX Market Makers in all other options classes will not change and thus will continue to be charged the same amount for non-Penny Pilot options classes and Penny Pilot options classes as they do today.

The Exchange proposes to continue to offer non-MIAX Market Makers the opportunity to reduce transaction fees by \$0.02 per contract in standard options in EEM, GLD, IWM, QQQ, and SPY. Specifically, any Member or its affiliates of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, that qualifies for Priority Customer Rebate Program volume tiers 3 or 4 and is a non-MIAX Market Maker will be assessed a reduced transaction fee of \$0.48 per contract for standard options in EEM, GLD, IWM, QQQ, and SPY. The Exchange believes that these incentives will encourage non-MIAX Market Makers to transact a greater number of orders on the Exchange.

The Exchange believes that the proposed fee reduction for non-MIAX Market Makers in EEM, GLD, IWM, QQQ, and SPY will benefit these market participants and encourage them to send greater order flow to the Exchange.

The proposed changes to the Fee Schedule will be operative as of January 1, 2016.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act⁵ in general, and furthers the objectives of Section 6(b)(4) of the Act⁶ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and issuers and other persons using its facilities.

The Exchange's proposed decrease in transaction fees for non-MIAX Market Makers in EEM, GLD, IWM, QQQ and SPY is reasonable because the lower fees should encourage these market participants to send additional order flow to the Exchange and the additional order flow should benefit all market participants. The instant proposal is equitable and not unfairly discriminatory because the fee applies equally to all non-MIAX Market Makers. The Exchange's continued higher transaction fee for non-MIAX Market Makers compared to that for MIAX Market Makers is equitable and not unfairly discriminatory because MIAX Market Makers have enhanced quoting obligations measured in both quantity

² 17 CFR 240.19b-4.

³ See Fee Schedule, Section (1)(a)(ii).

⁴ See Securities Act Release No. 73850 (December 16, 2014), 79 FR 76424 (December 22, 2014) (SR-MIAX-2014-63).

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4).

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

(as a percentage of time) and quality (minimum bid-ask differentials) that other market participants do not have.⁷ In addition, charging non-members higher transaction fees is a common practice amongst exchanges because Members are subject to other fees and dues associated with their membership to the Exchange that do not apply to non-members. The proposed differentiation between non-MIAX Market Makers and MIAX Market Makers recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants. Maintaining a lower transaction fee for MIAX Market Makers should encourage market participants and market makers on other exchanges to register as Market Makers on the Exchange, which will enhance the quality of quoting and should increase the volume of contracts traded in options listed on MIAX. Enhanced market quality and increased transaction volume that results from the increase in Market Maker activity on the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange's proposal to continue to offer non-MIAX Market Makers the opportunity to reduce transaction fees by \$0.02 per contract in standard options in EEM, GLD, IWM, QQQ, and SPY, provided certain criteria are met, is reasonable because the Exchange desires to offer all such market participants an opportunity to lower their transaction fees. This proposal is equitable and not unfairly discriminatory because the Exchange will offer this opportunity to all non-MIAX Market Makers in EEM, GLD, IWM, QQQ, and SPY.

The Exchange believes that establishing different pricing for EEM, GLD, IWM, and SPY options is reasonable, equitable, and not unfairly discriminatory because EEM, GLD, IWM, QQQ, and SPY options are more liquid options as compared to others and the Exchange wants to encourage market participants to become members and register as MIAX Market Makers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposal is consistent with robust competition by increasing the intermarket competition for order flow from market participants.

The Exchange believes that charging non-members higher transaction fees is appropriate and is a common practice amongst exchanges, because Members are subject to other fees and dues associated with their Exchange that do not apply to non-members. The proposed differentiation as between non-MIAX Market Makers and MIAX Market Makers recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants. Maintaining a lower transaction fee for MIAX Market Makers should encourage market participants and market makers on other exchanges to register as MIAX Market Makers, which will enhance the quality of quoting and increase the volume of contracts traded in options listed on MIAX. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow submitted to the Exchange will benefit all market participants and improve competition on the Exchange. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposal reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,⁸ and Rule 19b-4(f)(2)⁹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-MIAX-2015-72 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR-MIAX-2015-72. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2015-72 and should be submitted on or before January 19, 2016.

⁷ See MIAX Rules 603, 604, 605.

⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

⁹ 17 CFR 240.19b-4(f)(2).

¹⁰ 17 CFR 200.30-3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Brent J. Fields,

Secretary.

[FR Doc. 2015-32525 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76708; File No. SR-EDGX-2015-63]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for EDGX Options

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 10, 2015, EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members⁵ and non-members of the Exchange pursuant to EDGX Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the "Options Pricing" section of its fee schedule effective immediately, to modify pricing for orders routed away from the Exchange and executed at various away options exchanges. The Exchange currently charges the following rates for orders routed to certain other options exchanges: (i) Non-Customer⁶ orders in non-Penny Pilot Securities,⁷ routed to NYSE Arca, Inc. ("Arca"), which yield fee code AG, are charged \$0.95 per contract; (ii) Intermarket Sweep Orders ("ISOs") in non-Penny Pilot Securities that are directed to Nasdaq Options Market LLC ("NOM"), Arca, or ISE Gemini, LLC ("ISE Gemini") are charged \$0.95 per contract; (iii) ISOs directed to other options exchanges are charged \$0.65 per contract;⁸ (iv) Customer orders routed to the International Securities Exchange, LLC ("ISE") in non-Penny Pilot Securities which yield fee code ID and are charged \$0.12 per contract; (v) Customer orders routed to the Miami International Securities Exchange LLC ("MIAX") which yield fee code MC are charged \$0.12 per contract; (vi) Non-Customer orders routed to MIAX which yield fee code MF are charged \$0.65 per contract; (vii) Customer orders routed to the BOX Options Exchange LLC

("BOX") which yield fee code OC are charged no fee; (viii) Non-Customer orders routed to BOX which yield fee code OF are charged \$0.99 per contract; (ix) Non-Customer orders routed to NOM in Penny Pilot Securities which yield fee code QF are charged \$0.65 per contract; (x) Non-Customer orders routed to NOM in non-Penny Pilot Securities which yield fee code QG are charged \$0.95 per contract; and (xi) Customer orders routed to NYSE MKT LLC ("NYSE MKT" f/k/a AMEX) which yield fee code XC are charged \$0.12 per contract.

In an effort to continue to offer routing services to its Members at prices that approximate the cost to the Exchange, the Exchange is proposing to amend those rates as follows: (i) the fee for Customer orders routed to ISE in non-Penny Pilot Securities and any Customer orders routed to MIAX, BOX or NYSE MKT (fee codes ID, MC, OC and XC, respectively) would be increased to \$0.15 per contract; (ii) the fee for Non-Customer Orders in non-Penny Pilot Securities routed to Arca would be increased to \$1.15 per contract (fee code AG); (iii) the fee for ISOs directed to NOM, Arca, or ISE Gemini would be increased to \$1.25 per contract for Non-Penny Pilot Securities (fee code D1); (iv) the fee for ISOs directed to other options exchanges would be increased to \$0.75 per contract (fee code D4);⁹ (v) the fee for Non-Customer orders routed to MIAX would be increased to \$0.85 per contract (fee code MF); (vi) the fee for Non-Customer orders routed to BOX would be increased to \$1.20 (fee code OF); (vii) the fee for Non-Customer orders routed to NOM in Penny Pilot Securities would be increased to \$0.70 (fee code QF); and (viii) the fee for Non-Customer orders routed to NOM in non-Penny Pilot Securities would be increased to \$1.25 (fee code QG).

As noted previously and as set forth above, the Exchange's current approach to routing fees is to set forth in a simple manner certain sub-categories of fees that approximate the cost of routing to other options exchanges based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (*i.e.*, clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, "Routing Costs"). The Exchange then monitors the fees charged as compared to the costs of its routing services and adjusts its routing

⁶ "Non-Customer" applies to any transaction that is not a Customer Order. "Customer" applies to any transaction identified by a Member for clearing in the Customer range at the OCC, excluding any transaction for a Broker Dealer or a "Professional" as defined in Exchange Rule 16.1.

⁷ "Penny Pilot Securities" are those issues quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01.

⁸ ISOs directed to Nasdaq OMX BX LLC ("Nasdaq BX") in non-Penny Pilot Securities which yield fee code D2 and ISOs directed to the C2 Options Exchange, Inc. ("C2") and Nasdaq OMX PHLX LLC ("Nasdaq PHLX") which yield fee code D3 are charged \$0.95 per contract.

⁹ The Exchange does not propose to amend the fees charged for ISOs directed to Nasdaq BX in non-Penny Pilot Securities which yield fee code D2 and ISOs directed to the C2 and Nasdaq PHLX which yield fee code D3.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." See Exchange Rule 1.5(n).

fees and/or sub-categories to ensure that the Exchange's fees do indeed result in a rough approximation of overall Routing Costs, and are not significantly higher or lower in any area. In performing this analysis, the Exchange has concluded that certain orders that it was routing to other options exchanges were costing more than it was charging, and in one case, were costing significantly less than it was charging. As a result, and in order to avoid subsidizing routing to away options exchanges and to continue providing quality routing services, the Exchange proposes relatively modest increases and adjustments to the charges assessed for the orders described above.

Implementation Date

The Exchange proposes to implement these amendments to its fee schedule immediately.¹⁰

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.¹¹ Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,¹² in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues or providers of routing services if they deem fee levels to be excessive.

As explained above, the Exchange generally attempts to approximate the cost of routing to other options exchanges, including other applicable costs to the Exchange for routing. The Exchange believes that a pricing model based on approximate Routing Costs is a reasonable, fair and equitable approach to pricing. Specifically, the Exchange believes that its proposal to modify fees is fair, equitable and reasonable because the fees are generally an approximation of the cost to the Exchange for routing orders to such exchanges. Absent the proposed changes, the Exchange has concluded that certain orders that it was routing to

other options exchanges would cost more than its current fees. Accordingly, the Exchange believes that the proposed increases are fair, equitable and reasonable because they will help the Exchange to avoid subsidizing routing to away options exchanges and to continue providing quality routing services. The Exchange believes that its fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it provides certainty with respect to execution fees at away options exchanges. Under its straightforward fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or slight loss for orders routed to and executed at away options exchanges. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to such exchanges. The Exchange notes that routing through the Exchange is voluntary. The Exchange also believes that the proposed fee structure for orders routed to and executed at these away options exchanges is fair and equitable and not unreasonably discriminatory in that it applies equally to all Members.

The Exchange reiterates that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive or providers of routing services if they deem fee levels to be excessive. Finally, the Exchange notes that it constantly evaluates its routing fees, including profit and loss attributable to routing, as applicable, in connection with the operation of a flat fee routing service, and would consider future adjustments to the proposed pricing structure to the extent it was recouping a significant profit or loss from routing to away options exchanges.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As it relates to the proposed changes to routing fees, the proposed changes will assist the Exchange in recouping costs for routing orders to other options exchanges on behalf of its participants in a manner that is a better approximation of actual costs than is currently in place and that reflects pricing changes by various options exchanges as well as increases to other Routing Costs incurred by the Exchange. The Exchange also notes that Members may choose to mark their

orders as ineligible for routing to avoid incurring routing fees.¹³

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and paragraph (f) of Rule 19b-4 thereunder.¹⁵ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-EDGX-2015-63 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-EDGX-2015-63. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the

¹⁰ The Exchange initially filed the proposed fee change on December 1, 2015 (SR-EDGX-2015-57). On December 10, 2015, the Exchange withdrew that filing and submitted filing SR-BATS-2015-63 [sic].

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(4).

¹³ See Exchange Rule 21.1(d)(8) (describing "Post Only Orders") and Exchange Rule 21.9(a)(1) (describing the routing process, which requires orders to be designated as available for routing).

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f).

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EDGX-2015-63 and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Brent J. Fields,
Secretary.

[FR Doc. 2015-32536 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 31945; 812-14461]

Recon Capital Series Trust, et al.; Notice of Application

December 21, 2015.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c-1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(f) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

SUMMARY: *Summary of Application:* Applicants request an order that would permit (a) Series of certain open-end management investment companies to issue shares ("Shares") redeemable in

large aggregations only ("Creation Units"); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value ("NAV"); (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares; and (f) certain series to perform creations and redemptions of Creation Units in-kind in a master-feeder structure. The order would supersede a prior order.¹

Applicants: Recon Capital Series Trust (the "Trust"), Recon Capital Advisors, LLC (the "Current Adviser"), Recon Capital Partners, LLC, and Foreside Fund Services, LLC (the "Current Distributor").

DATES: *Filing Dates:* The application was filed on May 15, 2015, and amended on October 13, 2015.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 15, 2016, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090; Applicants: the Trust, the Current Adviser, and Recon Capital Advisors, LLC, 145 Mason Street, 2nd Floor, Greenwich, CT 08830; and the Current Distributor, Three Canal Plaza, Suite 100, Portland, ME 04101.

¹ Certain of the applicants previously received an order of exemption from the Commission with respect to the offering of indexed based funds. See Sage Quant Management LLC, et al., Investment Company Act Release Nos. 30439 (Mar. 28, 2013) (notice) and 30476 (Apr. 23, 2013) (order) (the "Existing Funds Order").

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at (202) 551-6879, or David P. Bartels, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Applicants' Representations

1. The Trust is a Delaware statutory trust that has registered under the Act as an open-end management investment company with multiple series. The Trust currently offers a number of exchange traded funds, each of which has a distinct investment objective, tracks a particular index and utilizes either a replication or representative sampling strategy (the "Current Funds"). Each Fund (as defined below) will operate as an exchange traded fund ("ETF").

2. The Current Adviser is the investment adviser to the Current Funds and an Adviser (as defined below) will be the investment adviser to the Funds. The Current Adviser is, and any other Adviser will be, registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). The Current Adviser is a wholly owned subsidiary of Recon Capital Partners, LLC, which is also registered as an investment adviser under the Advisers Act. The Adviser may enter into sub-advisory agreements with one or more investment advisers to act as sub-advisers (each, a "Sub-Adviser") to particular Funds, or their respective Master Fund (as defined below). Any Sub-Adviser will either be registered under the Advisers Act or will not be required to register thereunder.

3. The Current Distributor serves as the principal underwriter and distributor for the Current Funds. Applicants request that the order also apply to any future distributor of Shares ("Future Distributor" and, together with the Current Distributor, the "Distributor"), provided that any such Future Distributor complies with the terms and conditions of the application. The Distributor may be an affiliated person or an affiliated person of an affiliated person of that Fund's Adviser and/or Sub-Advisers.

4. Applicants request that the order apply to the Current Funds and any additional series of the Trust and any

¹⁶ 17 CFR 200.30-3(a)(12).

other existing or future open-end management investment company or existing or future series thereof ("Future Funds" and together with the Current Funds, "Funds"), that operate as ETFs, and their respective existing or future Master Funds, and will track a specified index comprised of domestic or foreign equity and/or fixed income securities (each, an "Underlying Index"). Any Fund will (a) be advised by the Current Adviser or an entity controlling, controlled by, or under common control with the Current Adviser (each, an "Adviser") and (b) comply with the terms and conditions of the application.²

5. Applicants state that a Fund may operate as a Feeder Fund in a master-feeder structure. Applicants request that the order permit a Feeder Fund to acquire shares of a Master Fund, which will be another registered investment company in the same group of investment companies having substantially the same investment objectives as the Feeder Fund, beyond the limitations in section 12(d)(1)(A) of the Act and permit the Master Fund, and any principal underwriter for the Master Fund, to sell shares of the Master Fund to the Feeder Fund beyond the limitations in section 12(d)(1)(B) of the Act ("Master-Feeder Relief"). Applicants may structure certain Feeder Funds to generate economies of scale and incur lower overhead costs.³ There would be no ability by Fund shareholders to exchange Shares of Feeder Funds for shares of another feeder series of the Master Fund.

6. Each Fund, or its respective Master Fund, will hold certain securities, assets or other positions ("Portfolio Holdings") selected to correspond generally to the performance of its Underlying Index. Certain Funds will be based on Underlying Indexes comprised solely of

equity and/or fixed income securities issued by one or more of the following categories of issuers: (i) domestic issuers and (ii) non-domestic issuers meeting the requirements for trading in U.S. markets. Other Funds will be based on Underlying Indexes that will be comprised solely of foreign and domestic, or solely foreign, equity and/or fixed income securities ("Foreign Funds").

7. Applicants represent that each Fund, or its respective Master Fund, will invest at least 80% of its assets (excluding securities lending collateral) in the component securities of its respective Underlying Index ("Component Securities"), or, in the case of Fixed Income Funds,⁴ in the Component Securities of its respective Underlying Index and TBA Transactions⁵ representing Component Securities and, in the case of Foreign Funds, Component Securities and Depositary Receipts⁶ representing Component Securities.⁷ Each Fund, or its respective Master Fund, may also invest up to 20% ("20% Asset Basket") of its assets in certain index futures, options, options on index futures, swap contracts or other derivatives, as related to its respective Underlying Index and its Component Securities, cash and cash equivalents, other investment companies, as well as in securities and other instruments not included in its Underlying Index but which the Adviser

⁴ "Fixed-Income Funds" track an Underlying Index comprised of domestic and/or foreign fixed income securities.

⁵ A "to-be-announced transaction" or "TBA Transaction" is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to settlement date.

⁶ Depositary receipts representing foreign securities ("Depositary Receipts") include American Depositary Receipts and Global Depositary Receipts. The Funds, or their respective Master Funds, may invest in Depositary Receipts representing foreign securities in which they seek to invest. Depositary Receipts are typically issued by a financial institution (a "depository bank") and evidence ownership interests in a security or a pool of securities that have been deposited with the depository bank. A Fund, or its respective Master Fund, will not invest in any Depositary Receipts that the Adviser or any Sub-Adviser deems to be illiquid or for which pricing information is not readily available. No affiliated person of a Fund, the Adviser or any Sub-Adviser will serve as the depository bank for any Depositary Receipts held by a Fund, or its respective Master Fund, except a depository bank that is deemed to be affiliated solely because a Fund owns greater than 5% of the outstanding voting securities of such depository bank.

⁷ With respect to a Fund, or its respective Master Fund, that invests in a Wholly-Owned Subsidiary (defined below), the Fund, or its respective Master Fund, will look through the Wholly-Owned Subsidiary to determine whether certain assets fall within the 20% Asset Basket (as defined below).

believes will help the Fund, or its respective Master Fund, track its Underlying Index. A Fund may also engage in short sales in accordance with its investment objective.

8. The Trust may issue Funds that seek to track Underlying Indexes constructed using 130/30 investment strategies ("130/30 Funds") or other long/short investment strategies ("Long/Short Funds"). Each Long/Short Fund will establish (i) exposures equal to approximately 100% of the long positions specified by the Long/Short Index⁸ and (ii) exposures equal to approximately 100% of the short positions specified by the Long/Short Index. Each 130/30 Fund will include strategies that: (i) establish long positions in securities so that total long exposure represents approximately 130% of a Fund's net assets; and (ii) simultaneously establish short positions in other securities so that total short exposure represents approximately 30% of such Fund's net assets. Each Business Day (as defined below), for each Long/Short Fund and 130/30 Fund, the Adviser will provide full portfolio transparency on the Fund's publicly available Web site ("Web site") by making available the Fund's, or its respective Master Fund's, Portfolio Holdings before the commencement of trading of Shares on the Listing Exchange (defined below).⁹ The information provided on the Web site will be formatted to be reader-friendly.

9. A Fund will utilize either a replication or representative sampling strategy to track its Underlying Index. A Fund using a replication strategy will invest in the Component Securities of its Underlying Index in the same approximate proportions as in such Underlying Index. A Fund using a representative sampling strategy will hold some, but not necessarily all of the Component Securities of its Underlying Index. Applicants state that a Fund using a representative sampling strategy will not be expected to track the performance of its Underlying Index with the same degree of accuracy as would an investment vehicle that invested in every Component Security of the Underlying Index with the same

⁸ Underlying Indexes that include both long and short positions in securities are referred to as "Long/Short Indexes."

⁹ Under accounting procedures followed by each Fund, trades made on the prior Business Day ("T") will be booked and reflected in NAV on the current Business Day (T+1). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day. This disclosure will look through any Wholly-Owned Subsidiary (defined below) and identify the specific Portfolio Holdings held by that entity.

² All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the order. In addition, all of the applicants to the Existing Funds Order have been named as applicants, or (as more fully described in the application) acquired by an applicant, or (in the case of the Distributor) replaced by an applicant, and applicants (and their affiliates) will not continue to rely on the Existing Funds Order if the requested order is issued. A Fund of Funds (as defined below) may rely on the order only to invest in Funds and not in any other registered investment company.

³ Operating in a master-feeder structure could also impose costs on a Feeder Fund and reduce its tax efficiency. The Feeder Fund's Board will consider any such potential disadvantages against the benefits of economies of scale and other benefits of operating within a master-feeder structure. In a master-feeder structure, the Master Fund—rather than the Feeder Fund—would generally invest its portfolio in compliance with the requested order.

weighting as the Underlying Index. Applicants expect that each Fund, or its respective Master Fund, will have an annual tracking error relative to the performance of its Underlying Index of less than 5%.

10. The Current Funds are, and any Future Fund will be, entitled to use its Underlying Index pursuant to either a licensing agreement with the entity that compiles, creates, sponsors or maintains the Underlying Index (each, an "Index Provider") or a sub-licensing arrangement with the Adviser, which will have a licensing agreement with such Index Provider.¹⁰ A "Self-Indexing Fund" is a Fund for which an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of such person, of the Trust or a Fund, of the Adviser, of any Sub-Adviser to or promoter of a Fund, or of the Distributor (each, an "Affiliated Index Provider")¹¹ will serve as the Index Provider. In the case of Self-Indexing Funds, an Affiliated Index Provider will create a proprietary, rules-based methodology to create Underlying Indexes (each an "Affiliated Index").¹² Except with respect to the Self-Indexing Funds, no Index Provider is or will be an affiliated person, or an affiliated person of an affiliated person, of the Trust or a Fund, of the Adviser, of any Sub-Adviser to or promoter of a Fund, or of the Distributor.

11. Applicants recognize that Self-Indexing Funds could raise concerns regarding the ability of the Affiliated

¹⁰ The licenses for the Self-Indexing Funds will specifically state that the Affiliated Index Provider (as defined below), or in case of a sub-licensing agreement, the Adviser, must provide the use of the Affiliated Indexes (as defined below) and related intellectual property at no cost to the Trust and the Self-Indexing Funds.

¹¹ In the event that an Adviser serves as the Affiliated Index Provider for a Self-Indexing Fund, the terms "Affiliated Index Provider" or "Index Provider," with respect to that Self-Indexing Fund, will refer to the employees of the applicable Adviser that are responsible for creating, compiling and maintaining the relevant Underlying Index.

¹² The Affiliated Indexes may be made available to registered investment companies, as well as separately managed accounts of institutional investors, foreign investment companies, and privately offered funds that are not deemed to be "investment companies" in reliance on section 3(c)(1) or 3(c)(7) of the Act for which the Adviser acts as adviser or subadviser ("Affiliated Accounts") as well as other such registered investment companies, separately managed accounts, foreign investment companies, and privately offered funds for which it does not act either as adviser or subadviser ("Unaffiliated Accounts"). The Affiliated Accounts and the Unaffiliated Accounts, like the Funds, would seek to track the performance of one or more Underlying Index(es) by investing in the constituents of such Underlying Indexes or a representative sample of such constituents of the Underlying Index. Consistent with the relief requested from section 17(a), the Affiliated Accounts will not engage in Creation Unit transactions with a Fund.

Index Provider to manipulate the Underlying Index to the benefit or detriment of the Self-Indexing Fund. Applicants further recognize the potential for conflicts that may arise with respect to the personal trading activity of personnel of the Affiliated Index Provider who have knowledge of changes to an Underlying Index prior to the time that information is publicly disseminated.

12. Applicants propose that each day that the Trust, the NYSE and the national securities exchange (as defined in section 2(a)(26) of the Act) (an "Exchange") on which the Fund's Shares are primarily listed ("Listing Exchange") are open for business, including any day that a Fund is required to be open under section 22(e) of the Act (a "Business Day"), each Self-Indexing Fund will post on its Web site, before commencement of trading of Shares on the Listing Exchange, the identities and quantities of the Portfolio Holdings held by the Fund, or its respective Master Fund, that will form the basis for the Fund's calculation of its NAV at the end of the Business Day.¹³ Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will also provide an additional mechanism for addressing any such potential conflicts of interest.

13. In addition, applicants do not believe the potential for conflicts of interest raised by the Adviser's use of the Underlying Indexes in connection with the management of the Self-Indexing Funds and the Affiliated Accounts will be substantially different from the potential conflicts presented by an adviser managing two or more registered funds. Both the Act and the Advisers Act contain various protections to address conflicts of interest where an adviser is managing two or more registered funds and these protections will also help address these conflicts with respect to the Self-Indexing Funds.¹⁴

14. Each Adviser and any Sub-Adviser has adopted or will adopt, pursuant to Rule 206(4)-7 under the Advisers Act, written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. These include policies and procedures designed to minimize potential conflicts of interest among the Self-Indexing Funds and the Affiliated Accounts, such as cross trading policies, as well as those

¹³ This disclosure will look through any Wholly-Owned Subsidiary (defined below) and identify the specific Portfolio Holdings held by that entity.

¹⁴ See, e.g., Rule 17j-1 under the Act and Section 204A under the Advisers Act and Rules 204A-1 and 206(4)-7 under the Advisers Act.

designed to ensure the equitable allocation of portfolio transactions and brokerage commissions. In addition, the Current Adviser has adopted policies and procedures as required under section 204A of the Advisers Act, which are reasonably designed in light of the nature of its business to prevent the misuse, in violation of the Advisers Act or the Exchange Act or the rules thereunder, of material non-public information by the Current Adviser or an associated person ("Inside Information Policy"). Any other Adviser or Sub-Adviser will be required to adopt and maintain a similar Inside Information Policy. In accordance with the Code of Ethics¹⁵ and Inside Information Policy of each Adviser and Sub-Advisers, personnel of those entities with knowledge about the composition of the Portfolio Deposit¹⁶ will be prohibited from disclosing such information to any other person, except as authorized in the course of their employment, until such information is made public. In addition, an Index Provider will not provide any information relating to changes to an Underlying Index's methodology for the inclusion of component securities, the inclusion or exclusion of specific component securities, or methodology for the calculation or the return of component securities, in advance of a public announcement of such changes by the Index Provider. The Adviser will also include under Item 10.C of Part 2 of its Form ADV a discussion of its relationship to any Affiliated Index Provider and any material conflicts of interest resulting therefrom, regardless of whether the Affiliated Index Provider is a type of affiliate specified in Item 10.

15. To the extent the Self-Indexing Funds transact with an affiliated person of the Adviser or Sub-Adviser, such transactions will comply with the Act, the rules thereunder and the terms and conditions of the requested order. In this regard, each Self-Indexing Fund's board of directors or trustees ("Board") will periodically review the Self-Indexing Fund's use of an Affiliated Index Provider. Subject to the approval of the Self-Indexing Fund's Board, an Adviser, affiliated persons of the Adviser ("Adviser Affiliates") and affiliated persons of any Sub-Adviser

¹⁵ Each Adviser has also adopted or will adopt a code of ethics pursuant to Rule 17j-1 under the Act and Rule 204A-1 under the Advisers Act, which contains provisions reasonably necessary to prevent Access Persons (as defined in Rule 17j-1) from engaging in any conduct prohibited in Rule 17j-1 ("Code of Ethics").

¹⁶ The instruments and cash that the purchaser is required to deliver in exchange for the Creation Units it is purchasing is referred to as the "Portfolio Deposit."

(“Sub-Adviser Affiliates”) may be authorized to provide custody, fund accounting and administration and transfer agency services to the Self-Indexing Funds. Any services provided by the Adviser, Adviser Affiliates, Sub-Adviser and Sub-Adviser Affiliates will be performed in accordance with the provisions of the Act, the rules under the Act and any relevant guidelines from the staff of the Commission. Applications for prior orders granted to Self-Indexing Funds have received relief to operate such funds on the basis discussed above.¹⁷

16. The Shares of each Fund will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (“Deposit Instruments”), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (“Redemption Instruments”).¹⁸ On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, unless the Fund is Rebalancing (as defined below). In addition, the Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund’s portfolio (including cash positions)¹⁹ except: (a) in the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary

to eliminate fractional shares or lots that are not tradeable round lots;²⁰ (c) TBA Transactions, short positions, derivatives and other positions that cannot be transferred in kind²¹ will be excluded from the Deposit Instruments and the Redemption Instruments;²² (d) to the extent the Fund determines, on a given Business Day, to use a representative sampling of the Fund’s portfolio;²³ or (e) for temporary periods, to effect changes in the Fund’s portfolio as a result of the rebalancing of its Underlying Index (any such change, a “Rebalancing”). If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Deposit Instruments or Redemption Instruments exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the “Cash Amount”).

17. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount; (b) if, on a given Business Day, the Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant (as defined below), the Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash;²⁴ (d) if, on a given

Business Day, the Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) such instruments are not eligible for transfer through either the NSCC or DTC (defined below); or (ii) in the case of Foreign Funds holding non-U.S. investments, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if the Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Foreign Fund holding non-U.S. investments would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.²⁵

18. Creation Units will consist of specified large aggregations of Shares (e.g., 10,000 Shares), and it is expected that the initial trading price per individual Share will range from \$10 to \$100. All orders to purchase Creation Units must be placed with the Distributor by or through an “Authorized Participant” which is either (1) a “Participating Party,” *i.e.*, a broker-dealer (“Broker”) or other participant in the Continuous Net Settlement System of the NSCC, a clearing agency registered with the Commission, or (2) a participant in The Depository Trust Company (“DTC”) (“DTC Participant”), which, in either case, has signed a participant agreement with the Distributor. The Distributor will be responsible for transmitting the orders to the Funds and will furnish to those placing such orders confirmation that the orders have been accepted, but applicants state that the Distributor may reject any order which is not submitted in proper form.

19. Each Business Day, before the open of trading on the Listing Exchange, each Fund will cause to be published

consequences for the remaining Fund shareholders that would not occur with an in-kind redemption. As a result, tax consideration may warrant in-kind redemptions.

²⁵ A “custom order” is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

²⁰ A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

²¹ This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

²² Because these instruments will be excluded from the Deposit Instruments and the Redemption Instruments, their value will be reflected in the determination of the Cash Amount (as defined below).

²³ A Fund may only use sampling for this purpose if the sample: (i) is designed to generate performance that is highly correlated to the performance of the Fund’s portfolio; (ii) consists entirely of instruments that are already included in the Fund’s portfolio; and (iii) is the same for all Authorized Participants on a given Business Day.

²⁴ In determining whether a particular Fund will sell or redeem Creation Units entirely on a cash or in-kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the Fund and its investors. For instance, in bond transactions, the Adviser may be able to obtain better execution than Share purchasers because of the Adviser’s size, experience and potentially stronger relationships in the fixed income markets. Purchases of Creation Units either on an all cash basis or in-kind are expected to be neutral to the Funds from a tax perspective. In contrast, cash redemptions typically require selling portfolio holdings, which may result in adverse tax

¹⁷ See, e.g., Emerging Global Advisors, LLC, et al., Investment Company Act Release Nos. 30910 (Feb. 10, 2014) (notice) and 30975 (Mar. 7, 2014) (order); VTL Associates, LLC, et al., Investment Company Act Release Nos. 30763 (Oct. 24, 2013) (notice) and 30789 (Nov. 19, 2013) (order); Guggenheim Funds Investment Advisors, LLC, Investment Company Act Release Nos. 30560 (June 14, 2013) (notice) and 30598 (July 10, 2013) (order); and Sigma Investment Advisors, LLC, Investment Company Act Release Nos. 30559 (June 14, 2013) (notice) and 30597 (July 10, 2013) (order).

¹⁸ The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 (“Securities Act”). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Funds will comply with the conditions of rule 144A.

¹⁹ The portfolio used for this purpose will be the same portfolio used to calculate the Fund’s NAV for the Business Day.

through the NSCC the names and quantities of the instruments comprising the Deposit Instruments and the Redemption Instruments, as well as the estimated Cash Amount (if any), for that day. The list of Deposit Instruments and Redemption Instruments will apply until a new list is announced on the following Business Day, and there will be no intra-day changes to the list except to correct errors in the published list. Each Listing Exchange, or other major market data provider, will disseminate, every 15 seconds during regular Exchange trading hours, through the facilities of the Consolidated Tape Association, or other widely disseminated means, an amount for each Fund stated on a per individual Share basis representing the sum of (i) the estimated Cash Amount and (ii) the current value of the Deposit Instruments.

20. Transaction expenses, including operational processing and brokerage costs, will be incurred by a Fund when investors purchase or redeem Creation Units in-kind and such costs have the potential to dilute the interests of the Fund's existing shareholders. Each Fund will impose purchase or redemption transaction fees ("Transaction Fees") in connection with effecting such purchases or redemptions of Creation Units. With respect to Feeder Funds, the Transaction Fee would be paid indirectly to the Master Fund.²⁶ In all cases, such Transaction Fees will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities. Since the Transaction Fees are intended to defray the transaction expenses as well as to prevent possible shareholder dilution resulting from the purchase or redemption of Creation Units, the Transaction Fees will be borne only by such purchasers or redeemers.²⁷ The Distributor will be responsible for delivering the Fund's prospectus to those persons acquiring Shares in Creation Units and for

²⁶ Applicants are not requesting relief from section 18 of the Act. Accordingly, a Master Fund may require a Transaction Fee payment to cover expenses related to purchases or redemptions of the Master Fund's shares by a Feeder Fund only if it requires the same payment for equivalent purchases or redemptions by any other feeder fund. Thus, for example, a Master Fund may require payment of a Transaction Fee by a Feeder Fund for transactions for 20,000 or more shares so long as it requires payment of the same Transaction Fee by all feeder funds for transactions involving 20,000 or more shares.

²⁷ Where a Fund permits an in-kind purchaser to substitute cash-in-lieu of depositing one or more of the requisite Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Instruments.

maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the applicable Fund to implement the delivery of its Shares.

21. Shares of each Fund will be listed and traded individually on an Exchange. It is expected that one or more member firms of an Exchange will be designated to act as a market maker (each, a "Market Maker") and maintain a market for Shares trading on the Exchange. Prices of Shares trading on an Exchange will be based on the current bid/offer market. Transactions involving the sale of Shares on an Exchange will be subject to customary brokerage commissions and charges.

22. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs. Market Makers, acting in their roles to provide a fair and orderly secondary market for the Shares, may from time to time find it appropriate to purchase or redeem Creation Units. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.²⁸ The price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their NAV.

23. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from the Fund, or tender such Shares for redemption to the Fund, in Creation Units only. To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed through an Authorized Participant. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Units.

24. Neither the Trust nor any Fund will be advertised or marketed or otherwise held out as a traditional open-end investment company or a "mutual fund." Instead, each such Fund will be marketed as an "ETF." All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares traded on an Exchange, or refer to redeemability, will prominently disclose that Shares are not

²⁸ Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or the DTC Participants.

individually redeemable and will disclose that the owners of Shares may acquire those Shares from the Fund or tender such Shares for redemption to the Fund in Creation Units only. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c-1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an "open-end company" as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable,

applicants request an order that would permit the Funds to register as open-end management investment companies and issue Shares that are redeemable in Creation Units only.²⁹ Applicants state that investors may purchase Shares in Creation Units and redeem Creation Units from each Fund. Applicants further state that because Creation Units may always be purchased and redeemed at NAV, the price of Shares on the secondary market should not vary materially from NAV.

Section 22(d) of the Act and Rule 22c-1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through an underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c-1 under the Act. Applicants request an exemption under section 6(c) from these provisions.³⁰

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by

permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve a Fund as a party and will not result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their NAV.

Section 22(e)

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants state that settlement of redemptions for Foreign Funds will be contingent not only on the settlement cycle of the United States market, but also on current delivery cycles in local markets for underlying foreign Portfolio Holdings held by a Foreign Fund. Applicants state that the delivery cycles currently practicable for transferring Redemption Instruments to redeeming investors, coupled with local market holiday schedules, may require a delivery process of up to fifteen (15) calendar days. Accordingly, with respect to Foreign Funds only, applicants hereby request relief under section 6(c) from the requirement imposed by section 22(e) to allow Foreign Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption.³¹

8. Applicants believe that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants propose that allowing redemption payments for Creation Units of a Foreign Fund to be made within fifteen calendar days would not be inconsistent with the

spirit and intent of section 22(e).³² Applicants suggest that a redemption payment occurring within fifteen calendar days following a redemption request would adequately afford investor protection.

9. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect creations and redemptions of Creation Units in-kind.³³

Section 12(d)(1)

10. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from knowingly selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

11. Applicants request an exemption to permit registered management investment companies and unit investment trusts ("UITs") that are not advised or sponsored by the Adviser, and not part of the same "group of investment companies," as defined in section 12(d)(1)(G)(ii) of the Act as the Funds (such management investment companies are referred to as "Investing Management Companies," such UITs are referred to as "Investing Trusts," and Investing Management Companies and Investing Trusts are collectively referred to as "Funds of Funds"), to acquire Shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any Broker registered under the Exchange Act, to sell Shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act.

12. Each Investing Management Company will be advised by an

²⁹The Master Funds will not require relief from sections 2(a)(32) and 5(a)(1) because the Master Funds will issue individually redeemable securities.

³⁰The Master Funds will not require relief from Section 22(d) or Rule 22c-1 because shares of the Master Funds will not trade at negotiated prices in the secondary market.

³¹Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations applicants may otherwise have under rule 15c6-1 under the Exchange Act requiring that most securities transactions be settled within three business days of the trade date.

³²Other feeder funds invested in any Master Fund are not seeking, and will not rely on, the section 22(e) relief requested herein.

³³In addition, the requested exemption from section 22(e) would only apply to in-kind redemptions by the Feeder Funds and would not apply to in-kind redemptions by other feeder funds.

investment adviser within the meaning of section 2(a)(20)(A) of the Act (the "Fund of Funds Adviser") and may be sub-advised by investment advisers within the meaning of section 2(a)(20)(B) of the Act (each, a "Fund of Funds Sub-Adviser"). Any Fund of Funds Adviser will be registered under the Advisers Act. Any Fund of Funds Sub-Adviser will be registered under the Advisers Act or will not be required to register. Each Investing Trust will be sponsored by a sponsor ("Sponsor").

13. Applicants submit that the proposed conditions to the requested relief adequately address the concerns underlying the limits in sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees and overly complex fund structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

14. Applicants believe that neither a Fund of Funds nor a Fund of Funds Affiliate would be able to exert undue influence over a Fund.³⁴ To limit the control that a Fund of Funds may have over a Fund, applicants propose a condition prohibiting a Fund of Funds Adviser or Sponsor, any person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by a Fund of Funds Adviser or Sponsor, or any person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor ("Fund of Funds Advisory Group") from controlling (individually or in the aggregate) a Fund, or its respective Master Fund, within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Fund of Funds Sub-Adviser, any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Fund of Funds Sub-Adviser or any person

³⁴ A "Fund of Funds Affiliate" is a Fund of Funds Adviser, Fund of Funds Sub-Adviser, Sponsor, promoter, and principal underwriter of a Fund of Funds, and any person controlling, controlled by, or under common control with any of those entities. A "Fund Affiliate" is an investment adviser, promoter, or principal underwriter of a Fund, or its respective Master Fund, and any person controlling, controlled by or under common control with any of these entities.

controlling, controlled by or under common control with the Fund of Funds Sub-Adviser ("Fund of Funds Sub-Advisory Group").

15. Applicants propose other conditions to limit the potential for undue influence over the Funds, or their respective Master Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund, or its respective Master Fund, to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate ("Affiliated Underwriting"). An "Underwriting Affiliate" is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-Adviser, employee or Sponsor of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Fund of Funds Adviser or Fund of Funds Sub-Adviser, employee or Sponsor is an affiliated person (except that any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

16. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of any Investing Management Company, including a majority of the directors or trustees who are not "interested persons" within the meaning of section 2(a)(19) of the Act ("disinterested directors or trustees"), will find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Fund, or its respective Master Fund, in which the Investing Management Company may invest. In addition, under condition B.5., a Fund of Funds Adviser, or a Fund of Funds' trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund, or its respective Master Fund, under rule 12b-1 under the Act) received from a Fund by the Fund of Funds Adviser, trustee or Sponsor or an affiliated person of the Fund of Funds Adviser, trustee or Sponsor, other than any advisory fees paid to the Fund of Funds Adviser, trustee or Sponsor or its affiliated person by a Fund, in connection with the investment by the Fund of Funds in the Fund. Applicants state that any sales charges and/or

service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.³⁵

17. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Fund, nor its respective Master Fund, will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, other than a Wholly-Owned Subsidiary,³⁶ except to the extent permitted by exemptive relief from the Commission permitting the Fund, or its respective Master Fund, to purchase shares of other investment companies for short-term cash management purposes. To ensure a Fund of Funds is aware of the terms and conditions of the requested order, the Fund of Funds will enter into an agreement with the Fund ("FOF Participation Agreement"). The FOF Participation Agreement will include an acknowledgement from the Fund of Funds that it may rely on the order only to invest in the Funds and not in any other investment company.

18. Applicants also note that a Fund may choose to reject a direct purchase of Shares in Creation Units by a Fund of Funds. To the extent that a Fund of Funds purchases Shares in the secondary market, a Fund would still retain its ability to reject any initial investment by a Fund of Funds in excess of the limits of section 12(d)(1)(A) by declining to enter into a FOF Participation Agreement with the Fund of Funds.

19. Applicants also are seeking the Master-Feeder Relief to permit the Feeder Funds to perform creations and redemptions of Shares in-kind in a master-feeder structure. Applicants assert that this structure is substantially identical to traditional master-feeder structures permitted pursuant to the

³⁵ Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.

³⁶ A Fund, or its respective Master Fund, may invest in a wholly-owned subsidiary, organized under the laws of the Cayman Islands as an exempted company or under the laws of another non-U.S. jurisdiction (each, a "Wholly-Owned Subsidiary"), in order to pursue its investment objectives and/or ensure that the Fund remains qualified as a registered investment company for U.S. federal income tax purposes. Certain Wholly-Owned Subsidiaries may be investment companies or excluded from the definition of investment company by section 3(c)(1) or 3(c)(7) of the Act. For a Fund, or its respective Master Fund, that invests in a Wholly-Owned Subsidiary, the Adviser will serve as investment adviser to both the Fund, or its respective Master Fund, and the Wholly-Owned Subsidiary. A Feeder Fund will not invest in a Wholly-Owned Subsidiary.

exception provided in section 12(d)(1)(E) of the Act. Section 12(d)(1)(E) provides that the percentage limitations of section 12(d)(1)(A) and (B) shall not apply to a security issued by an investment company (in this case, the shares of the applicable Master Fund) if, among other things, that security is the only investment security held by the investing investment company (in this case, the Feeder Fund). Applicants believe the proposed master-feeder structure complies with section 12(d)(1)(E) because each Feeder Fund will hold only investment securities issued by its corresponding Master Fund; however, the Feeder Funds may receive securities other than securities of its corresponding Master Fund if a Feeder Fund accepts an in-kind creation. To the extent that a Feeder Fund may be deemed to be holding both shares of the Master Fund and other securities, applicants request relief from section 12(d)(1)(A) and (B). The Feeder Funds would operate in compliance with all other provisions of section 12(d)(1)(E).

Sections 17(a)(1) and (2) of the Act

20. Sections 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines “affiliated person” of another person to include (a) any person directly or indirectly owning, controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to vote by the other person, and (c) any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act defines “control” as the power to exercise a controlling influence over the management or policies of a company, and provides that a control relationship will be presumed where one person owns more than 25% of a company’s voting securities. The Funds may be deemed to be controlled by the Adviser or an entity controlling, controlled by or under common control with the Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by an Adviser or an entity controlling, controlled by or under common control with an Adviser (an “Affiliated Fund”). Any investor,

including Market Makers, owning 5% or holding in excess of 25% of the Trust or such Funds, may be deemed affiliated persons of the Trust or such Funds. In addition, an investor could own 5% or more, or in excess of 25% of the outstanding shares of one or more Affiliated Funds making that investor an affiliated person of an affiliated person of the Funds.

21. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act pursuant to sections 6(c) and 17(b) of the Act to permit persons that are affiliated persons of the Funds, or an affiliated person of such affiliated person of the Funds, solely by virtue of one or more of the following: (a) holding 5% or more, or in excess of 25%, of the outstanding Shares of one or more Funds; (b) an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds, to effectuate purchases and redemptions “in-kind.”

22. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making “in-kind” purchases or “in-kind” redemptions of Shares of a Fund in Creation Units. Both the deposit procedures for “in-kind” purchases of Creation Units and the redemption procedures for “in-kind” redemptions of Creation Units will be effected in exactly the same manner for all purchases and redemptions, regardless of size or number. There will be no discrimination between purchasers or redeemers. Deposit Instruments and Redemption Instruments for each Fund will be valued in the identical manner as those Portfolio Holdings currently held by such Fund, or its respective Master Fund, and the valuation of the Deposit Instruments and Redemption Instruments will be made in an identical manner regardless of the identity of the purchaser or redeemer. Applicants do not believe that “in-kind” purchases and redemptions will result in abusive self-dealing or overreaching, but rather assert that such procedures will be implemented consistently with each Fund’s objectives and with the general purposes of the Act. Applicants believe that “in-kind” purchases and redemptions will be made on terms reasonable to Applicants and any affiliated persons because they will be valued pursuant to verifiable objective standards. The method of valuing Portfolio Holdings held by a Fund is identical to that used for calculating “in-kind” purchase or redemption values and therefore creates no opportunity for affiliated persons or affiliated persons of affiliated persons of

applicants to effect a transaction detrimental to the other holders of Shares of that Fund. Similarly, applicants submit that, by using the same standards for valuing Portfolio Holdings held by a Fund as are used for calculating “in-kind” redemptions or purchases, the Fund will ensure that its NAV will not be adversely affected by such securities transactions. Applicants also note that the ability to take deposits and make redemptions “in-kind” will help each Fund to track closely its Underlying Index and therefore aid in achieving the Fund’s objectives.

23. Applicants also seek relief under sections 6(c) and 17(b) from section 17(a) to permit a Fund that is an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds to sell its Shares to and redeem its Shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.³⁷ Applicants state that the terms of the transactions are fair and reasonable and do not involve overreaching. Applicants note that any consideration paid by a Fund of Funds for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund.³⁸ Applicants believe that any proposed transactions directly between the Funds and Funds of Funds will be consistent with the policies of each Fund of Funds. The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the investment restrictions of any such Fund of Funds and will be consistent with the investment policies set forth in the Fund of Funds’ registration

³⁷ Although applicants believe that most Funds of Funds will purchase Shares in the secondary market and will not purchase Creation Units directly from a Fund, a Fund of Funds might seek to transact in Creation Units directly with a Fund that is an affiliated person of a Fund of Funds. To the extent that purchases and sales of Shares occur in the secondary market and not through principal transactions directly between a Fund of Funds and a Fund, relief from section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to a Fund of Funds and redemptions of those Shares. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

³⁸ Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of Shares of a Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to a Fund of Funds, may be prohibited by section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

statement. Applicants also state that the proposed transactions are consistent with the general purposes of the Act and are appropriate in the public interest.

24. To the extent that a Fund operates in a master-feeder structure, applicants also request relief permitting the Feeder Funds to engage in in-kind creations and redemptions with the applicable Master Fund. Applicants state that the customary section 17(a)(1) and 17(a)(2) relief would not be sufficient to permit such transactions because the Feeder Funds and the applicable Master Fund could also be affiliated by virtue of having the same investment adviser. However, applicants believe that in-kind creations and redemptions between a Feeder Fund and a Master Fund advised by the same investment adviser do not involve “overreaching” by an affiliated person. Such transactions will occur only at the Feeder Fund’s proportionate share of the Master Fund’s net assets, and the distributed securities will be valued in the same manner as they are valued for the purposes of calculating the applicable Master Fund’s NAV. Further, all such transactions will be effected with respect to pre-determined securities and on the same terms with respect to all investors. Finally, such transaction would only occur as a result of, and to effectuate, a creation or redemption transaction between the Feeder Fund and a third-party investor. Applicants believe that the terms of the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned, the proposed transactions are consistent with the policy of each Fund and will be consistent with the investment objectives and policies of each Fund of Funds, and the proposed transactions are consistent with the general purposes of the Act.

Applicants’ Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. ETF Relief

1. The requested relief to permit ETF operations, other than the Master-Feeder Relief, will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based ETFs.

2. As long as a Fund operates in reliance on the requested order, the Shares of such Fund will be listed on an Exchange.

3. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual

fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from the Fund and tender those Shares for redemption to a Fund in Creation Units only.

4. The Web site, which is and will be publicly accessible at no charge, will contain, on a per Share basis for each Fund, the prior Business Day’s NAV and the market closing price or the midpoint of the bid/ask spread at the time of the calculation of such NAV (“Bid/Ask Price”), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

5. Each Self-Indexing Fund, Long/Short Fund and 130/30 Fund will post on the Web site on each Business Day, before commencement of trading of Shares on the Exchange, the Fund’s, or its respective Master Fund’s, Portfolio Holdings.

6. No Adviser or any Sub-Adviser to a Self-Indexing Fund, directly or indirectly, will cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Self-Indexing Fund) to acquire any Deposit Instrument for the Self-Indexing Fund, or its respective Master Fund, through a transaction in which the Self-Indexing Fund, or its respective Master Fund, could not engage directly.

B. Fund of Funds Relief

1. The members of a Fund of Funds’ Advisory Group will not control (individually or in the aggregate) a Fund, or its respective Master Fund, within the meaning of section 2(a)(9) of the Act. The members of a Fund of Funds’ Sub-Advisory Group will not control (individually or in the aggregate) a Fund, or its respective Master Fund, within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Fund of Funds’ Advisory Group or the Fund of Funds’ Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund’s Shares. This condition does not apply to the Fund of Funds’ Sub-Advisory Group with respect to a Fund, or its respective Master Fund, for which the Fund of Funds’ Sub-Adviser or a person controlling, controlled by or under common control with the Fund of

Funds’ Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in a Fund to influence the terms of any services or transactions between the Fund of Funds or Fund of Funds Affiliate and the Fund, or its respective Master Fund, or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Fund of Funds Adviser and Fund of Funds Sub-Adviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or a Fund of Funds Affiliate from a Fund, or its respective Master Fund, or Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of a Fund exceeds the limits in section 12(d)(1)(A)(i) of the Act, the Board of the Fund, or its respective Master Fund, including a majority of the directors or trustees who are not “interested persons” within the meaning of section 2(a)(19) of the Act (“non-interested Board members”), will determine that any consideration paid by the Fund, or its respective Master Fund, to the Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (i) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund, or its respective Master Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund, or its respective Master Fund, and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Fund of Funds Adviser, or trustee or Sponsor of an Investing Trust, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund, or its respective Master Fund, under rule 12b-1 under the Act) received from a Fund, or its respective Master Fund, by the Fund of Funds Adviser, or

trustee or Sponsor of the Investing Trust, or an affiliated person of the Fund of Funds Adviser, or trustee or Sponsor of the Investing Trust, other than any advisory fees paid to the Fund of Funds Adviser, or trustee or Sponsor of an Investing Trust, or its affiliated person by the Fund, or its respective Master Fund, in connection with the investment by the Fund of Funds in the Fund. Any Fund of Funds Sub-Adviser will waive fees otherwise payable to the Fund of Funds Sub-Adviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund, or its respective Master Fund, by the Fund of Funds Sub-Adviser, or an affiliated person of the Fund of Funds Sub-Adviser, other than any advisory fees paid to the Fund of Funds Sub-Adviser or its affiliated person by the Fund, or its respective Master Fund, in connection with the investment by the Investing Management Company in the Fund made at the direction of the Fund of Funds Sub-Adviser. In the event that the Fund of Funds Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund, or its respective Master Fund, to purchase a security in any Affiliated Underwriting.

7. The Board of a Fund, or its respective Master Fund, including a majority of the non-interested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund, or its respective Master Fund, in an Affiliated Underwriting, once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Fund. The Board will consider, among other things: (i) whether the purchases were consistent with the investment objectives and policies of the Fund, or its respective Master Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii)

whether the amount of securities purchased by the Fund, or its respective Master Fund, in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Fund.

8. Each Fund, or its respective Master Fund, will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limit in section 12(d)(1)(A), a Fund of Funds and the Trust will execute a FOF Participation Agreement stating, without limitation, that their respective boards of directors or trustees and their investment advisers, or trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Fund of the investment. At such time, the Fund of Funds will also transmit to the Fund a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the

board of directors or trustees of each Investing Management Company including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund, or its respective Master Fund, in which the Investing Management Company may invest. These findings and their basis will be fully recorded in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund, or its respective Master Fund, will acquire securities of an investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent (i) the Fund, or its respective Master Fund, acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Fund, or its respective Master Fund, to acquire securities of one or more investment companies for short-term cash management purposes, (ii) the Fund acquires securities of the Master Fund pursuant to the Master-Feeder Relief, or (iii) the Fund invests in a Wholly-Owned Subsidiary that is a wholly-owned and controlled subsidiary of the Fund (or its respective Master Fund) as described in the application. Further, no Wholly-Owned Subsidiary will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act other than money market funds that comply with rule 2a-7 for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2015-32578 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76706; File No. SR-BATS-2015-116]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for BZX Options

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 9, 2015, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members⁵ and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange’s Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fee schedule applicable to the Exchange’s options platform to: (i) Bifurcate Market Maker⁶ and Non-BATS Market Maker⁷ pricing; and (ii) to modify the criteria necessary to meet the Customer Penny Pilot Add Volume Tier 6 and the Non-Customer Penny Pilot Take Volume Tier 3.

Market Maker/Non-BATS Market Maker Pricing

The Exchange proposes to bifurcate Market Maker and Non-BATS Market Maker pricing within the fee schedule. To do so, the Exchange proposes to amend: (i) The Standard Rates table; (ii) the Fee Codes and Associated Fees table to (A) modify fee codes NM and PM; and (B) add new fee codes NN and PN; (iii) the NBBO Setter tiers under footnote 4 to reference fee codes NN and PN; (iv) footnote 6 to remove references to Non-BATS Market Maker pricing and copy Tier 1 and relocate Tier 3 and the Step-Up Tier to new footnote 10; and (v) footnote 7 to remove references to Non-BATS Market Maker Pricing and copy Tiers 1 and 2 to new footnote 11. The Exchange notes, other than as proposed herein, pricing for Non-BATS Market Maker transactions are the same as Market Maker transactions. The proposed rule change generally bifurcates the existing pricing for Market Makers and Non-BATS Market Makers.

Standard Rates and Fee Codes and Associated Fee Tables

First, the Exchange proposes to amend the Fee Codes and Associated Fee table to amend fee codes NM and PM to remove references to Non-BATS Market Maker Pricing. Pricing for Non-BATS Market Makers would be set forth

under new fee codes NN and PN. Under current fee code NM, Market Makers and Non-BATS Market Makers that add liquidity in non-Penny Pilot Securities⁸ receive a rebate of \$0.42 per contract. Under proposed fee code NN, Non-BATS Market Makers that add liquidity in non-Penny Pilot Securities would receive a rebate of \$0.36 per contract. Fee code NN would also include references to footnotes 4 and 11, discussed below.

Under current fee code PM, Market Makers and Non-BATS Market Makers that add liquidity in Penny Pilot Securities receive a rebate of \$0.35 per contract. Under proposed fee code PN, Non-BATS Market Makers that add liquidity in Penny Pilot Securities would receive a rebate of \$0.30 per contract. Fee code PN would also include references to footnotes 4 and 10, discussed below.

Second, the Exchange proposes to amend the Standard Rates table to add a row to delineate pricing for Non-BATS Market Makers. Non-BATS Market Maker orders that yield new fee code PN would receive a rebate of \$0.30 per contract if they do not qualify for an enhanced rebates under the Exchange’s tiered pricing structure. The Exchange does not propose to amend the enhanced rebates, which are either \$0.40, \$0.43, or \$0.46 per contract depending on the tier that the Non-BATS Market Maker qualifies for. Likewise, Non-BATS Market Maker orders that yield new fee code NN would receive a rebate of \$0.36 per contract if they do not qualify for an enhanced rebates under the Exchange’s tiered pricing structure. The Exchange does not propose to amend the enhanced rebates, which are either \$0.45 or \$0.52 per contract depending on the tier that the Non-BATS Market Maker qualifies for.

The Exchange believes it is reasonable to provide Market Makers with improved rates than Non-BATS Market Makers as the proposed differentiation recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants.

Footnote 4, NBBO Setter Tiers.

The Exchange proposes to amend the NBBO Setter tiers under footnote 4 to reference fee codes NN and PN. In addition to fee codes PA, PF, PM, NA, NF, and NM, the Exchange proposes to state that NBBO Setter Tiers 1, 2, and 3 are applicable to fee codes PN and NN.

⁸ “Penny Pilot Securities” are those issues quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01. *Id.*

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ The term “Member” is defined as “any registered broker or dealer that has been admitted to membership in the Exchange.” See Exchange Rule 1.5(n).

⁶ “Market Maker” applies to any transaction identified by a Member for clearing in the Market Maker range at the OCC, where such Member is registered with the Exchange as a Market Maker as defined in Rule 16.1(a)(37). See the Exchange’s fee schedule available at http://www.batsoptions.com/support/fee_schedule/bzx/.

⁷ “Non-BATS Market Maker” applies to any transaction identified by a Member for clearing in the Market Maker range at the OCC, where such Member is not registered with the Exchange as a Market Maker, but is registered as a market maker on another options exchange. *Id.*

NBBO Setter Tier 4 would be applicable to fee code PN, in addition to PF and PM. All of the fee codes referenced in footnote 4 are applicable to orders that add liquidity.

Footnotes 6 and 10, Market Maker and Non-BATS Market Maker Penny Pilot Add Volume Tiers

The Exchange proposes to bifurcate the Market Maker and Non-Market Maker pricing in Penny Pilot Securities under footnote 6 by removing references to Non-BATS Market Maker pricing and copy Tier 1 and relocate Tier 3 and the Step-Up Tier to new footnote 10. Footnote 6 would be amended to remove references to Non-BATS Market Makers as the tiers under footnote 6 would only apply to Market Maker activity in Penny Pilot Securities. The criteria for Tier 2 under footnote 6 would continue to reference Non-BATS Market Makers as liquidity a Market Maker adds in a non-market making capacity would continue to be applied towards the tier's requirements.

Tiers applicable to Non-BATS Market Maker activity in Penny Pilot Securities would be set forth under new footnote 10. Fee code PN would be applicable to the tiers listed under footnote 10. Under Tier 1, a Non-BATS Market Maker would receive a rebate of \$0.40 per contract where they have an ADV⁹ equal to or greater than 0.30% of average TCV.¹⁰ This is identical to Tier 1 under footnote 6 for Market Makers. Tier 3 and the Step-Up Tier would be deleted from footnote 6 relocated to new footnote 10 without change. Tier 3 from footnote 6 would be listed a Tier 2 under footnote 10. As they do today, a Non-BATS Market Maker would receive a rebate of \$0.46 per contract under Tier 2 where they have an ADAV¹¹ in Firm/BD/JBO¹² orders in Penny Pilot Securities (yielding Fee Code PF) equal to or greater than 0.25% of average TCV or an ADV equal to or greater than 1.50% of average TCV. Likewise, under the Step-Up Tier under footnote 10, a Non-BATS Market Maker would receive a rebate of \$0.43 per contract where they have an Options Step-Up Add TCV¹³ in Non-Customer orders from March 2015 baseline equal to or greater than 0.15% or an ADAV in Non-BATS Market Maker/Firm/BD/JBO orders equal to or greater than 0.30% of average TCV.

⁹ As defined in the Exchange's fee schedule.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ As defined in the Exchange's fee schedule.

Footnotes 7 and 11, Market Maker and Non-BATS Market Maker Non-Penny Pilot Add Volume Tiers

The Exchange proposes to bifurcate the Market Maker and Non-Market Maker pricing in non-Penny Pilot Securities under footnote 7 by removing references to Non-BATS Market Maker pricing and coping Tiers 1 and 2 to new footnote 11. Footnote 7 would be amended to remove references to Non-BATS Market Makers as the tiers under footnote 7 would only apply to Market Maker activity in non-Penny Pilot Securities.

Tiers applicable to Non-BATS Market Maker activity in non-Penny Pilot Securities would be set forth under new footnote 11. Tiers 1 and 2 under footnote 7 would be replicated under new footnote 11 without change. Under Tier 1, a Non-BATS Market Maker would continue to receive a rebate of \$0.45 per contract where they have an ADV equal to or greater than 0.30% of average TCV. Under Tier 2, a Non-BATS Market Maker would continue to receive a rebate of \$0.52 per contract where they have an ADV equal to or greater than 1.00% of average TCV. Fee code NN would be applicable to the tiers listed under footnote 11.

Customer Penny Pilot Add Volume Tier 6

The Exchange currently offers a total of eight Customer¹⁴ Penny Pilot Add Volume Tiers that provide enhanced rebates for Customer orders in Penny Pilot Securities that add liquidity under fee code PY. Under the Customer Add Volume Tier 6, the Member would receive a rebate of \$0.53 per contract where they have an ADAV in Customer orders equal to or greater than 1.80% of average TCV. The Exchange proposes to ease the criteria necessary to qualify for the Customer Penny Pilot Add Volume Tier 6 by requiring an ADAV in Customer orders equal to or greater than 1.60%, rather than 1.80% of average TCV.

Non-Customer Penny Pilot Take Volume Tier 3

The Exchange currently offers a total of three Non-Customer¹⁵ Penny Pilot Take Volume Tiers that provide discounted fees for Non-Customer orders in Penny Pilot Securities that remove liquidity under fee code PP. Under the Non-Customer Take Volume Tier 3, the Member would be charged a discounted fee of \$0.46 per contract where they have an ADAV in Non-Customer orders equal to or greater than

1.80% of average TCV. The Exchange proposes to ease the criteria necessary to qualify for the Non-Customer Penny Pilot Take Volume Tier 3 by requiring an ADAV in Customer orders equal to or greater than 1.60%, rather than 1.80% of average TCV.

Implementation Date

The Exchange proposes to implement these amendments to its fee schedule immediately.¹⁶

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.¹⁷ Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁸ in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive.

Market Maker/Non-BATS Market Maker Pricing

The Exchange also believes it is equitable, reasonable and not unfairly discriminatory to bifurcate Market Maker and Non-BATS Market Maker pricing within the fee schedule. The Exchange notes, other than as proposed herein, pricing for Non-BATS Market Maker transactions are the same as Market Maker transactions. The proposed rule change generally bifurcates the existing pricing for Market Makers and Non-BATS Market Makers. The proposed rule change would serve to clearly delineate within the fee schedule the fees, rebates and tiers available to Market Makers and Non-BATS Market Makers; thereby, avoiding Members confusion regarding the applicable fees and rebates.

The Exchange also believes it is equitable, reasonable and not unfairly discriminatory to provide Market Makers with improved rates than Non-BATS Market Makers. The proposed

¹⁶ The Exchange initially filed the proposed fee change on November 30, 2015 (SR-BATS-2015-107). On December 9, 2015, the Exchange withdrew that filing and submitted filing SR-BATS-2015-116.

¹⁷ 15 U.S.C. 78f.

¹⁸ 15 U.S.C. 78f(b)(4).

¹⁴ *Id.*

¹⁵ *Id.*

differentiation between Market Makers and Non-BATS Market Makers recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants. Market Makers, unlike Non-BATS Market Makers, have obligations on the Exchange and regulatory requirements,¹⁹ which do not apply to Non-BATS Market Makers. A Market Maker on the Exchange has the obligation to make continuous markets, engage in course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with such course of dealings. On the other hand, Non-BATS Market Makers, do not have such obligations on the Exchange.

Customer Penny Pilot Add and Remove Tier Amendments

Volume-based rebates and fees such as the ones currently maintained on the Exchange have been widely adopted by equities and options exchanges and are equitable because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and introduction of higher volumes of orders into the price and volume discovery processes. Easing the criteria for the Customer Penny Pilot Add Volume Tier 6 and Non-Customer Penny Pilot Take Volume Tier 3 are intended to incentivize Members to send additional orders to the Exchange in an effort to qualify for the enhanced rebate or discounted fee available by the respective tier.

The Exchange believes that these changes are reasonable, fair and equitable and non-discriminatory, for the reasons set forth with respect to volume-based pricing generally and because such changes will either incentivize participants to further contribute to market quality on the Exchange or will allow the Exchange to earn additional revenue that can be used to offset the addition of new pricing incentives. The Exchange also believes that the proposed fees and rebates remain consistent with pricing previously offered by the Exchange as well as competitors of the Exchange and do not represent a significant departure from the Exchange's general pricing structure.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed amendments to its fee schedule would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed change represents a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed change will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets. The Exchange does not believe its bifurcation of Market Maker and Non-BATS Market Maker pricing would burden competition as they are intended to simply clearly delineate within the fee schedule the fees, rebates and tiers available to Market Makers and Non-BATS Market Makers; thereby, avoiding Members confusion regarding the applicable fees and rebates. The Exchange also does not believe that providing Market Makers with improved rates than Non-BATS Market Makers would burden competition as the proposed differentiation recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants.

The Exchange also does not believe that any of the proposed changes to the Exchange's tiered pricing structure burden competition, but instead, that they enhance competition as they are intended to increase the competitiveness of the Exchange by easing the criteria necessary to qualify for certain tiers. Also, the Exchange believes that the decrease to these thresholds necessary to meet the respective tiers contributes to, rather than burdens competition, as such changes are intended to incentivize participants to increase their participation on the Exchange.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²⁰ and paragraph (f) of Rule 19b-4 thereunder.²¹ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-BATS-2015-116 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-BATS-2015-116. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for

¹⁹ See Exchange Rule 22.5, Obligations of Market Makers.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f).

inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BATS-2015-116 and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Brent J. Fields,

Secretary.

[FR Doc. 2015-32534 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76718; File No. SR-NASDAQ-2015-112]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change To Amend Rule 4758

December 21, 2105.

I. Introduction

On September 21, 2015, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt a new routing option, the Retail Order Process (“RTFY”). The proposed rule change was published for comment in the **Federal Register** on October 1, 2015.³ The Commission received two comment letters on the proposed rule change ⁴ and a response letter from NASDAQ.⁵ On November 3, 2015, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to

December 30, 2015.⁶ NASDAQ subsequently submitted a second response letter.⁷ This order approves the proposed rule change.

II. Description of the Proposal

NASDAQ is proposing to amend Rule 4758 to add a new order routing option—RTFY—for Designated Retail Orders (“DROs”).⁸ NASDAQ states that retail order firms ⁹ often send non-marketable order flow to post and display on exchanges. However, some orders that have been deemed to be non-marketable by the entering firm become marketable by the time the exchange receives them.¹⁰ NASDAQ notes that these orders ultimately remove liquidity from the NASDAQ order book even though the firm entering the order did not intend them to remove liquidity.¹¹

Under the proposal, a DRO that is marketable upon receipt by NASDAQ and that elects to follow the RTFY routing option will be routed to destinations in the System routing table instead of immediately removing liquidity from the Exchange order book—unless explicitly instructed by the entering party to check the Exchange order book first.¹² RTFY orders may

remove liquidity from the Exchange book after routing to other destinations.¹³ All non-marketable RTFY orders will post on the Exchange book.¹⁴

According to NASDAQ, the destinations in the System routing table for RTFY will include OTC market makers,¹⁵ which may also be registered NASDAQ market makers.¹⁶ NASDAQ believes these market makers will likely provide the greatest opportunity for price improvement for the DROs, and the RTFY routing option will benefit DROs by providing additional price improvement opportunities for retail investors.¹⁷ NASDAQ anticipates that the RTFY routing option will route to trading centers in the System routing table that have experience executing and providing price improvement to DROs.¹⁸

As proposed, an order using the RTFY routing option will be sent to the primary listing exchange for opening, reopening, and closing auctions.¹⁹ Orders received in non-NASDAQ listed securities prior to market open that are not eligible for the pre-market session will be submitted to the primary listing market for inclusion in that market’s opening process.²⁰ Orders received in NASDAQ-listed securities prior to market open that are not eligible for the pre-market session will follow normal pre-market processing.²¹ Orders received prior to the market open that are eligible for the pre-market session will be posted—and routed if

⁶ See Securities Exchange Act Release No. 76335, 80 FR 69256 (November 9, 2015).

⁷ See letter from Jonathan F. Cayne, Senior Associate General Counsel, NASDAQ to Brent J. Fields, Secretary, Commission, dated December 11, 2015 (“NASDAQ Supplemental Response”).

⁸ A Designated Retail Order is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 and that originates from a natural person and is submitted to NASDAQ by a member that designates it pursuant to Rule 7018, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. An order from a “natural person” can include orders on behalf of accounts that are held in a corporate legal form—such as an Individual Retirement Account, Corporation, or a Limited Liability Company—that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual. Members must submit a signed written attestation, in a form prescribed by NASDAQ, that they have implemented policies and procedures that are reasonably designed to ensure that substantially all orders designated by the member as DROs comply with these requirements. Orders may be designated on an order-by-order basis, or by designating all orders on a particular order entry port as DROs. See NASDAQ Rule 7018.

⁹ The term “retail order firms” refers to NASDAQ member firms that provide orders that qualify as Designated Retail Orders under NASDAQ Rule 7018.

¹⁰ See Notice, 80 FR at 59210.

¹¹ See *id.*

¹² See *id.* The term “System routing table” refers to the proprietary process for determining the specific trading venues to which the System routes orders and the order in which it routes them. NASDAQ reserves the right to maintain a different System routing table for different routing options and to modify the System routing table at any time without notice. See NASDAQ Rule 4758(a)(1)(A).

¹³ See Notice, 80 FR at 59210.

¹⁴ If a RTFY order is posted on the Exchange, either because it was non-marketable when it was received or it has exhausted all available liquidity within its limit price—including on the Exchange, Regulation NMS protected quotations and other destinations in the System routing table—and the order is subsequently locked or crossed by another market center, the System will not route to the locking or crossing market center. See *id.*

¹⁵ An “OTC market maker” in a stock is defined in Rule 600(b)(52) of Regulation NMS as, in general, a dealer that holds itself out as willing to buy and sell the stock, otherwise than on a national securities exchange, in amounts of less than block size (less than 10,000 shares).

¹⁶ See Notice, 80 FR at 59210.

¹⁷ See *id.* NASDAQ believes that, because retail orders are generally smaller on average, they are often able to receive better prices than the prevailing national best bid and offer. See *id.* at 59211. NASDAQ believes that this is achieved by retail order firms sending their orders to OTC market makers that provide some level of price improvement. See *id.*

¹⁸ See *id.* NASDAQ believes that approximately 96% of the DROs that will use the RTFY routing option will not be marketable and will add liquidity on the Exchange, while the remainder will be routed to destinations on the System routing table for potential price improvement, including to OTC market makers. See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.* and NASDAQ Rule 4752.

²² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 75987 (September 25, 2015), 80 FR 59210 (“Notice”).

⁴ See letter from Joseph Saluzzi, Themis Trading LLC to the Commission, dated September 29, 2015 (“Themis Letter”); and letter from Suzanne Shatto to the Commission, dated October 6, 2015 (“Shatto Letter”).

⁵ See letter from Jonathan F. Cayne, Senior Associate General Counsel, NASDAQ to Brent J. Fields, Secretary, Commission, dated October 22, 2015 (“NASDAQ Response”).

marketable—for potential execution.²² Approximately two minutes prior to market open, active pre-market session orders in the Exchange's possession will be routed to the primary listing exchange.²³ When a security that is listed on an exchange other than NASDAQ is halted, RTFY orders—including RTFY orders received during the halt—will be sent to the primary listing exchange for inclusion in that exchange's reopening process.²⁴ All RTFY orders will be sent to the primary listing exchange approximately two minutes prior to that exchange's closing process.²⁵

In its proposal, NASDAQ notes that the RTFY routing option is similar to the existing TFTY routing option.²⁶ NASDAQ specifically notes that orders using the TFTY routing option do not check the NASDAQ book—unless so instructed by the entering firm—for available shares, and instead route to the TFTY destinations on the System routing table with the goal of executing with lower transaction fees.²⁷ NASDAQ states that the RTFY routing option differs from TFTY in three ways: (i) RTFY is only available to DROs; (ii) RTFY uses a separate and distinct routing table; and (iii) RTFY orders will be sent to the primary listing exchange for opening, reopening, and closing auctions.²⁸

NASDAQ notes that there are several alternatives to using an Exchange routing strategy.²⁹ NASDAQ also notes that it offers multiple routing options, that each routing option has its own set of strengths and trade-offs, and that these varying routing strategies are designed to meet varying market participants' needs.³⁰ NASDAQ believes the RTFY routing option will meet the needs of the retail order firms that opt to use it based on their routing technology, business model, or level of retail order flow.³¹

NASDAQ states that the RTFY routing table will be monitored and approved by a best execution committee ("Committee").³² NASDAQ states that the Committee determines how to organize the System routing table and which trading destinations are included in the routing table by reviewing various parameters, such as price improvement, fill rate, latency, interaction rate, experience of the execution venue operator, and the volume the execution venue handles on a daily basis.³³ NASDAQ notes that the parameters considered by the Committee evolve over time; often resulting in new parameters being considered.³⁴

NASDAQ states that neither the Exchange, nor any of its affiliates, will accept payment for order flow from any OTC market maker to which an RTFY order is sent.³⁵ If the trading venue pays a standard rebate for DROs to all of its subscribers or another exchange pays a rebate to remove liquidity, NASDAQ will accept and retain those rebates.³⁶ However, NASDAQ expects that most, if not all, orders routed using the RTFY routing option will be sent to and executed by an OTC market maker that may also be a registered NASDAQ market maker.³⁷

III. Comment Summary and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.³⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,³⁹ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission received two comment letters opposing the proposal, as well as a response and a supplemental response from NASDAQ.⁴⁰

The commenters express concern that RTFY is designed to allow leakage of order flow information.⁴¹ The Commission notes that, in response, NASDAQ states that this claim is factually incorrect and is speculation.⁴² NASDAQ reiterates that RTFY is designed to enhance execution quality and benefit retail investors by providing price improvement opportunities to retail order flow.⁴³ According to NASDAQ, it will use the Committee to review and determine the structure and destinations of the System routing table, and if the Committee observes that a particular destination is not providing sufficient price improvement, the destination will have to improve or be dropped from the System routing table.⁴⁴ NASDAQ also notes that RTFY is a voluntary routing type, and retail orders firms can elect not to use RTFY if it fails to benefit their clients.⁴⁵ Moreover, NASDAQ notes that retail investors have a choice when routing their orders and it is up to them to determine whether they will use a broker-provided router or send their orders directly to a particular destination.⁴⁶

The commenters also express concerns related to best execution. Specifically, one commenter questions whether retail investors will forgo their marketable orders interacting with the NBBO at NASDAQ for "meaningless" price improvement at OTC market makers.⁴⁷ This commenter expresses concern that RTFY could result in a failure to obtain best execution, specifically in situations where NASDAQ was at the NBBO when a marketable retail order that has elected the RTFY routing option was received, NASDAQ routes the marketable retail order away but the order does not execute on the away destinations, and by the time the order comes back to NASDAQ, the NBBO has moved so that the retail order is no longer marketable and posts to the book instead of executing.⁴⁸ In addition, both commenters express concerns regarding the transparency of the RTFY routing

²² See Notice, 80 FR at 59211.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ See NASDAQ Rule 4758(a)(1)(A)(v). NASDAQ further notes that RTFY is also similar to BATS' TRIM routing option, under which an order checks the BATS system for available shares only if so instructed by the entering firm and then is sent to destinations on the system routing table. See Notice, 80 FR at 59211.

²⁷ See Notice, 80 FR at 59210.

²⁸ See *id.* at 59211.

²⁹ See *id.* For example, the Exchange notes that broker-dealers and vendors provide customized routing strategies and order execution algorithms, order flow firms may choose to make their own routing decisions based on proprietary routing processes, and retail order firms may use other firms to enhance their routing capabilities. See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.* at 59212. The Exchange states that the Committee consists of several internal NASDAQ participants representing product management, internal audit, economic research, broker-dealer compliance, and market operations. See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.*

³⁸ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁹ 15 U.S.C. 78f(b)(5).

⁴⁰ See *supra* notes 4, 5, and 7.

⁴¹ See Themis Letter and Shatto Letter, *supra* note 4.

⁴² See NASDAQ Response, *supra* note 5, at 2.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.* at 4.

⁴⁷ See Themis Letter, *supra* note 4.

⁴⁸ See *id.*

table and the effectiveness of the Committee.⁴⁹

In response, NASDAQ states its belief that providing additional price improvement opportunities for retail investors is a “critical component of its best execution obligations.”⁵⁰ In its supplemental response letter, NASDAQ states that, in all routing of orders, when one routing destination is chosen over another, there is always a possibility that an execution will be missed.⁵¹ The Commission notes, however, that NASDAQ believes that any chance of an RTFY order missing a better price at the Exchange is “miniscule.”⁵² The Commission notes that, according to NASDAQ, some routing destinations agree to a guaranteed minimum price improvement per share for RTFY orders, some focus more on the average price improvement, and others are unsure of what the level of price improvement will be, but provide assurances that they will compete vigorously with their execution quality.⁵³ Consequently, NASDAQ believes that the competition for RTFY orders, and thus the resulting execution quality, will be better than what is experienced today.⁵⁴

The Commission notes that, with respect to commenters’ concerns regarding the RTFY routing table and the Committee, NASDAQ states that—as with all other routing options, other than Directed Orders—the RTFY routing table will be monitored and approved by the Committee.⁵⁵ According to NASDAQ, the use of a best execution committee is not novel, and such committees are widely-used at many broker-dealers.⁵⁶ In addition, the Committee is subject to FINRA oversight, as well as oversight by NASDAQ Inc.’s internal audit group, which reports to the audit committee of the Board of Directors of NASDAQ Inc.⁵⁷ According to NASDAQ, the Committee reviews the performance of routing destinations on a regular basis

for all routing and the same will be true for RTFY.⁵⁸ If the Committee determines that a particular routing destination is underperforming based on the various parameters, such as price improvement, fill rate, and latency, the Committee may either remove that destination altogether or lower its priority within the routing table.⁵⁹ According to NASDAQ, this process ensures that these destinations will compete aggressively with each other in order to receive RTFY orders.⁶⁰

Based on the foregoing, the Commission believes that the proposed rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁶¹ that the proposed rule change (SR–NASDAQ–2015–112) be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶²

Brent J. Fields,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76717; File No. SR–MIAX–2015–73]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

December 21, 2015.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4

⁵⁸ See NASDAQ Supplemental Response, *supra* note 7, at 2.

⁵⁹ See *id.* NASDAQ notes that missed executions often may be due to latency in away destinations systems. See *id.* at 3. According to NASDAQ, because latency is one of the parameters that the Committee considers in its regular reviews of routing destinations, destinations causing undue latency that may lead to missed executions or inferior execution prices would lose their priority within the routing table or be removed altogether. See *id.* NASDAQ also notes that, if the Committee determines that a particular routing destination is not providing sufficient price improvement opportunities, then that destination will likely be removed from the RTFY routing table. See NASDAQ Response, *supra* note 5, at 4.

⁶⁰ See NASDAQ Supplemental Response, *supra* note 7, at 2. NASDAQ states that, in the past, the Committee has moved venues down within the routing table due, in part, to unsatisfactory fill rate, unsatisfactory price improvement, and/or unsatisfactory latency profile. See *id.*

⁶¹ 15 U.S.C. 78s(b)(2).

⁶² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

thereunder,² notice is hereby given that on December 14, 2015, Miami International Securities Exchange LLC (“MIAX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the “Fee Schedule”).

The text of the proposed rule change is available on the Exchange’s Web site at http://www.miaxoptions.com/filter/wotitle/rule_filing, at MIAX’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to modify the transaction fees for Members that participate in the price improvement auction (“PRIME Auction” or “PRIME”) pursuant to Rule 515A.³ Specifically, the Exchange proposes to: (i) Increase the fee for a PRIME AOC Response⁴ from \$0.49 per

² 17 CFR 240.19b–4.

³ See Exchange Rule 515A. See also Securities Exchange Act Release Nos. 75408 (July 9, 2015) 80 FR 41530 (July 15, 2015)(SR–MIAX–2015–45); 72943 (August 28, 2014), 79 FR 52785 (September 4, 2014) (SR–MIAX–2014–45); MIAX Options Fee Schedule, Section (1)(a)(iv).

⁴ See Exchange Rule 515A(a)(2)(i). When the Exchange receives a properly designated Agency Order for auction processing, a Request for Responses (“RFR”) detailing the option, side, size, and initiating price will be sent to all subscribers of the Exchange’s data feeds. Members may submit

⁴⁹ See Themis Letter and Shatto Letter, *supra* note 4.

⁵⁰ See NASDAQ Response, *supra* note 5, at 4. Moreover, NASDAQ reiterates that it will not accept any negotiated payment for order flow. See NASDAQ Supplemental Response, *supra* note 7, at 1–2.

⁵¹ See NASDAQ Supplemental Response, *supra* note 7, at 2.

⁵² See *id.* at 3.

⁵³ See *id.* at 2.

⁵⁴ See *id.*

⁵⁵ See NASDAQ Response, *supra* note 5, at 3. NASDAQ notes that many factors are weighed when making best execution determinations, and that price improvement opportunities for retail investors are an “integral component of such decisions by both the Committee and by retail order firms.” See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.* at 3–4.

contract to \$0.50 per contract for standard options in Penny Pilot classes; (ii) increase the fee for a PRIME AOC Response from \$0.94 per contract to \$0.99 per contract for standard options in non-Penny Pilot classes; and (iii) continue to provide for additional incentives of \$0.04 per contract for achieving certain Priority Customer Rebate Program volume tiers. The Exchange also proposes technical clarifying amendments to the Fee Schedule, as described below.

Currently, the Exchange assesses PRIME AOC Responses \$0.49 per contract for standard options in Penny Pilot classes and \$0.94 per contract in non-Penny Pilot classes. The Exchange now proposes to modify these fees that apply to PRIME AOC Responses. Specifically, the Exchange proposes to: (i) Increase the fee for a PRIME AOC Response from \$0.49 per contract to \$0.50 per contract for standard options in Penny Pilot classes; and (ii) increase the fee for a PRIME AOC Response from \$0.94 per contract to \$0.99 per contract for standard options in non-Penny Pilot classes. The Exchange will continue to assess the standard transaction fees to a PRIME AOC Response if they execute against unrelated orders.

The Exchange currently offers Members that submit PRIME AOC Responses the opportunity to reduce transaction fees by \$0.04 per contract in standard options if the Member or its affiliates of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, qualifies in a given month for Priority Customer Rebate Program volume tiers 3 or 4 in the Fee Schedule.

Currently, any Member or its affiliates of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, that qualifies for Priority Customer Rebate Program volume tiers 3 or 4 are assessed a PRIME AOC Response fee of \$0.45 per contract for standard options in Penny Pilot classes. In addition, any Member or its affiliates of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, that qualifies for Priority Customer Rebate Program volume tiers 3 or 4 are assessed a PRIME AOC Response fee of \$0.90 per contract for standard options in non-Penny Pilot classes.

In order to continue to offer Members or their affiliates of at least 75% common ownership between the firms

as reflected on each firm's Form BD, Schedule A, that qualifies for Priority Customer Rebate Program volume tiers 3 or 4 ("qualifying Members") the opportunity to reduce transaction fees by \$0.04 per contract in standard options, the Exchange is proposing to modify the reduced fees to \$0.46 per contract for standard options in Penny Pilot classes, and to \$0.95 per contract for standard options in non-Penny Pilot classes for such qualifying Members.

The Exchange believes that these incentives will continue to encourage Members to transact a greater number of contracts on the Exchange. The Exchange notes that these incentives will operate identically to the Priority Customer Rebate Program incentives that apply to any Member or its affiliates of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A that qualifies for Priority Customer Rebate Program volume tiers 3 or 4 in other types of transaction fees.⁵

The Exchange is also proposing technical clarifying amendments to the Fee Schedule. Specifically, the headings in the table in Section 1) a) iv) of the Fee Schedule will be amended from: (i) "PRIME Order" to "PRIME Order Fee," (ii) "Responder to PRIME Auction" to "Responder to PRIME Auction Fee," and (iii) "PRIME Break-up" to "PRIME Break-up Credit." These changes are intended to clarify and more specifically label the various columns in the table for investors using it.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act⁶ in general, and furthers the objectives of Section 6(b)(4) of the Act⁷ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and issuers and other persons using its facilities.

The Exchange's proposal to increase the transaction fees for certain participants that submit PRIME AOC Responses is reasonable because the Exchange's fees will remain competitive with fees at other options exchanges.⁸ The Exchange's proposal to increase the transaction fees for certain participants in the PRIME Auction is equitable and not unfairly discriminatory because the increase applies equally to all such participants. The Exchange believes that the transaction fees for PRIME AOC

Responses will not deter market participants from providing price improvement.

The Exchange's proposal to offer qualifying PRIME Auction participants the opportunity to reduce transaction fees by \$0.04 per contract in standard options, provided certain criteria are met, is reasonable because the Exchange desires to offer all such market participants an opportunity to lower their transaction fees. The Exchange's proposal to offer qualifying PRIME Auction participants the opportunity to reduce transaction fees by \$0.04 per contract in standard options, provided certain criteria are met, is equitable and not unfairly discriminatory because the Exchange will offer all market participants a means to reduce transaction fees by qualifying for volume tiers in the Priority Customer Rebate Program. The Exchange believes that continuing to offer all such market participants the opportunity to lower transaction fees by transacting Priority Customer order flow in turn benefits all market participants. To the extent that there are higher transaction fees assessed on market participants without Priority Customer order flow, the Exchange believes that this is appropriate because the proposal creates incentives for Members to direct additional order flow to the Exchange and thus provide additional liquidity that enhances the quality of its markets and increases the volume of contracts traded on MIAX. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange believes that the proposal to allow the aggregation of trading activity of separate Members or its affiliates for purposes of the fee reduction is fair, equitable and not unreasonably discriminatory. The Exchange believes the proposed rule change is reasonable because it would allow aggregation of the trading activity of separate Members or its affiliates for purposes of the fee reduction only in very narrow circumstances, namely, where the firm is an affiliate, as defined herein. The Exchange believes that all such market participants should have the opportunity to lower transaction fees by transacting additional Priority Customer order flow, which in turn benefits all market participants.

The Exchange believes that the technical clarifying amendments to the

RFR responses consisting of an Auction or Cancel ("AOC") order or an AOC eQuote. Such responses cannot cross the disseminated MIAX Best Bid or Offer ("MBBO") on the opposite side of the market from the response.

⁵ See MIAX Options Fee Schedule.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4).

⁸ See e.g., NYSE Amex Options Fee Schedule; International Securities Exchange LLC Schedule of Fees; BOX Options Exchange Fee Schedule.

Fee Schedule ensure that the Fee Schedule is transparent regarding the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and are thus consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change will enhance the competitiveness of the Exchange relative to other exchanges that offer their own electronic price improvement mechanism.

The Exchange believes that the proposed fees do not impact intra-market competition notwithstanding that the proposed per contract fees assessed to participants in the PRIME Auction that respond to an Agency Order (for purposes of this discussion, "responders") are greater than the per contract fees assessed to participants that begin the auction process by submitting an Agency Order (for purposes of this discussion, "initiators"). Initiators guarantee execution of the entire Agency Order in full, either at a single price or at multiple prices using the "auto-match" option.⁹ Responders may elect not to respond at all, or may elect to respond only at a single price, and are not required to guarantee the execution of the entire order at any price. Because of this guarantee, initiators are assuming greater risk and are providing more liquidity in the Exchange's markets. The Exchange believes therefore that it is reasonable, equitable and not unfairly discriminatory, and consequently not a burden on competition, to charge responders and initiators differently, as proposed. The Exchange believes that these market participants understand that the price-improving benefits, based on their experience with PRIME, and on electronic price improvement mechanisms on other markets, justify the transaction fees associated with the PRIME Auction, based upon the disparity in risk assumed in the PRIME Auction process.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its

fees to remain competitive with other exchanges and to attract order flow to the Exchange. The Exchange believes that the proposed rule change reflects this competitive environment because it establishes a fee structure in a manner that encourages market participants to submit their order flow, to provide liquidity, and to attract additional transaction volume to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,¹⁰ and Rule 19b-4(f)(2)¹¹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-MIAX-2015-73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549. All submissions should refer to File Number SR-MIAX-2015-73. This file number should be included on the subject line if email is used. To help the Commission process and review your

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2015-73 and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Brent J. Fields,
Secretary.

[FR Doc. 2015-32526 Filed 12-24-15; 8:45 am]
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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76712; File No. SR-EDGA-2015-47]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rule 11.6(n)(1), Routing/Posting Instructions, To Amend the Aggressive Instruction

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 16, 2015, EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

¹¹ 17 CFR 240.19b-4(f)(2).

⁹ See Exchange Rule 515A(a)(2)(i)(A).

below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the Aggressive instruction under Exchange Rule 11.6(n)(1) to route such orders where that order has been locked or crossed by other Trading Centers. The proposed rule change is based on recently filed proposed rule changes by BATS Exchange, Inc. (“BZX”) and BATS Y-Exchange, Inc. (“BYX”).⁵

The text of the proposed rule change is available at the Exchange’s Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

In early 2014, the Exchange and its affiliate, EDGX Exchange, Inc. (“EDGX”) received approval to effect a merger (the “Merger”) of the Exchange’s parent company, Direct Edge Holdings LLC, with BATS Global Markets, Inc., the parent of BZX and BYX (together with

BZX, EDGA and EDGX, the “BGM Affiliated Exchanges”).⁶ In the context of the Merger, the BGM Affiliated Exchanges are working to align their rules and functionality, retaining only intended differences between the BGM Affiliated Exchanges. Thus, the Exchange proposes to amend the Aggressive instruction under Exchange Rule 11.6(n)(1) in order to conform with recently filed proposed rule changes by BYX and BZX⁷ to provide a consistent rule set across each of the BGM Affiliated Exchanges.⁸

Users⁹ may submit Limit Orders¹⁰ to the Exchange that are processed pursuant to Exchange Rules 11.10(a) and 11.11, as set forth below. Rule 11.10(a) describes the process by which an incoming order would execute against the EDGA Book.¹¹ To the extent an order has not been executed in its entirety against the EDGA Book, Rule 11.11 then describes the process of routing marketable Limit Orders to one or more Trading Centers, including a description of how the Exchange treats any unfilled balance that returns to the Exchange following the first attempt to fill the order through the routing process. If not filled through routing, and based on the order instructions, the unfilled balance of the order may be posted to the EDGA Book.

The Aggressive instruction subjects an order to the routing process after being posted to the EDGA Book only if the order is subsequently crossed by another Trading Center (rather than if the order is locked or crossed). Further, a routable Limit Order with a Non-Displayed¹² instruction posted to the EDGA Book that is crossed by another accessible Trading Center will be automatically routed to the crossing Trading Center. The Exchange proposes to modify the Aggressive instruction to also provide that, where the order is locked by another accessible Trading Center, it would be automatically routed to the locking Trading Center. The proposed amendment would also apply to orders with a Non-Displayed instruction and Aggressive instruction.¹³

⁶ See Securities Exchange Act Release No. 71449 (January 30, 2014), 79 FR 6961 (February 5, 2014) (SR-EDGX-2013-43; SR-EDGA-2013-34).

⁷ See *supra* note 5.

⁸ The Exchange notes that EDGA intends to file an identical proposal with the Commission.

⁹ The term “User” means “any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.” See Exchange Rule 1.5(ee).

¹⁰ See Exchange Rule 11.8(b).

¹¹ See Exchange Rule 1.5(d).

¹² See Exchange Rule 11.6(e)(2).

¹³ The Exchange also provides the Super Aggressive instruction which directs the System to

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act¹⁴ and furthers the objectives of Section 6(b)(5) of the Act¹⁵ because it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and, in general, to protect investors and the public interest. Specifically, the proposed changes are designed to provide Users with additional control over their orders in the context of a national market system where quotations may lock or cross orders posted to the EDGA Book and to facilitate executions on the Exchange consistent with User instructions. Thus, the proposals are directly targeted at removing impediments to and perfecting the mechanism of a free and open market and national market system. The proposed rule change also is designed to support the principles of Section 11A(a)(1)¹⁶ of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. Lastly, the Exchange notes that the proposed amendments to the Aggressive instruction previously existed on BZX and BYX as the RECYCLE routing option.¹⁷

route the order if an away Trading Center locks or crosses the limit price of the order resting on the EDGA Book. See Exchange Rule 11.6(n)(2). When any order with a Super Aggressive instruction is locked by an incoming order with a Post Only instruction that does not remove liquidity pursuant to Rule 11.6(n)(4) below, the order with a Super Aggressive instruction is converted to an executable order and will remove liquidity against such incoming order (“liquidity swap functionality”). *Id.* Once amended, the only difference between the Aggressive and Super Aggressive instructions would be that the liquidity swap functionality described above would be available to an order subject to the Super Aggressive instruction and not available to an order subject to the Aggressive instruction.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ 15 U.S.C. 78k-1(a)(1).

¹⁷ See Securities Exchange Act Release Nos. 59967 (May 21, 2009), 74 FR 25793 (May 29, 2009) (SR-BATS-2009-015) (proposing to allow the designation of an order as eligible for re-routing after being posted to the BATS Book if another Trading Center has locked or crossed the posted order); 62404 (June 30, 2010), 75 FR 39303 (July 8, 2010) (SR-BATS-2010-017) (naming the designation of an order as eligible for re-routing after being posted to the BATS Book if another Trading Center has locked or crossed the posted order as the RECYCLE routing option); and 63097 (October 13, 2010), 75 FR 64767 (October 20, 2010) (SR-BATS-2010-002) [sic] (naming the designation of an order as eligible for re-routing after being posted to the BATS Book if another Trading Center has locked or crossed the posted order as the RECYCLE routing option).

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

⁵ See Securities Exchange Act Release Nos. 76623 (December 11, 2015) (SR-BATS-2015-112), and 76625 (December 11, 2015) (SR-BYX-2015-49) (amending the Aggressive Re-Route instruction under BYX and BZX Rules 11.13(b)(4)(A) to route such orders where that order has been locked or crossed by other Trading Centers).

Consistent with Section 6(b)(5) of the Act,¹⁸ the proposed rule change, combined with the planned filing for EDGX, would allow the BGM Affiliated Exchanges to provide a consistent set of rules as it relates to the routing of orders that are locked or crossed by a Trading Center. Consistent rules, in turn, will simplify the regulatory requirements for Members of the Exchange that are also participants on EDGA, BYZ and/or BZX. The proposed rule change would provide greater harmonization between rules of similar purpose on the BGM Affiliated Exchanges, resulting in greater uniformity and less burdensome and more efficient regulatory compliance and understanding of Exchange Rules. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that proposed amendment to the Aggressive functionality encourages competition by increasing the likelihood of executions of orders that have been posted to the Exchange. The increased likelihood of an execution where the order is locked by a quotation on a Trading Center should attract additional order flow to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 Act¹⁹ and Rule 19b-4(f)(6) thereunder.²⁰

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act²¹ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)²² permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that waiver of the operative delay will allow the Exchange to immediately provide Users with additional control over their orders in the context of a national market system where quotations may lock or cross orders posted to the EDGA Book and to facilitate executions on the Exchange consistent with User instructions.²³ The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.²⁴

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.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

²¹ 17 CFR 240.19b-4(f)(6).

²² 17 CFR 240.19b-4(f)(6)(iii).

²³ The Exchange further stated that it will provide Members with reasonable advance notice of the proposed rule change's implementation date.

²⁴ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-EDGA-2015-47 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-EDGA-2015-47. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EDGA-2015-47, and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Brent J. Fields,

Secretary.

[FR Doc. 2015-32540 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

²⁵ 17 CFR 200.30-3(a)(12).

¹⁸ 15 U.S.C. 78f(b)(5).

SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

In the Matter of Yayi International, Inc.,; Order of Suspension of Trading

December 23, 2015.

It appears to the Securities and Exchange Commission (“Commission”) that there is a lack of current and accurate information concerning the securities of Yayi International, Inc. (“YYINE”)¹ (CIK No. 789860), a void Delaware corporation whose principal place of business is listed as Zhongbei Town, Xiqing District, Tianjin, China because it is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2011. On April 22, 2015, the Commission’s Division of Corporation Finance sent a delinquency letter to YYINE at the address shown in its then-most recent filing in the Commission’s EDGAR system requesting compliance with its periodic filing requirements. To date, YYINE has failed to cure its delinquencies. As of December 15, 2015, the common stock of YYINE was quoted on OTC Link operated by OTC Markets Group, Inc. (formerly “Pink Sheets”) had seven market makers and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST on December 23, 2015, through 11:59 p.m. EST on January 7, 2016.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2015-32704 Filed 12-23-15; 4:15 pm]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76711; File No. SR-EDGA-2015-46]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of EDGA Exchange, Inc.

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 17, 2015, EDGA Exchange, Inc. (the “Exchange” or “EDGA”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the Market Data section of its fee schedule to: (i) Adopt definitions for the terms “Non-Display Usage” and “Trading Platforms”; and (ii) amend the fees for EDGA Depth, to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

The text of the proposed rule change is available at the Exchange’s Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Market Data section of its fee schedule to: (i) Adopt definitions for the terms “Non-Display Usage” and “Trading Platforms”; and (ii) amend the fees for EDGA Depth to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

Definitions

The Exchange proposes to adopt definitions for the terms “Non-Display Usage” and “Trading Platforms”. The proposed definitions are designed to provide greater transparency with regard to how the Exchange assesses fees for market data. Non-Display Usage would be defined as “any method of accessing a Market Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.”⁵ The term Trading Platform would be defined as “any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).”⁶

EDGA Depth Fees

EDGA Depth is an uncompressed market data feed that provides depth-of-book quotations and execution information based on equity orders entered into the System.⁷

Internal Distributor Fee. Currently, the Exchange charges fees for both internal and external distribution of EDGA Depth. The cost of EDGA Depth for an Internal Distributor⁸ is currently

⁵ The proposed definition of Non-Display Usage is substantially similar to Nasdaq Stock Market LLC (“Nasdaq”) Rule 7023(a)(2)(B), which defines Non-Display Usage as “any method of accessing Depth-of-Book data that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.”

⁶ The proposed definition of Trading Platform is identical to the definition of Trading Platform under Nasdaq Rule 7023(a)(7).

⁷ See Exchange Rule 11.22(a) and (c).

⁸ An “Internal Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor’s own entity.”

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

¹ The short form of the issuer’s name is also its ticker symbol.

\$500 per month. The Exchange also separately charges an External Distributor⁹ of EDGA Depth a flat fee of \$2,500 per month. The Exchange does not charge Internal and External Distributors separate display User¹⁰ fees. The Exchange now proposes to increase the fee for Internal Distributors from \$500 per month to \$1,000 per month. The Exchange does not propose to amend its fees for External Distributors.

Non-Display Usage Fee. The Exchange also proposes to adopt a new fee for Non-Display Usage by Trading Platforms, which is similar to fees currently being charged by Nasdaq and the New York Stock Exchange, Inc. (“NYSE”).¹¹ As proposed, subscribers to EDGA Depth would pay a fee of \$2,000 per month for Non-Display Usage of EDGA Depth by its Trading Platforms. Trading Platforms, as defined above, include registered National Securities Exchanges, Alternative Trading Systems (“ATs”), and Electronic Communications Networks (“ECNs”) as those terms are defined in the Exchange Act and regulations and rules thereunder. The fee would be assessed in addition to existing Distributor fees. The fee of \$2,000 per month would represent the maximum charge per subscriber regardless of the number of Trading Platforms the subscriber operates and receive the data for Non-Display Usage. For example, if a subscriber operates three Trading Platforms that receives EDGA Depth for Non-Displayed Usage, that subscriber would continue to pay a total fee of \$2,000 per month, rather than paying \$6,000 per month for its three Trading Platforms (\$2,000 for each Trading Platform).

Implementation Date

The Exchange proposes to implement the proposed changes to its fee schedule on January 4, 2016.

See the Exchange Fee Schedule available at http://batstrading.com/support/fee_schedule/edga/. A “Distributor” is defined as “any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.” *Id.*

⁹ An “External Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.” *Id.*

¹⁰ A “User” is defined as “a natural person, a proprietorship, corporation, partnership, or entity, or device (computer or other automated service), that is entitled to receive Exchange data.” *Id.*

¹¹ See Nasdaq Rule 7023(d) (setting forth a Trading Platform Fee of \$5,000 per trading platform up to a maximum of three trading platforms for depth-of-book data). See also NYSE Market Data Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹² in general, and furthers the objectives of Section 6(b)(4),¹³ 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 believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all recipients of Exchange data. The Exchange believes the proposed fees are competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients. Lastly, the Exchange also believes that the proposed fees are reasonable and non-discriminatory because they will apply uniformly to all recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act¹⁴ in that it 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. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,¹⁵ 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 self-regulatory organizations 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.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange’s subscribers will be subject to the proposed fees on an equivalent basis. EDGA Depth is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation to make this data available. Accordingly, Distributors and Users can

discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Moreover, the Exchange is not required to make any proprietary data products available or to offer any specific pricing alternatives to any customers.

In addition, the fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange’s Statement on Burden on Competition, the existence of alternatives to EDGA Depth further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. If another exchange (or its affiliate) were to charge less to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute EDGA Depth, prospective Users likely would not subscribe to, or would cease subscribing to, EDGA Depth.

The Exchange notes that the Commission is not required to undertake a cost-of-service or rate-making approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.¹⁶

¹⁶ The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress’s direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE’s comments to the Commission’s 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission’s Web site at <http://www.sec.gov/rules/concept/s72899/buck1.htm>. See

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78k-1.

¹⁵ See 17 CFR 242.603.

The proposed amendment to the Internal Distributor fee for EDGA Depth is also equitable and reasonable as, despite the increase, the fee proposed continues to be less than similar fees currently charged by Nasdaq and NYSE for their depth-of-book data products.¹⁷ In addition, the proposed Non-Display Usage fee by Trading Platforms for EDGA Depth is equitable and reasonable as the fees proposed are equal to, and in some cases less than, similar fees currently charged by Nasdaq for its depth-of-book data. Like as proposed by the Exchange, Nasdaq charges subscribers to its depth-of-book data utilized by trading platforms on a non-displayed basis \$2,000 per month.¹⁸ However, unlike the Exchange, a subscriber utilizing Nasdaq depth-of-book data on more than one Trading Platform would pay \$5,000 per month for each up to a maximum fee of \$15,000. The Exchange proposes to charge the same rate regardless of the number of Trading Platforms receiving the data for Non-Display Usage operated by that subscriber.

The Trading Platform fee is also equitable and reasonable in that it ensures that heavy users of the EDGA Depth pay an equitable share of the total fees. Currently, External Distributors pay higher fees than Internal Distributors based upon their assumed higher usage levels. The Exchange believes that Trading Platforms are generally high users of the data, using it to power a matching engine for millions or even billions of trading messages per day.

Lastly, the Exchange believes that the proposed definitions are reasonable because they are designed to provide greater transparency to Members with regard to how the Exchange would assess the proposed fee for Non-Display Usage of EDGA Depth by Trading Platforms. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing the manner in which it assesses fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and eliminate

potential investor confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest. Lastly, the proposed definitions are based on existing rules of Nasdaq.¹⁹

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's ability to price EDGA Depth is constrained by: (i) Competition among exchanges, other trading platforms, and Trade Reporting Facilities ("TRF") that compete with each other in a variety of dimensions; (ii) the existence of inexpensive real-time consolidated data and market-specific data and free delayed data; and (iii) the inherent contestability of the market for proprietary data.

The Exchange and its market data products are subject to significant competitive forces and the proposed fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.

In addition, EDGA Depth competes with a number of alternative products. For instance, EDGA Depth does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce depth-of-book information products, and many currently do, including Nasdaq and NYSE.

In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on Exchange data products and the Exchange's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting the proposed data product fees. The proposed data product fees are, in part, responses to that pressure. The Exchange believes that the proposed

fees would reflect an equitable allocation of its overall costs to users of its facilities.

In addition, when establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all Users. The existence of alternatives to EDGA Depth, including existing similar feeds by other exchanges, consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

The Exchange believes the proposed increase to the Internal Distributor fee and adoption of the fee for Non-Display Usage by Trading Platforms for EDGA Depth would increase competition amongst the exchanges that offer depth-of-book products. The Exchange notes that, despite the proposed increase, the Internal Distribution fee for EDGA Depth continues to be less than similar fees currently charged by Nasdaq and NYSE for its depth-of-book data.²⁰ In addition, the proposed Non-Display Usage fee by Trading Platforms is equal to, and in some cases less than, similar fees currently charged by Nasdaq for its Depth-of-Book data.²¹

Lastly, the proposed definitions will not result in any burden on competition. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing the manner in which it assesses fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and are not designed to have a competitive impact.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

¹⁷ See Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (SR-NYSE-2014-64) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish an Access Fee for the NYSE Best Quote and Trades Data Feed, Operative December 1, 2014).

¹⁸ See Nasdaq Rule 7023(c) (providing for fees of \$25,000 to \$500,000 to internal distributors of Nasdaq Depth-of-Book products). See also NYSE Market Data Fees, November 2015 (providing a \$5,000 per month access fee for NYSE OpenBook).

¹⁹ See Nasdaq Rule 7023(d). See also NYSE Market Data Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

¹⁹ Nasdaq Rules 7023(a)(1)(B) [sic] and (a)(7).

²⁰ See *supra* note 17.

²¹ See *supra* note 18.

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 Act²² and paragraph (f) of Rule 19b-4 thereunder.²³ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-EDGA-2015-46 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-EDGA-2015-46. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EDGA-2015-46, and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Brent J. Fields,

Secretary.

[FR Doc. 2015-32539 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-31946; 811-8025]

Self Storage Group, Inc.; Notice of Application

December 21, 2015.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application for deregistration under section 8(f) of the Investment Company Act of 1940 (the "Act").

SUMMARY OF APPLICATION: Self Storage Group, Inc. requests an order declaring that it has ceased to be an investment company.

APPLICANT: Self Storage Group, Inc.

FILING DATES: The application was filed on March 28, 2014, and amended on September 19, 2014, and September 25, 2015.

HEARING OR NOTIFICATION OF HEARING: An order granting the request will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 15, 2016, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: The Commission: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

Applicant: 11 Hanover Square, 12th Floor, New York, NY 10005.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at (202) 551-6879, or David P. Bartels, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Applicant's Representations

1. From 1983 through 1996, applicant operated as a diversified series of shares of Bull & Bear Incorporated, an open-end management investment company. Applicant became separately incorporated under the laws of the State of Maryland in December 1996 and registered under the Act as a closed-end management investment company in January 1997. Applicant, formerly known as Global Income Fund, Inc., changed its name to Self Storage Group, Inc., effective November 2013.

2. On February 29, 2012, applicant's stockholders approved a proposal to change the nature of applicant's business so as to cease to be an investment company and to become an operating company that would own, operate, manage, acquire, develop and redevelop professionally managed self storage facilities and would seek to qualify as a real estate investment trust ("REIT") for federal tax purposes (the "Business Proposal").¹ Applicant states that, for this purpose, "professionally managed self storage facility" refers to a type of real property that offers storage space rental, generally on a month-to-month basis, for personal or business use. Applicant represents that it manages and operates each of its self

¹ The Business Proposal permits applicant to invest in "real estate assets," which according to applicant the Internal Revenue Code defines to include, in addition to real property, interests in REITs, interests in mortgages on real property and other investments in the real estate investment, service and related industries. Applicant concedes that some or all of these additional types of assets may be considered investment securities within the meaning of section 3(a)(2) of the Act. However, applicant intends to invest primarily in real property self storage facilities and represents that it will limit its investments in other real estate assets to avoid classification as an investment company under the Act.

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f).

²⁴ 17 CFR 200.30-3(a)(12).

storage facilities using its own personnel and does not intend to retain third party management for any of its self storage facilities.

3. Applicant states that, following stockholder approval, it has taken steps to implement the Business Proposal. In particular, on June 15, 2012, applicant's board of directors (the "Board") approved the termination of applicant's management contract with an outside investment adviser and applicant became internally managed by its officers and employees. In addition, applicant's management commenced seeking acquisition opportunities in real property self storage facilities. Applicant states that those efforts have resulted in its assets being concentrated in several wholly owned subsidiaries, all of which own and operate real property self storage facilities. Applicant represents that none of these subsidiaries is an investment company as defined in section 3(a) of the Act or is relying on the exception from the definition of investment company in section 3(c)(1) or section 3(c)(7) of the Act.

4. Applicant states that, as of December 31, 2014, and June 30, 2015, applicant's wholly owned subsidiaries represented approximately 81% and 82%, respectively, of its total assets measured at fair value on an unconsolidated basis (exclusive of Government securities and cash items), and each of applicant's wholly owned subsidiaries held at least 90% of its assets in direct investments in real property self storage facilities. Applicant further states that, as of December 31, 2014, and June 30, 2015, its holdings of investment securities (as defined in section 3(a) of the Act) ("Investment Securities") represented approximately 9% and 10%, respectively, and cash items represented approximately 10% and 9% of its total assets on an unconsolidated basis.

5. Applicant states that, for the six months ended June 30, 2015, on a consolidated basis, it derived approximately 69% of its gross income from its operation of self storage facilities, approximately 29% from realized gains from divestment of its holdings of Investment Securities, approximately 3% from dividends paid by its holdings of Investment Securities, and less than 1% from its cash items.² Applicant anticipates currently that, for fiscal 2015, on a consolidated basis, it will derive approximately 75% of its gross income from its operation of self storage facilities, approximately 23%

² Applicant states that none of its subsidiaries derives any of its gross income from securities.

from realized gains from divestment of its holdings of Investment Securities, approximately 2% from dividends paid by its holdings of Investment Securities, and less than 1% from its cash items. In addition, applicant states that, for the last four fiscal quarters combined, no more than 45 percent of its consolidated net income after taxes was derived from securities (other than securities issued by companies (i) that are wholly owned by applicant, (ii) through which applicant engages in a business other than that of investing, reinvesting, owning, holding or trading in securities and (iii) that are not investment companies).

6. Applicant expects to continue to earn a majority of its gross income from its self storage facility operations and expects its income from Investment Securities and a time deposit to continue to decrease as it continues to divest its holdings of Investment Securities.

7. Applicant represents that, since stockholders approved the Business Proposal, it has consistently represented to the public that it is primarily engaged in the business of owning, operating, managing, acquiring, developing, and redeveloping professionally managed self storage facilities. In addition, applicant asserts that its president and other officers spend substantially all of the time that they devote to applicant's business on (a) overseeing and guiding the management of its wholly owned subsidiaries' self storage facilities and (b) conducting strategic review of applicant's lines of business in order to determine if these units are appropriately structured to implement applicant's objectives. Applicant states that its president and other officers spend no time engaged in investing and reinvesting applicant's assets in Investment Securities other than to continue to divest applicant's holdings of Investment Securities. Likewise, applicant asserts that its Board has shifted its focus from oversight of a company engaged in the business of investing and reinvesting in securities to oversight of a company engaged in the business of owning and operating real property self storage facilities.

8. Applicant states that it is not currently a party to any litigation or administrative proceeding and has timely complied with its obligations to file annual and other reports with the Commission.

9. Applicant represents that, if the requested order is granted, it will seek to list its common stock on NASDAQ and will be subject to the reporting and other requirements of the Exchange Act.

Applicant's Legal Analysis

1. Section 8(f) of the Act provides that whenever the Commission, upon application or its own motion, finds that a registered investment company has ceased to be an investment company, the Commission shall so declare by order and upon the taking effect of such order, the registration of such company shall cease to be in effect.

2. Section 3(a)(1)(A) of the Act defines an "investment company" as any issuer that "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities." Section 3(a)(1)(C) of the Act defines an "investment company" as any issuer that "is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis."³

3. Section 3(b)(1) of the Act provides that "[n]otwithstanding paragraph (1)(C) of subsection (a), none of the following persons is an investment company within the meaning of this title: (1) Any issuer primarily engaged, directly or through a wholly owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities." Rule 3a-1 under the Act states that "[n]otwithstanding section 3(a)(1)(C) of the Act, an issuer will be deemed not to be an investment company under the Act, provided, that: (a) no more than 45 percent of the value (as defined in section 2(a)(41) of the Act) of such issuer's total assets (exclusive of Government securities and cash items) consists of, and no more than 45 percent of such issuer's net income after taxes (for the last four fiscal quarters combined) is derived from, securities other than: (1) Government securities; (2) securities issued by employees' securities companies; (3) securities issued by majority-owned subsidiaries of the issuer (other than subsidiaries relying on the exclusion from the definition of investment company in section 3(b)(3) or (c)(1) of the Act) which are not

³ Section 3(a)(2) of the Act defines "investment securities" as "all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c)."

investment companies; and (4) securities issued by companies: (i) which are controlled primarily by such issuer; (ii) through which such issuer engages in a business other than that of investing, reinvesting, owning, holding or trading in securities; and (iii) which are not investment companies; (b) the issuer is not an investment company as defined in section 3(a)(1)(A) or 3(a)(1)(B) of the Act and is not a special situation investment company; and (c) the percentages described in paragraph (a) of this section are determined on an unconsolidated basis, except that the issuer shall consolidate its financial statements with the financial statements of any wholly-owned subsidiaries.”

4. Applicant states that it is no longer an investment company as defined in section 3(a)(1)(A) or section 3(a)(1)(C). As noted above, applicant states that, for the last four fiscal quarters combined, no more than 45 percent of its consolidated net income after taxes was derived from securities (other than securities issued by companies (i) that are wholly owned by applicant, (ii) through which applicant engages in a business other than that of investing, reinvesting, owning, holding or trading in securities and (iii) that are not investment companies). Applicant asserts that it is primarily engaged in the business of owning, operating, managing, acquiring, developing, and redeveloping professionally managed self storage facilities through its wholly owned subsidiaries. Applicant argues that its historical development, its public representations, the activities of its directors and officers, the nature of its present assets and the sources of its present income support this assertion. Applicant states that it is thus qualified for an order of the Commission pursuant to section 8(f) of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,
Secretary.

[FR Doc. 2015–32579 Filed 12–24–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76719; File No. SR–NYSEArca–2015–73]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment Nos. 3, 4, 5, and 6 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 3, 4, 5 and 6, To List and Trade of Shares of the Guggenheim Total Return Bond ETF Under NYSE Arca Equities Rule 8.600

December 21, 2015.

I. Introduction

On September 1, 2015, NYSE Arca, Inc. (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Guggenheim Total Return Bond ETF (“Fund”) under NYSE Arca Equities Rule 8.600. On September 15, 2015, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission published notice of the proposed rule change, as modified by Amendment No. 1 thereto, in the **Federal Register** on September 22, 2015.⁴ On September 22, 2015, the Exchange submitted Amendment No. 3 to the proposed rule change.⁵ On November 5, 2015, pursuant to Section 19(b)(2) of the Act,⁶ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁷ On November 23, 2015, December 14, 2015, and December 16, 2015, the Exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ Amendment No. 1 to the proposed rule change replaced and superseded the original filing in its entirety.

⁴ See Securities Exchange Act Release No. 75930 (September 16, 2015), 80 FR 57251 (“Notice”).

⁵ On September 21, 2015, the Exchange submitted and withdrew Amendment No. 2 to the proposal. In Amendment No. 3, the Exchange clarified certain representations regarding the availability of quotation, last sale, and pricing information for the Shares and the instruments in which the Fund may invest. Amendment No. 3 is available at <http://www.sec.gov/comments/sr-nysearca-2015-73/nysearca201573-2.pdf>.

⁶ 15 U.S.C. 78s(b)(2).

⁷ See Securities Exchange Act Release No. 76362, 80 FR 70044 (November 12, 2015). The Commission designated December 21, 2015 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

submitted Amendment Nos. 4, 5, and 6, respectively, to the proposed rule change.⁸ The Commission is publishing this notice to solicit comment on Amendment Nos. 3, 4, 5 and 6 to the proposed rule change from interested persons and is approving the proposed rule change, as modified by Amendment Nos. 1, 3, 4, 5 and 6, on an accelerated basis.

II. The Exchange’s Description of the Proposal⁹

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange.¹⁰ The Shares will be offered by the Claymore Exchange-Traded Fund Trust 2 (“Trust”),¹¹ a statutory trust organized

⁸ Amendment No. 4 replaced and superseded the original filing, as modified by Amendment Nos. 1 and 3, in its entirety. Amendment No. 4 is available at <http://www.sec.gov/comments/sr-nysearca-2015-73/nysearca201573-3.pdf>. Amendment No. 5 replaced and superseded the original filing, as modified by Amendment Nos. 1, 3 and 4, in its entirety. Amendment No. 5 is available at <http://www.sec.gov/comments/sr-nysearca-2015-73/nysearca201573-4.pdf>. Amendment No. 6 replaced and superseded the original filing, as modified by Amendment Nos. 1, 3, 4 and 5, in its entirety.

⁹ Additional information regarding the Fund, the Trust (as defined herein), and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings, disclosure policies, calculation of net asset value (“NAV”), distributions, and taxes, among other things, can be found in the Notice and the Registration Statement, as applicable. See Notice, *supra* note 4, and Registration Statement, *infra* note 11.

¹⁰ The Commission previously approved a proposed rule change relating to listing and trading of shares of the Guggenheim Enhanced Total Return ETF under NYSE Arca Equities Rule 8.600. See Securities Exchange Act Release Nos. 68488 (December 20, 2012), 77 FR 76326 (December 27, 2012) (SR–NYSEArca–2012–142) (“Prior Notice”); and 68863 (February 7, 2013), 78 FR 10222 (February 13, 2013) (SR–NYSEArca–2012–142) (“Prior Order” and, together with the Prior Notice, “Prior Release”). The Exchange represents that shares of the Guggenheim Enhanced Total Return ETF have not commenced listing and trading on the Exchange, that the Fund would replace the Guggenheim Enhanced Total Return ETF as approved in the Prior Release, and that the Notice supersedes the Prior Release in its entirety. The Exchange represents that prior to commencement of trading of Shares of the Fund, the Trust will file an amendment to its Registration Statement to change the name of the Guggenheim Enhanced Total Return ETF to the name of the Fund.

¹¹ The Exchange states that the Trust is registered under the 1940 Act. According to the Exchange, on November 25, 2014, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) (“Securities Act”) and the 1940 Act relating to the Fund (File Nos. 333–135105 and 811–21910) (“Registration Statement”). The Exchange states that the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29271 (May 18, 2010) (File No. 812–13534) (“Exemptive Order”).

under the laws of the State of Delaware and registered with the Commission as an open-end management investment company. The investment adviser for the Fund is Guggenheim Partners Investment Management, LLC (“Adviser”).¹² The Bank of New York Mellon is the custodian and transfer agent for the Fund. Guggenheim Funds Distributors, LLC is the distributor for the Fund.

A. The Fund’s Principal Investments

The Exchange states that the Fund’s investment objective is to seek maximum total return, comprised of income and capital appreciation. According to the Exchange, the Fund will normally¹³ invest at least 80% of its assets in “Fixed Income Instruments” (as defined below) of varying maturities and of any credit quality, which may be represented by certain derivative instruments as discussed below,¹⁴ and exchange-traded funds (“ETFs”)¹⁵ and exchange-traded and over-the-counter (“OTC”) closed-end funds (“CEFs”) (which may include ETFs and CEFs affiliated with the Fund)

¹² The Exchange states that the Adviser is affiliated with a broker-dealer and has represented that it has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the portfolio. In the event (a) the Adviser or any sub-adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, such adviser or sub-adviser will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition of and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

¹³ The term “normally” includes, but is not limited to, the absence of extreme volatility or trading halts in the securities markets or the financial markets generally; circumstances under which the Fund’s investments are made for temporary defensive purposes; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

¹⁴ See Section II.D, *infra*. The Exchange states that the Fund will invest in the following derivative instruments on Fixed-Income Securities: Foreign exchange forward contracts; exchange-traded futures on securities, indices, currencies and other investments; exchange-traded and OTC options; exchange-traded and OTC options on futures contracts; exchange-traded and OTC interest rate swaps, cross-currency swaps, total return swaps, inflation swaps, and credit default swaps; and options on such swaps.

¹⁵ For purposes of this filing, ETFs consist of Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)), Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). All ETFs will be listed and traded in the U.S. on a national securities exchange. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) ETFs.

that invest substantially all of their assets in Fixed Income Instruments (the “80% Policy”). The Fund has no target duration for its investment portfolio.

The Fixed Income Instruments¹⁶ in which the Fund will invest, as described further below, are the following: Corporate debt securities of U.S. and non-U.S. issuers, including corporate bonds;¹⁷ inflation-indexed bonds issued both by governments and corporations;¹⁸ securities issued by the U.S. government or its agencies, instrumentalities, or sponsored corporations (including those not backed by the full faith and credit of the U.S. government); debt securities issued by states or local governments and their agencies, authorities, and other government-sponsored enterprises; obligations of non-U.S. governments and their subdivisions, agencies, and government-sponsored enterprises; obligations of international agencies or supranational entities; cash equivalents;¹⁹ agency and non-agency mortgage-backed securities (“MBS”) and asset-backed securities (“ABS”);²⁰ U.S.

¹⁶ Fixed Income Instruments may be of varying maturities and of any credit quality rating.

¹⁷ The Adviser expects that normally the Fund generally will seek to invest at least 75% of its corporate debt securities assets in issuances that have at least \$100,000,000 par amount outstanding in developed countries or at least \$200,000,000 par amount outstanding in emerging market countries.

¹⁸ Inflation-indexed bonds (other than municipal inflation-indexed bonds and certain corporate inflation-indexed bonds) are fixed income securities whose principal value is periodically adjusted according to the rate of inflation (e.g., Treasury Inflation Protected Securities (“TIPS”). Municipal inflation-indexed securities are municipal bonds that pay coupons based on a fixed rate plus the Consumer Price Index for All Urban Consumers. With regard to municipal inflation-indexed bonds and certain corporate inflation-indexed bonds, the inflation adjustment is reflected in the semi-annual coupon payment.

¹⁹ Cash equivalents in which the Fund may invest include U.S. Treasury Bills, investment grade commercial paper, cash, and Short Term Investment Funds (“STIFs”). STIFs are a type of fund that invests in short-term investments of high quality and low risk.

²⁰ The MBS in which the Fund may invest may also include residential mortgage-backed securities (“RMBS”), collateralized mortgage obligations (“CMOs”), and commercial mortgage-backed securities (“CMBS”). The ABS in which the Fund may invest includes collateralized debt obligations (“CDOs”). CDOs include collateralized bond obligations (“CBOs”), collateralized loan obligations (“CLOs”), and other similarly structured securities. A CBO is a trust which is backed by a diversified pool of high risk, below investment grade fixed income securities. A CLO is a trust typically collateralized by a pool of loans, which may include domestic and foreign senior secured loans, senior unsecured loans, and subordinate corporate loans, including loans that may be rated below investment grade or equivalent unrated loans. Specifically, the Exchange notes that such ABS are bonds backed by pools of loans or other receivables and are securitized by a wide variety of assets that are generally broken into three categories: Consumer, commercial, and corporate.

agency mortgage pass-through securities;²¹ repurchase agreements; convertible securities;²² preferred securities;²³ bank capital;²⁴ commercial instruments;²⁵ variable or floating rate instruments and variable rate demand instruments;²⁶ zero-coupon and pay-in-

The consumer category includes credit card, auto loan, student loan, and timeshare loan ABS. The commercial category includes trade receivables, equipment leases, oil receivables, film receivables, rental cars, aircraft securitizations, ship and container securitizations, whole business securitizations, and diversified payment right securitizations. Corporate ABS includes cash flow collateralization loan obligations, collateralized by both middle market and broadly syndicated bank loans. An ABS is issued through a special purpose vehicle that is bankruptcy remote from the issuer of the collateral. The credit quality of an ABS tranche depends on the performance of the underlying assets and the structure. To protect ABS investors from the possibility that some borrowers could miss payments or even default on their loans, ABS include various forms of credit enhancement.

²¹ The Fund will seek to obtain exposure to U.S. agency mortgage pass-through securities primarily through the use of “to-be-announced” or “TBA transactions.” “TBA” refers to a commonly used mechanism for the forward settlement of U.S. agency mortgage pass-through securities, and not to a separate type of mortgage-backed security. Most transactions in mortgage pass-through securities occur through the use of TBA transactions. TBA transactions generally are conducted in accordance with widely-accepted guidelines which establish commonly observed terms and conditions for execution, settlement, and delivery.

²² Convertible securities include bonds, debentures, notes, and other securities that may be converted into a prescribed amount of common stock or other equity securities at a specified price and time.

²³ The preferred securities in which the Fund may invest include preferred stock, contingent capital securities, contingent convertible securities, capital securities, and hybrid securities of debt and preferred stock. The Fund may invest in preferred securities traded on an exchange or OTC. Preferred securities pay fixed or adjustable rate dividends to investors, and have “preference” over common stock in the payment of dividends and the liquidation of a company’s assets.

²⁴ There are two common types of bank capital: Tier I and Tier II. Bank capital is generally, but not always, of investment grade quality. Tier I securities are typically preferred stock or contingent capital securities. Tier I securities are often perpetual or long-dated (with no maturity date). Tier II securities are typically subordinated debt securities.

²⁵ Commercial instruments include commercial paper, master notes, asset-backed commercial paper, and other short-term corporate instruments. Commercial paper normally represents short-term unsecured promissory notes issued in bearer form by banks or bank holding companies, corporations, finance companies and other issuers. Commercial paper may be traded in the secondary market after its issuance. Master notes are demand notes that permit the investment of fluctuating amounts of money at varying rates of interest pursuant to arrangements with issuers who meet the quality criteria of the Fund. Master notes are generally illiquid and therefore subject to the Fund’s percentage limitations for investments in illiquid securities. Asset-backed commercial paper is issued by a special purpose entity that is organized to issue the commercial paper and to purchase trade receivables or other financial assets.

²⁶ Variable or floating rate instruments and variable rate demand instruments, including variable amount master demand notes, will

kind securities;²⁷ bank instruments, including certificates of deposit (“CDs”), time deposits, and bankers’ acceptances from U.S. banks;²⁸ and participations in and assignments of bank loans or corporate loans, which loans include senior loans, syndicated bank loans, junior loans, bridge loans,²⁹ unfunded commitments,³⁰ revolving credit facilities (“revolvers”),³¹ and participation interests.³²

normally involve industrial development or revenue bonds that provide that the rate of interest is set as a specific percentage of a designated base rate (such as the prime rate) at a major commercial bank. In addition, the interest rate on these securities may be reset daily, weekly or on some other reset period and may have a floor or ceiling on interest rate changes. The Adviser will monitor the pricing, quality and liquidity of the variable or floating rate securities held by the Fund.

²⁷ Zero-coupon and pay-in-kind securities are debt securities that do not make regular cash interest payments. Zero-coupon securities are sold at a deep discount to their face value. Pay-in-kind securities pay interest through the issuance of additional securities.

²⁸ A bankers’ acceptance is a bill of exchange or time draft drawn on and accepted by a commercial bank. A CD is a negotiable interest-bearing instrument with a specific maturity.

²⁹ Bridge loans are short-term loan arrangements (e.g., maturities that are generally less than one year) typically made by a borrower following the failure of the borrower to secure other intermediate-term or long-term permanent financing. A bridge loan remains outstanding until more permanent financing, often in the form of high yield notes, can be obtained. Most bridge loans have a step-up provision under which the interest rate increases incrementally the longer the loan remains outstanding so as to incentivize the borrower to refinance as quickly as possible. In exchange for entering into a bridge loan, the Fund typically will receive a commitment fee and interest payable under the bridge loan and may also have other expenses reimbursed by the borrower. Bridge loans may be subordinate to other debt and generally are unsecured.

³⁰ Unfunded commitments are contractual obligations pursuant to which the Fund agrees in writing to make one or more loans up to a specified amount at one or more future dates. The underlying loan documentation sets out the terms and conditions of the lender’s obligation to make the loans as well as the economic terms of such loans. The portion of the amount committed by a lender that the borrower has not drawn down is referred to as “unfunded.” Loan commitments may be traded in the secondary market through dealer desks at large commercial and investment banks although these markets are generally not considered liquid.

³¹ Revolving credit facilities (“revolvers”) are borrowing arrangements in which the lender agrees to make loans up to a maximum amount upon demand by the borrower during a specified term. As the borrower repays the loan, an amount equal to the repayment may be borrowed again during the term of the revolver. Revolvers usually provide for floating or variable rates of interest.

³² All or a significant portion of the loans in which the Fund will invest may be below investment grade quality. The Fund normally will invest at least 75% of its bank loan or corporate loan assets, which includes senior loans, syndicated bank loans, junior loans, bridge loans, unfunded commitments, revolvers and participation interests, in issuances that have at least \$100 million par amount outstanding.

With respect to Fixed Income Instrument investments, the Fund may invest in restricted securities (Rule 144A securities), which are subject to legal restrictions on their sale. In addition, with respect to Fixed Income Instrument investments, the Fund may, without limitation, seek to obtain market exposure to the securities in which it primarily invests by entering into a series of purchase and sale contracts or by using other investment techniques (such as buy backs or dollar rolls).

The Fund may also use leverage to the extent permitted under the 1940 Act by entering into reverse repurchase agreements and borrowing transactions (principally lines of credit) for investment purposes. The Fund’s exposure to reverse repurchase agreements will be covered by securities having a value equal to or greater than such commitments. The Exchange represents that, under the 1940 Act, reverse repurchase agreements are considered borrowings. Although there is no limit on the percentage of Fund assets that can be used in connection with reverse repurchase agreements, the Portfolio does not expect to engage, under normal circumstances, in reverse repurchase agreements with respect to more than 33 1/3% of its assets.

B. The Fund’s Other Investments

While the Fund normally will invest at least 80% of its assets in the securities and financial instruments described above, the Fund may invest its remaining assets in exchange-traded and OTC hybrid instruments, which combine a traditional stock, bond, or commodity with an option or forward contract. Generally, the principal amount, amount payable upon maturity or redemption, or interest rate of a hybrid is tied (positively or negatively) to the price of some commodity, currency or securities index or another interest rate or some other economic factor (“underlying benchmark”).³³ The Fund is also permitted to invest in

³³ According to the Exchange, certain hybrid instruments may provide exposure to the commodities markets. These are derivative securities with one or more commodity-linked components that have payment features similar to commodity futures contracts, commodity options, or similar instruments. Commodity-linked hybrid instruments may be either equity or debt securities, and are considered hybrid instruments because they have both security and commodity-like characteristics. A portion of the value of these instruments may be derived from the value of a commodity, futures contract, index or other economic variable. The Fund would only invest in commodity-linked hybrid instruments that qualify, under applicable rules of the Commodity Futures Trading Commission, for an exemption from the provisions of the Commodity Exchange Act (7 U.S.C. 1).

structured notes, which are debt obligations that also contain an embedded derivative component with characteristics that adjust the obligation’s risk/return profile. Generally, the performance of a structured note will track that of the underlying debt obligation and the derivative embedded within it. Further, the Fund may invest in credit-linked notes, which are a type of structured note,³⁴ and risk-linked securities (“RLS”), which are a form of derivative issued by insurance companies and insurance-related special purpose vehicles that apply securitization techniques to catastrophic property and casualty damages.³⁵ The Fund may invest a portion of its assets in high-quality money market instruments and U.S. and foreign common stocks, both exchange-listed and OTC, and may gain exposure to commodities through the use of investments in exchange-traded products (“ETPs”)³⁶ and exchange-traded notes (“ETNs”).³⁷ Finally, the Fund may invest in the securities of exchange-traded and OTC real estate investment trusts (“REITs”).

C. The Fund’s Investment Restrictions

The Fund may invest up to 20% of its total assets in the aggregate in MBS and ABS that are privately issued, non-agency, and non-government sponsored entity (“Private MBS/ABS”), and in

³⁴ The difference between a credit default swap and a credit-linked note is that the seller of a credit-linked note receives the principal payment from the buyer at the time the contract is originated. Through the purchase of a credit-linked note, the buyer assumes the risk of the reference asset and funds this exposure through the purchase of the note. The buyer takes on the exposure to the seller to the full amount of the funding it has provided. The seller has hedged its risk on the reference asset without acquiring any additional credit exposure. The Fund has the right to receive periodic interest payments from the issuer of the credit-linked note at an agreed-upon interest rate and a return of principal at the maturity date.

³⁵ RLS are typically debt obligations for which the return of principal and the payment of interest are contingent on the non-occurrence of a pre-defined “trigger event.” Depending on the specific terms and structure of the RLS, this trigger could be the result of a hurricane, earthquake or some other catastrophic event. Insurance companies securitize this risk to transfer to the capital markets the truly catastrophic part of the risk exposure. A typical RLS provides for income and return of capital similar to other fixed income investments, but would involve full or partial default if losses resulting from a certain catastrophe exceeded a predetermined amount.

³⁶ Such ETPs include Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); and Trust Units (as described in NYSE Arca Equities Rule 8.500).

³⁷ ETNs include Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)).

asset-backed commercial paper. Such holdings would be subject to the respective limitations on the Fund's investments in illiquid assets and high yield securities. The liquidity of a security, especially in the case of Private MBS/ABS, will be a substantial factor in the Fund's security selection process. The Fund may invest in defaulted or distressed Private MBS/ABS.

The Fund may invest up to 20% of its total assets in the aggregate in participations in and assignments of bank loans or corporate loans, which loans include syndicated bank loans, junior loans, bridge loans, unfunded commitments, revolvers and participation interests (but specifically do not include senior loans), in structured notes, in credit-linked notes, in risk-linked securities, in OTC REITs, and in OTC hybrid instruments. Such holdings would be subject to the respective limitations on the Fund's investments in illiquid assets and high yield securities. The liquidity of such securities will be a substantial factor in the Fund's security selection process.

The Fund may invest in debt securities and instruments that are economically tied to emerging market countries and may invest without limitation in securities denominated in foreign currencies and in U.S. dollar-denominated securities of foreign issuers.³⁸ Further, the Fund may invest up to 33⅓% of its total assets in high yield debt securities ("junk bonds"), which are debt securities that are rated below investment grade by nationally recognized statistical rating organizations, or are unrated securities that the Adviser believes are of comparable below investment grade quality.

The Fund will be considered non-diversified and can invest a greater portion of assets in securities of individual issuers than a diversified fund. However, the Fund may not invest more than 25% of the value of its net assets in securities of issuers in any one industry or group of industries. This restriction does not apply to obligations issued or guaranteed by the U.S.

³⁸ See *supra* note 17. Generally, the Fund considers an instrument to be economically tied to an emerging market country through consideration of some or all of the following factors: (i) Whether the issuer is the government of the emerging market country (or any political subdivision, agency, authority or instrumentality of such government), or is organized under the laws of the emerging market country; (ii) amount of the issuer's revenues that are attributable to the emerging market country; (iii) the location of the issuer's management; (iv) if the security is secured or collateralized, the country in which the security or collateral is located; and/or (v) the currency in which the instrument is denominated or currency fluctuations to which the issuer is exposed.

Government, its agencies or instrumentalities.

The Fund's investments, including investments in derivative instruments, are subject to all of the restrictions under the 1940 Act, including restrictions with respect to illiquid assets. The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities, Private MBS/ABS, master notes, loans and loan commitments deemed illiquid by the Adviser,³⁹ consistent with Commission guidance. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, while the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N-1A).⁴⁰

D. The Fund's Use of Derivatives

According to the Exchange, the Fund proposes to seek certain exposures through derivative transactions. The Fund may invest in the following derivative instruments: Foreign exchange forward contracts; exchange-traded futures on securities, indices, currencies and other investments; exchange-traded and OTC options; exchange-traded and OTC options on futures contracts; exchange-traded and

³⁹ In reaching liquidity decisions with respect to Rule 144A securities, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers willing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.*, the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

⁴⁰ The Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following the Fund's first full calendar year of performance.

OTC interest rate swaps, cross-currency swaps, total return swaps, inflation swaps and credit default swaps; and options on such swaps ("swaptions").⁴¹ The Fund may, but is not required to, use derivative instruments for risk management purposes or as part of its investment strategies.⁴² The Fund may also engage in derivative transactions for speculative purposes to enhance total return, to seek to hedge against fluctuations in securities prices, interest rates or currency rates, to change the effective duration of its portfolio, to manage certain investment risks and/or as a substitute for the purchase or sale of securities or currencies.

The Exchange states that investments in derivative instruments will be made in accordance with the 1940 Act and consistent with the Fund's investment objective and policies. To limit the potential risk associated with such transactions, the Fund will segregate or " earmark " assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees ("Board") and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations under derivative instruments. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk.

In addition to the Fund's use of derivatives in connection with its 80% Policy, under the proposal the Exchange states that the Fund will seek to invest in derivative instruments not based on Fixed-Income Instruments, consistent with the Fund's investment restrictions relating to exposure to those asset classes.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and

⁴¹ Options on swaps are traded OTC. In the future, in the event that there are exchange-traded options on swaps, the Fund may invest in these instruments.

⁴² The Fund will seek, where possible, to use counterparties whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser will monitor the financial standing of counterparties on an ongoing basis. This monitoring may include information provided by credit agencies, as well as the Adviser's credit analysts and other team members who evaluate approved counterparties using various methods of analysis, including but not limited to earnings updates, the counterparty's reputation, the Adviser's past experience with the broker-dealer, market levels for the counterparty's debt and equity, the counterparty's liquidity and its share of market participation.

regulations thereunder applicable to a national securities exchange.⁴³ In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 3, 4, 5 and 6, is consistent with Section 6(b)(5) of the Exchange Act,⁴⁴ which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,⁴⁵ which sets forth the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

According to the Exchange, quotation and last sale information will be available via the Consolidated Tape Association ("CTA") high-speed line for the Shares and for the following U.S. exchange-traded securities: Common stocks, hybrid instruments, convertible securities, preferred securities, REITs, CEFs, ETFs, ETPs, and ETNs. Intra-day price information for foreign exchange-traded stocks will be available from the applicable foreign exchange and from major market data vendors. Intra-day price information for exchange-traded derivative instruments will be available from the applicable exchange and from major market data vendors. Intra-day price information for OTC REITs, OTC common stocks, OTC CEFs, OTC options, money market instruments, forwards, structured notes, RLS, OTC derivative instruments, and OTC hybrid instruments will be available from major market data vendors. Intraday and closing price information for exchange-traded options and futures will be available from the applicable exchange and from major market data vendors. In addition, intra-day price information for U.S. exchange-traded options is available from the Options Price Reporting Authority. Intra-day and closing price information from brokers

and dealers or independent pricing services will be available for Fixed Income Instruments.

In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.⁴⁶ On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of NAV at the end of the business day.⁴⁷

The NAV for the Shares will be calculated after 4:00 p.m. Eastern Time each trading day. A basket composition file, which will include the security names and share quantities required to be delivered in exchange for the Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange via the National Securities Clearing Corporation. Information regarding market price and trading volume for the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be

⁴⁶ Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Portfolio Indicative Values taken from CTA or other data feeds.

⁴⁷ On a daily basis, the Adviser will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, commodity, index or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge. The Fund's disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions intraday.

necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.⁴⁸ Trading in Shares of the Fund will be halted if the circuit-breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.⁴⁹ Trading in the Shares also will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. The Exchange represents that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Adviser is affiliated with a broker-dealer and has represented that it has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.⁵⁰ Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio of the Fund must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.⁵¹

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders ("ETP Holders") in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by regulatory staff of the Exchange, or the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations

⁴⁸ See NYSE Arca Equities Rule 8.600(d)(1)(B).

⁴⁹ These may include: (1) The extent to which trading is not occurring in the securities or the financial instruments constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

⁵⁰ See *supra* note 12. The Exchange represents that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940.

⁵¹ See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

⁴³ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴⁴ 15 U.S.C. 78f(b)(5).

⁴⁵ 15 U.S.C. 78k-1(a)(1)(C)(iii).

of Exchange rules and applicable federal securities laws.⁵²

The Exchange represents that it deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has also made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) Trading in the Shares will be subject to the existing trading surveillances, administered by regulatory staff of the Exchange, or FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

(4) FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, will communicate as needed regarding trading in the Shares, certain exchange-traded options and futures, certain exchange-traded equities (including ETFs, ETPs, ETNs, CEFs, certain common stocks, and certain REITs) with other markets or other entities that are members of the Intermarket Surveillance Group ("ISG"), and FINRA or regulatory staff of the Exchange may obtain trading information regarding trading in the Shares, certain exchange-traded options and futures, certain exchange-traded equities (including ETFs, ETPs, ETNs, CEFs, certain common stocks and certain REITs) from such markets or entities. In addition, the Exchange may obtain information regarding trading in the Shares, certain exchange-traded options and futures, certain exchange-traded equities (including ETFs, ETPs, ETNs, CEFs, certain common stocks, and certain REITs) from markets or other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund

reported to FINRA's Trade Reporting and Compliance Engine.

(5) Prior to the commencement of trading of the Shares, the Exchange will inform its ETP Holders in a Bulletin of the special characteristics and risks associated with trading the Shares. The Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in creation units (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (d) how information regarding the Portfolio Indicative Value and the Disclosed Portfolio is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(6) For initial and continued listing, the Fund will be in compliance with Rule 10A-3 under the Exchange Act,⁵³ as provided by NYSE Arca Equities Rule 5.3.

(7) A minimum of 100,000 Shares for the Fund will be outstanding at the commencement of trading on the Exchange.

(8) While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) ETFs.

(9) Not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (other than non-exchange-traded investment company securities) will consist of equity securities whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. In addition, not more than 10% of the net assets of the Fund in the aggregate invested in futures contracts or exchange-traded options contracts will consist of futures contracts or exchange-traded options contracts whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

(10) Normally the Fund will seek to invest at least 75% of its corporate debt securities assets in issuances that have at least \$100,000,000 par amount outstanding in developed countries or at

least \$200,000,000 par amount outstanding in emerging market countries.

(11) The Fund normally will invest at least 75% of its bank loan or corporate loan assets, which includes senior loans, syndicated bank loans, junior loans, bridge loans, unfunded commitments, revolvers and participation interests, in issuances that have at least \$100 million par amount outstanding.

(12) The Fund may invest up to 20% of its total assets in the aggregate in Private MBS/ABS and in asset-backed commercial paper. Such holdings would be subject to the respective limitations on the Fund's investments in illiquid assets and high yield securities. The liquidity of such securities, especially in the case of Private MBS/ABS, will be a substantial factor in the Fund's security selection process.

(13) The Fund may invest up to 20% of its total assets in the aggregate in participations in and assignments of bank loans or corporate loans, which loans include syndicated bank loans, junior loans, bridge loans, unfunded commitments, revolvers and participation interests (but specifically do not include senior loans), in structured notes, in credit-linked notes, in risk-linked securities, in OTC REITs, and in OTC hybrid instruments. Such holdings would be subject to the respective limitations on the Fund's investments in illiquid assets and high yield securities. The liquidity of such securities will be a substantial factor in the Fund's security selection process.

(14) Not more than 33 1/3% of the Fund's total assets will be in junk bonds.

(15) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities, Private MBS/ABS, master notes, loans, and loan commitments deemed illiquid by the Adviser, consistent with Commission guidance.

(16) The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, while the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N-1A).

(17) Investments in derivative instruments will be made in accordance with the 1940 Act and consistent with the Fund's investment objective and

⁵² The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

⁵³ 17 CFR 240.10A-3.

policies. The Fund will seek, where possible, to use counterparties whose financial status is such that the risk of default is reduced. The Fund will segregate or “earmark” assets determined to be liquid by the Adviser in accordance with procedures established by the Board and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations under derivative instruments. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. To mitigate leveraging risk, the Adviser will segregate or “earmark” liquid assets or otherwise cover the transactions that may give rise to such risk.

This approval order is based on all of the Exchange’s representations, including those set forth above and in the Notice. The Commission notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be initially and continuously listed and traded on the Exchange.

IV. Solicitation of Comments on Amendment Nos. 3, 4, 5, and 6

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment Nos. 3, 4, 5, and 6 to the proposed rule change are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–NYSEArca–2015–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. All submissions should refer to File Number SR–NYSEArca–2015–73. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2015–73 and should be submitted on or before January 19, 2016.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1, 3, 4, 5, and 6

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 1, 3, 4, 5 and 6, prior to the 30th day after the date of publication of notice of Amendment Nos. 3, 4, 5, and 6 in the **Federal Register**. Amendment Nos. 3, 4, 5, and 6 revised the proposed rule change by: (1) Modifying, and defining, the Fixed Income Instruments in which the Fund will invest; (2) representing that normally corporate debt securities and bank loan and corporate loan assets will each have a certain par amount outstanding; (3) modifying the investment restrictions of the Fund; (4) clarifying price information in, and adding assets to, the Availability of Information section, and (5) noting that trading surveillances may be administered by the regulatory staff of the Exchange.

Amendment Nos. 3, 4, 5, and 6 supplement the proposed rule change by, among other things, clarifying the scope of the Fund’s permitted investments and investment restrictions and providing additional information about the availability of pricing information for the Fund’s underlying assets. They also help the Commission evaluate whether the listing and trading of the Shares of the Fund would be consistent with the protection of investors and the public interest.

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁵⁴ to approve the proposed

rule change, as modified by Amendment Nos. 1, 3, 4, 5, and 6, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,⁵⁵ that the proposed rule change (SR–NYSEArca–2015–73), as modified by Amendment Nos. 1, 3, 4, 5, and 6 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁶

Brent J. Fields,

Secretary.

[FR Doc. 2015–32528 Filed 12–24–15; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76715; File No. SR–EDGX–2015–65]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rule 21.8, Order Display and Book Processing

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 16, 2015, EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b–4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to authorize the Exchange’s equity options platform (“EDGX Options”) to make a modification to Rule 21.8 (Order Display and Book Processing).

⁵⁵ 15 U.S.C. 78s(b)(2).

⁵⁶ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b–4(f)(6)(iii).

⁵⁴ 15 U.S.C. 78s(b)(2).

The text of the proposed rule change is available at the Exchange's Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to modify Rule 21.8, Order Display and Book Processing, which sets forth the priority rules applicable to EDGX Options as well as the Exchange's program for accepting Directed Orders. Specifically, Rule 21.8 describes the general priority rules for EDGX Options, including that quotes and orders are prioritized by price and then on a pro-rata basis according to size. Rule 21.8 also describes additional priority overlays, including special priority provisions for Customer orders, Directed Market Makers and Primary Market Makers. The purpose of this rule filing is to make a minor modification to the Directed Order program, as described below.

Pursuant to Rule 21.8(f), an Options Member may designate a Market Maker ("Directed Market Maker") on orders it enters into the Exchange's system ("Directed Orders"). A Directed Market Maker receives certain participation entitlements described in Rule 21.8 subject to certain conditions, which conditions are also set forth in the Rule. For instance, the Directed Market Maker must be registered with the Exchange as a Market Maker in the relevant option class at the time of receipt of the Directed Order to be eligible to receive the Directed Market Maker participation entitlement. One current limitation on the Directed Market Maker priority overlay is that only Customer Orders are eligible to be directed by an Options Member to a Directed Market Maker.

The Exchange proposes to eliminate this limitation to align more closely with the directed order rules applicable to options trading on the options trading platform of NASDAQ OMX BX, Inc. ("BX Options")⁵ and other options exchanges.⁶ Accordingly, as proposed, an Options Member could direct any order to a Directed Market Maker, not just a Customer Order.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.⁷ In particular, the proposal is consistent with Section 6(b)(5) of the Act⁸ because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposed rule change will allow the Exchange to accept Directed Orders on the EDGX Options platform without restricting such orders to Customer Orders. The Exchange believes that the change is appropriate and consistent with the Act because it recognizes that orders of other participants, not just Customers, could potentially be directed to a Directed Market Maker. As noted above, other options exchanges operate with similar directed order programs.⁹

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather to make a modification to the

⁵ See BX Options, Chapter VI, Section 10(1)(C)(2)(iii), which does not limit "Directed Orders" on BX Options to "Customer" orders. A "Directed Order" is defined in BX Options Chapter VI, Section 1(e)(2) as "an order to buy or sell which has been directed, provided it is properly marked as such, to a particular market maker. . . ." A "Customer" is defined in BX Options Chapter 1, Section 1(a)(22) and is equivalent to a Customer on the Exchange.

⁶ See, e.g., NYSE Arca Rules 6.1A(4) and 6.76A; NASDAQ PHLX Rules 1014(g)(vii) and 1080(l).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ See *supra* notes 5 and 6.

Exchange's Directed Order program. As noted above, the change would make the Exchange's rule similar to that of other options exchanges.¹⁰ The Exchange believes that the proposed change will have a positive competitive impact by allowing additional Directed Orders to be submitted to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (A) Significantly affect the protection of investors or the public interest; (B) impose any significant burden on competition; and (C) by its terms, 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 Act¹¹ and paragraph (f)(6) of Rule 19b-4 thereunder,¹² the Exchange has designated this rule filing as non-controversial. The Exchange has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

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: (1) Necessary or appropriate in the public interest; (2) for the protection of investors; or (3) 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 proposal is consistent with the Act. Comments may

¹⁰ *Id.*

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4.

be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-EDGX-2015-65 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 No. SR-EDGX-2015-65. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-EDGX-2015-65 and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Brent J. Fields,

Secretary.

[FR Doc. 2015-32524 Filed 12-24-15; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76713; File No. SR-EDGX-2015-62]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of EDGX Exchange, Inc.

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 17, 2015, EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the Market Data section of its fee schedule to: (i) Adopt definitions for the terms "Non-Display Usage" and "Trading Platforms"; and (ii) amend the fees for EDGX Depth, to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

The text of the proposed rule change is available at the Exchange's Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Market Data section of its fee schedule to: (i) Adopt definitions for the terms "Non-Display Usage" and "Trading Platforms"; and (ii) amend the fees for EDGX Depth to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

Definitions

The Exchange proposes to adopt definitions for the terms "Non-Display Usage" and "Trading Platforms". The proposed definitions are designed to provide greater transparency with regard to how the Exchange assesses fees for market data. Non-Display Usage would be defined as "any method of accessing a Market Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons."⁵ The term Trading Platform would be defined as "any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS)."⁶

EDGX Depth Fees

EDGX Depth is an uncompressed market data feed that provides depth-of-book quotations and execution information based on equity orders entered into the System.⁷

Internal Distributor Fee. Currently, the Exchange charges fees for both internal and external distribution of EDGX Depth. The cost of EDGX Depth for an Internal Distributor⁸ is currently

⁵ The proposed definition of Non-Display Usage is substantially similar to Nasdaq Stock Market LLC ("Nasdaq") Rule 7023(a)(2)(B), which defines Non-Display Usage as "any method of accessing Depth-of-Book data that involves access or use by a machine or automated device without access or use of a display by a natural person or persons."

⁶ The proposed definition of Trading Platform is identical to the definition of Trading Platform under Nasdaq Rule 7023(a)(7).

⁷ See Exchange Rule 13.8(a).

⁸ An "Internal Distributor" is defined as "a Distributor that receives the Exchange Market Data product and then distributes that data to one or

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

\$500 per month. The Exchange also separately charges an External Distributor⁹ of EDGX Depth a flat fee of \$2,500 per month. The Exchange does not charge Internal and External Distributors separate display User¹⁰ fees. The Exchange now proposes to increase the fee for Internal Distributors from \$500 per month to \$1,500 per month. The Exchange does not propose to amend its fees for External Distributors.

Non-Display Usage Fee. The Exchange also proposes to adopt a new fee for Non-Display Usage by Trading Platforms, which is similar to fees currently being charged by Nasdaq and the New York Stock Exchange, Inc. (“NYSE”).¹¹ As proposed, subscribers to EDGX Depth would pay a fee of \$5,000 per month for Non-Display Usage of EDGX Depth by its Trading Platforms. Trading Platforms, as defined above, include registered National Securities Exchanges, Alternative Trading Systems (“ATSS”), and Electronic Communications Networks (“ECNs”) as those terms are defined in the Exchange Act and regulations and rules thereunder. The fee would be assessed in addition to existing Distributor fees. The fee of \$5,000 per month would represent the maximum charge per subscriber regardless of the number of Trading Platforms the subscriber operates and receive the data for Non-Display Usage. For example, if a subscriber operates three Trading Platforms that receives EDGX Depth for Non-Displayed Usage, that subscriber would continue to pay a total fee of \$5,000 per month, rather than paying \$15,000 per month for its three Trading Platforms (\$5,000 for each Trading Platform).

more Users within the Distributor’s own entity.” See the Exchange Fee Schedule available at http://batstrading.com/support/fee_schedule/edgx/. A “Distributor” is defined as “any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.” *Id.*

⁹ An “External Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.” *Id.*

¹⁰ A “User” is defined as “a natural person, a proprietorship, corporation, partnership, or entity, or device (computer or other automated service), that is entitled to receive Exchange data.” *Id.*

¹¹ See Nasdaq Rule 7023(d) (setting forth a Trading Platform Fee of \$5,000 per trading platform up to a maximum of three trading platforms for depth-of-book data). See also NYSE Market Data Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

Implementation Date

The Exchange proposes to implement the proposed changes to its fee schedule on January 4, 2016.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹² in general, and furthers the objectives of Section 6(b)(4),¹³ 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 believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all recipients of Exchange data. The Exchange believes the proposed fees are competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients. Lastly, the Exchange also believes that the proposed fees are reasonable and non-discriminatory because they will apply uniformly to all recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act¹⁴ in that it 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. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,¹⁵ 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 self-regulatory organizations 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.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange’s subscribers will be subject to the proposed fees on an equivalent basis. EDGX Depth is distributed and

purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation to make this data available. Accordingly, Distributors and Users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Moreover, the Exchange is not required to make any proprietary data products available or to offer any specific pricing alternatives to any customers.

In addition, the fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange’s Statement on Burden on Competition, the existence of alternatives to EDGX Depth further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. If another exchange (or its affiliate) were to charge less to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute EDGX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, EDGX Depth.

The Exchange notes that the Commission is not required to undertake a cost-of-service or rate-making approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.¹⁶

¹⁶ The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress’s direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78k-1.

¹⁵ See 17 CFR 242.603.

The proposed amendment to the Internal Distributor fee for EDGX Depth is also equitable and reasonable as, despite the increase, the fee proposed continues to be less than similar fees currently charged by Nasdaq and NYSE for their depth-of-book data products.¹⁷ In addition, the proposed Non-Display Usage fee by Trading Platforms for EDGX Depth is equitable and reasonable as the fees proposed are equal to, and in some cases less than, similar fees currently charged by Nasdaq for its depth-of-book data. Like as proposed by the Exchange, Nasdaq charges subscribers to its depth-of-book data utilized by trading platforms on a non-displayed basis \$5,000 per month.¹⁸ However, unlike the Exchange, a subscriber utilizing Nasdaq depth-of-book data on more than one Trading Platform would pay \$5,000 per month for each up to a maximum fee of \$15,000. The Exchange proposes to charge the same rate regardless of the number of Trading Platforms receiving the data for Non-Display Usage operated by that subscriber.

The Trading Platform fee is also equitable and reasonable in that it ensures that heavy users of the EDGX Depth pay an equitable share of the total fees. Currently, External Distributors pay higher fees than Internal Distributors based upon their assumed higher usage levels. The Exchange believes that Trading Platforms are generally high users of the data, using it to power a matching engine for millions or even billions of trading messages per day.

Lastly, the Exchange believes that the proposed definitions are reasonable because they are designed to provide greater transparency to Members with regard to how the Exchange would assess the proposed fee for Non-Display Usage of EDGX Depth by Trading Platforms. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing

the manner in which is assess fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and eliminate potential investor confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest. Lastly, the proposed definitions are based on existing rules of Nasdaq.¹⁹

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's ability to price EDGX Depth is constrained by: (i) Competition among exchanges, other trading platforms, and Trade Reporting Facilities ("TRF") that compete with each other in a variety of dimensions; (ii) the existence of inexpensive real-time consolidated data and market-specific data and free delayed data; and (iii) the inherent contestability of the market for proprietary data.

The Exchange and its market data products are subject to significant competitive forces and the proposed fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.

In addition, EDGX Depth competes with a number of alternative products. For instance, EDGX Depth does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce depth-of-book information products, and many currently do, including Nasdaq and NYSE.

In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on Exchange data products and the Exchange's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in

setting the proposed data product fees. The proposed data product fees are, in part, responses to that pressure. The Exchange believes that the proposed fees would reflect an equitable allocation of its overall costs to users of its facilities.

In addition, when establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all Users. The existence of alternatives to EDGX Depth, including existing similar feeds by other exchanges, consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

The Exchange believes the proposed increase to the Internal Distributor fee and adoption of the fee for Non-Display Usage by Trading Platforms for EDGX Depth would increase competition amongst the exchanges that offer depth-of-book products. The Exchange notes that, despite the proposed increase, the Internal Distribution fee for EDGX Depth continues to be less than similar fees currently charged by Nasdaq and NYSE for its depth-of-book data.²⁰ In addition, the proposed Non-Display Usage fee by Trading Platforms is equal to, and in some cases less than, similar fees currently charged by Nasdaq for its Depth-of-Book data.²¹

Lastly, the proposed definitions will not result in any burden on competition. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing the manner in which is assess fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and are not designed to have a competitive impact.

NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's Web site at <http://www.sec.gov/rules/concept/s72899/buck1.htm>. See also Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (SR-NYSE-2014-64) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish an Access Fee for the NYSE Best Quote and Trades Data Feed, Operative December 1, 2014).

¹⁷ See Nasdaq Rule 7023(c) (providing for fees of \$25,000 to \$500,000 to internal distributors of Nasdaq Depth-of-Book products). See also NYSE Market Data Fees, November 2015 (providing a \$5,000 per month access fee for NYSE OpenBook).

¹⁸ See Nasdaq Rule 7023(d). See also NYSE Market Data Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

¹⁹ Nasdaq Rules 7023(a)(2)(B) and (a)(7).

²⁰ See *supra* note 17.

²¹ See *supra* note 18.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²² and paragraph (f) of Rule 19b-4 thereunder.²³ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-EDGX-2015-62 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-EDGX-2015-62. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EDGX-2015-62, and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Brent J. Fields,
Secretary.

[FR Doc. 2015-32541 Filed 12-24-15; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76707; File No. SR-BATS-2015-117]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for BZX Options

December 21, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 10, 2015, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members⁵ and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the "Options Pricing" section of its fee schedule effective immediately, to modify pricing for orders routed away from the Exchange and executed at various away options exchanges. The Exchange currently charges the following rates for orders routed to certain other options exchanges: (i) Non-Customer⁶ orders in non-Penny Pilot Securities,⁷ routed to NYSE Arca, Inc. ("Arca"), which yield fee code AG, are charged \$0.95 per contract; (ii) Intermarket Sweep Orders ("ISOs") in non-Penny Pilot Securities that are directed to Nasdaq Options Market LLC ("NOM"), Arca, or ISE Gemini, LLC ("ISE Gemini") are charged \$0.95 per contract; (iii) ISOs directed to other

⁵ The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." See Exchange Rule 1.5(n).

⁶ "Non-Customer" applies to any transaction that is not a Customer Order. "Customer" applies to any transaction identified by a Member for clearing in the Customer range at the OCC, excluding any transaction for a Broker Dealer or a "Professional" as defined in Exchange Rule 16.1.

⁷ "Penny Pilot Securities" are those issues quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01.

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f).

options exchanges are charged \$0.65 per contract;⁸ (iv) Customer orders routed to the International Securities Exchange, LLC (“ISE”) in non-Penny Pilot Securities which yield fee code ID and are charged \$0.12 per contract; (v) Customer orders routed to the Miami International Securities Exchange LLC (“MIAX”) which yield fee code MC are charged \$0.12 per contract; (vi) Non-Customer orders routed to MIAX which yield fee code MF are charged \$0.65 per contract; (vii) Customer orders routed to the BOX Options Exchange LLC (“BOX”) which yield fee code OC are charged no fee; (viii) Non-Customer orders routed to BOX which yield fee code OF are charged \$0.99 per contract; (ix) Non-Customer orders routed to NOM in Penny Pilot Securities which yield fee code QF are charged \$0.65 per contract; (x) Non-Customer orders routed to NOM in non-Penny Pilot Securities which yield fee code QG are charged \$0.95 per contract; and (xi) Customer orders routed to NYSE MKT LLC (“NYSE MKT”) f/k/a AMEX which yield fee code XC are charged \$0.12 per contract.

In an effort to continue to offer routing services to its Members at prices that approximate the cost to the Exchange, the Exchange is proposing to amend those rates as follows: (i) The fee for Customer orders routed to ISE in non-Penny Pilot Securities and any Customer orders routed to MIAX, BOX or NYSE MKT (fee codes ID, MC, OC and XC, respectively) would be increased to \$0.15 per contract; (ii) the fee for Non-Customer Orders in non-Penny Pilot Securities routed to Arca would be increased to \$1.15 per contract (fee code AG); (iii) the fee for ISOs directed to NOM, Arca, or ISE Gemini would be increased to \$1.25 per contract for Non-Penny Pilot Securities (fee code D1); (iv) the fee for ISOs directed to other options exchanges would be increased to \$0.75 per contract (fee code D4);⁹ (v) the fee for Non-Customer orders routed to MIAX would be increased to \$0.85 per contract (fee code MF); (vi) the fee for Non-Customer orders routed to BOX would be increased to \$1.20 (fee code OF); (vii) the fee for Non-Customer orders routed to NOM in Penny Pilot Securities would be increased to \$0.70 (fee code QF); and

⁸ ISOs directed to Nasdaq OMX BX LLC (“Nasdaq BX”) in non-Penny Pilot Securities which yield fee code D2 and ISOs directed to the C2 Options Exchange, Inc. (“C2”) and Nasdaq OMX PHLX LLC (“Nasdaq PHLX”) which yield fee code D3 are charged \$0.95 per contract.

⁹ The Exchange does not propose to amend the fees charged for ISOs directed to Nasdaq BX in non-Penny Pilot Securities which yield fee code D2 and ISOs directed to the C2 and Nasdaq PHLX which yield fee code D3.

(viii) the fee for Non-Customer orders routed to NOM in non-Penny Pilot Securities would be increased to \$1.25 (fee code QG).

As noted previously and as set forth above, the Exchange’s current approach to routing fees is to set forth in a simple manner certain sub-categories of fees that approximate the cost of routing to other options exchanges based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (*i.e.*, clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, “Routing Costs”). The Exchange then monitors the fees charged as compared to the costs of its routing services and adjusts its routing fees and/or sub-categories to ensure that the Exchange’s fees do indeed result in a rough approximation of overall Routing Costs, and are not significantly higher or lower in any area. In performing this analysis, the Exchange has concluded that certain orders that it was routing to other options exchanges were costing more than it was charging, and in one case, were costing significantly less than it was charging. As a result, and in order to avoid subsidizing routing to away options exchanges and to continue providing quality routing services, the Exchange proposes relatively modest increases and adjustments to the charges assessed for the orders described above.

Implementation Date

The Exchange proposes to implement these amendments to its fee schedule immediately.¹⁰

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.¹¹ Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,¹² in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing

venues or providers of routing services if they deem fee levels to be excessive.

As explained above, the Exchange generally attempts to approximate the cost of routing to other options exchanges, including other applicable costs to the Exchange for routing. The Exchange believes that a pricing model based on approximate Routing Costs is a reasonable, fair and equitable approach to pricing. Specifically, the Exchange believes that its proposal to modify fees is fair, equitable and reasonable because the fees are generally an approximation of the cost to the Exchange for routing orders to such exchanges. Absent the proposed changes, the Exchange has concluded that certain orders that it was routing to other options exchanges would cost more than its current fees. Accordingly, the Exchange believes that the proposed increases are fair, equitable and reasonable because they will help the Exchange to avoid subsidizing routing to away options exchanges and to continue providing quality routing services. The Exchange believes that its fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it provides certainty with respect to execution fees at away options exchanges. Under its straightforward fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or slight loss for orders routed to and executed at away options exchanges. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to such exchanges. The Exchange notes that routing through the Exchange is voluntary. The Exchange also believes that the proposed fee structure for orders routed to and executed at these away options exchanges is fair and equitable and not unreasonably discriminatory in that it applies equally to all Members.

The Exchange reiterates that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive or providers of routing services if they deem fee levels to be excessive. Finally, the Exchange notes that it constantly evaluates its routing fees, including profit and loss attributable to routing, as applicable, in connection with the operation of a flat fee routing service, and would consider future adjustments to the proposed pricing structure to the extent it was recouping a significant profit or loss from routing to away options exchanges.

¹⁰ The Exchange initially filed the proposed fee change on December 1, 2015 (SR-BATS-2015-109). On December 10, 2015, the Exchange withdrew that filing and submitted filing SR-BATS-2015-117.

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(4).

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As it relates to the proposed changes to routing fees, the proposed changes will assist the Exchange in recouping costs for routing orders to other options exchanges on behalf of its participants in a manner that is a better approximation of actual costs than is currently in place and that reflects pricing changes by various options exchanges as well as increases to other Routing Costs incurred by the Exchange. The Exchange also notes that Members may choose to mark their orders as ineligible for routing to avoid incurring routing fees.¹³

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and paragraph (f) of Rule 19b-4 thereunder.¹⁵ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

¹³ See Exchange Rule 21.1(d)(8) (describing "BATS Only" orders) and Exchange Rule 21.9(a)(1) (describing the routing process, which requires orders to be designated as available for routing).

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f).

- Send an email to rule-comments@sec.gov. Please include File No. SR-BATS-2015-117 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-BATS-2015-117. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BATS-2015-117 and should be submitted on or before January 19, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Brent J. Fields,
Secretary.

[FR Doc. 2015-32535 Filed 12-24-15; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Notice of Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration ("SBA") under Section 309 of the Small Business Investment

¹⁶ 17 CFR 200.30-3(a)(12).

Act of 1958, as amended, and Section 107.1900 of the Small Business Administration Rules and Regulations, SBA by this notice declares null and void the license to function as a small business investment company under the Small Business Investment Company License No. 03/03-0238 issued to Merion Investment Partners, L.P.

United States Small Business Administration.

Dated: December 22, 2015.

Mark Walsh,

Associate Administrator, Office of Investment and Innovation.

[FR Doc. 2015-32600 Filed 12-24-15; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[Docket No. SBA-2015-0013]

Community Advantage Pilot Program

AGENCY: U.S. Small Business Administration.

ACTION: Notice of extension of and changes to Community Advantage Pilot Program and request for comments.

SUMMARY: The Community Advantage ("CA") Pilot Program is a pilot program to increase SBA-guaranteed loans to small businesses in underserved areas. The Small Business Administration ("SBA") continues to refine and improve the design of the Community Advantage Pilot Program. To support SBA's commitment to expanding access to capital for small businesses and entrepreneurs in underserved markets, SBA is issuing this Notice to extend the term of the CA Pilot Program and lay out a plan for its evaluation regarding whether it should be made permanent, improve the effectiveness of the program, expand program eligibility to new organizations, and to revise other program requirements, including certain regulatory waivers.

DATES: *Effective Date:* The changes to the CA Pilot Program identified in this Notice will be effective December 28, 2015. The CA Pilot Program will remain in effect until March 31, 2020.

Comment Date: Comments must be received on or before February 26, 2016.

ADDRESSES: You may submit comments, identified by SBA docket number SBA-2015-0013 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail: Community Advantage Pilot Program Comments—Office of Economic Opportunity, U.S. Small Business Administration, 409 Third

Street SW., Suite 8300, Washington, DC 20416.

- Hand Delivery/Courier: Grady B. Hedgespeth, Director, Office of Economic Opportunity, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please submit the information to Grady B. Hedgespeth, Director, Office of Economic Opportunity, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, or send an email to communityadvantage@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Grady B. Hedgespeth, Director, Office of Economic Opportunity, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; (202) 205-7562; grady.hedgespeth@sba.gov.

SUPPLEMENTARY INFORMATION:

1. Background

On February 18, 2011, SBA issued a notice and request for comments introducing the CA Pilot Program (76 FR 9626). The CA Pilot Program was introduced to increase the number of SBA-guaranteed loans made to small businesses in underserved markets. The February 18, 2011 notice provided an overview of the CA Pilot Program requirements and, pursuant to the authority provided to SBA under 13 CFR 120.3 to suspend, modify or waive certain regulations in establishing and testing pilot loan initiatives, SBA modified or waived as appropriate certain regulations which otherwise apply to 7(a) loans for the CA Pilot Program.

Subsequent notices have made changes to the CA Pilot Program to improve the program experience for participants, improve their ability to deliver capital to underserved markets, and appropriately manage risk to the Agency. These notices were issued on the following dates: September 12, 2011 (76 FR 56262), February 8, 2012 (77 FR 6619), and November 9, 2012 (77 FR 67433). To further support SBA's commitment to expanding access to capital for small businesses and entrepreneurs in underserved markets, SBA is issuing this notice to further

revise program requirements as described more fully below.

The CA Pilot Program is currently set to expire March 15, 2017. With this notice, SBA is extending the pilot program until March 31, 2020. This extension will allow for additional time to evaluate the pilot, and if warranted, begin the process for it to be made permanent. SBA will evaluate the pilot in accordance with criteria that would be applicable to 7(a) pilot programs generally, including whether: the pilot is achieving its objective(s), the costs (including losses) of the pilot are within an acceptable range, sufficient numbers and types of lenders are using the pilot, and there is a continuing need for the pilot. SBA also will evaluate the CA Pilot Program to assess its effect along the following additional indices among others: success in reaching the CA underserved markets, impact on job creation and retention, portfolio performance based on initial projections and as it relates to other 7(a) programs, and impact on business creation and/or business expansion. Based on the findings of the evaluation, SBA will refine the program and undergo rulemaking to make the program permanent, if appropriate.

2. Comments

Although the changes to the CA Pilot Program will be effective December 28, 2015, comments are solicited from interested members of the public on all aspects of the CA Pilot Program, including whether the pilot program should be made permanent. Comments must be submitted on or before the deadline for comments listed in the **DATES** section. The SBA will consider these comments and the need for making any revisions as a result of these comments.

3. Changes to the Community Advantage Pilot Program

The Community Advantage Participant Guide is being updated to reflect the changes below and will be available on SBA's Web site at www.sba.gov.

a. 7(a) Small Loan Procedures & Delegated Authority Procedures

On October 10, 2014, SBA issued Policy Notice 5000-1324, Streamlining CA Pilot Program. The Notice included: the adoption of the SBA 7(a) Small Loan credit standards that includes the use of a credit score upon submission of the application to SBA; the adoption of 7(a) Small Loan procedures when closing and disbursing CA loans; and the revision of the procedures to request delegated authority that more closely

aligns with the procedures for 7(a) lenders to acquire Preferred Lenders Program (PLP) authority. The Notice also provided that CA Lenders could be authorized to begin processing applications under their delegated authority after making an initial disbursement on at least five CA loans. These policy changes are being incorporated into a revised Community Advantage Participant Guide (version 4.0), which will be issued upon publication of this **Federal Register** Notice.

b. Expanded CA Program Eligibility

The original February 18, 2011, Notice (76 FR 9626) introducing the CA Pilot Program limited program eligibility to three types of entities: SBA Microloan Intermediaries, SBA Certified Development Companies ("CDCs") and non-federally regulated Community Development Financial Institutions ("CDFIs") certified by the U.S. Treasury. SBA is expanding the eligible organizations to include SBA Intermediary Lending Pilot (ILP) Program Intermediaries authorized under Section 7(l) of the Small Business Act (15 U.S.C. 636(l)).

c. CA Loan Sales

The February 18, 2011 Notice (76 FR 9626) introducing the CA Pilot Program prohibited CA Lenders from including CA loans in certain participant lender financings such as loan participations and securitizations. In order to implement this prohibition, SBA waived the regulations at 13 CFR 120.420 through 120.435.

In a subsequent **Federal Register** Notice published on September 12, 2011 (76 FR 56262), SBA recognized that these prohibitions can restrict the ability of CA Lenders to obtain access to capital or other streams of revenue necessary to support their CA lending. Therefore, in order to permit CA Lenders to pledge loans as collateral for certain lender financings, SBA discontinued the waiver of the regulations at 13 CFR 120.420, 120.430-120.431 (only with respect to pledges), and 120.434.

SBA will now allow CA Lenders to sell entire CA loans or an entire CA loan portfolio under limited circumstances. Therefore, SBA is no longer waiving 13 CFR 120.430, 120.431, 120.432(a), and 120.433 (only with respect to the sale of an entire CA loan). SBA will continue to waive 13 CFR 120.432(b) & (c), and therefore, CA Lenders may not sell, or sell a participating interest in, a part of a CA loan. CA Lenders must follow the same regulations and SOP requirements as 7(a) lenders with respect to loan sales with the following important

modification: the sale of an entire CA Loan or CA loan portfolio requires the approval of the Director of SBA's Office of Credit Risk Management (D/OCRM). Although sales of a CA loan or CA loan portfolio are not permitted as a normal course of business in CA lending, in the event that a sale is necessary as part of a lender's withdrawal from the CA Pilot Program for example, the CA Lender must make a concerted effort to sell such loans to a capable and financially viable CA Lender. If no CA Lender is interested, capable or financially viable to purchase the CA loan(s), then the loan(s) may be sold to a 7(a) Lender with SBA's prior written consent, which SBA may withhold in its sole discretion. The D/OCRM will make the final determination on whether to approve such transactions. No changes are being made to the requirements for CA Lenders to sell the guaranteed portion of a CA Loan on SBA's Secondary Market.

d. Debt Refinancing

All debt refinancing in the CA Pilot Program must meet the requirements for refinancing set forth in SOP 50 10 5(H), Subpart B, Chapter 2, Paragraph IV.E., with two modifications discussed below.

1. Under SOP 50 10 5(H), Subpart B, Chapter 2, Paragraph IV. E. 3, in order to refinance certain debts, the lender must demonstrate that the new loan will result in a 10 percent improvement in the Small Business Applicant's cash flow. For CA loans, however, the lender must demonstrate either:

- (a) a 10 percent improvement in cash flow; or
- (b) that the CA loan exceeds the amount being refinanced by at least \$5,000 or 25 percent, whichever is greater.

2. Under SOP 50 10 5(H), Subpart B, Chapter 2, Paragraph IV. E. 5, when a lender seeks to use SBA-guaranteed loan proceeds to refinance non-SBA guaranteed, same institution debt, it must include a transcript showing the due dates and when payments were received as part of its analysis and recommendation for the prior 36 months, or the life of the loan, whichever is less. In addition, the lender must explain in writing any late payments and late charges that have occurred during the last 36 months. However, for CA loans refinancing non-SBA guaranteed, same institution debt, the lender must instead include a transcript showing due dates and six months of timely payments for the most recent six month period. If there are any late payments in the most recent six month period, the debt may not be refinanced with a CA loan. Late

payments are defined as any payment made beyond 29 days of the due date.

e. Revised Oversight Strategy

SBA is revising the oversight strategy for CA Lenders to better align with the PARRiS analytical review protocol introduced in SBA Policy Notice 5000-1332 on December 29, 2014. Components of PARRiS include Portfolio performance, Asset management, Regulatory compliance, Risk management, and Special items. SBA's reviews for CA Lenders include quarterly compliance reviews, lender profile assessments, analytical reviews, targeted reviews and/or full reviews. SBA conducts reviews and examinations of CA Lenders in accordance with 13 CFR 120.1025 through 120.1060 and SOPs 50 53(A), 51 00, and 50 10 5(H), as revised from time to time. The type of review or whether a safety and soundness examination is performed may depend on the risk associated with the CA Lender and its SBA portfolio.

f. Revised Deadline for Annual Report

Currently, all SBA Supervised Lenders are required by 13 CFR 120.464(a)(1) to submit an annual report with audited financial statements within 90 days of the end of the fiscal year. SBA is revising this reporting deadline for CA Lenders and requiring that this report instead be submitted within 120 days after the end of the CA Lender's fiscal year. In order to accomplish this change, SBA is modifying 13 CFR 120.464(a)(1), but only with respect to timing, to require submission of the annual report within 120 days after the end of the CA Lender's fiscal year.

g. Expanded Underserved Market Definition

The original February 18, 2011, Notice (76 FR 9626) introducing the CA Pilot Program defined underserved markets to include: Low-to-moderate income communities; Empowerment Zones and Enterprise Communities; HUBZones; New businesses; Businesses eligible for Patriot Express, including Veteran-owned businesses; and Firms where more than 50% of their full time workforce is low-income or resides in LMI census tracts. SBA is revising this program definition to include designated Promise Zones¹ as an underserved market.

¹ The Promise Zone Initiative is a Presidential plan that seeks to partner with local communities and businesses to create jobs, increase economic security, expand educational opportunities, increase access to quality, affordable housing and improve public safety. The first five Zones, located

In addition, the original February 18, 2011 Notice (79 FR 9626) identified businesses eligible for SBA's Patriot Express Pilot Loan Initiative as an eligible underserved market. The Patriot Express Pilot Loan Initiative expired December 31, 2013; therefore, the applicable language in the revised Community Advantage Participant Guide has been changed to read "businesses eligible for SBA Veterans Advantage." (For information on SBA Veteran's Advantage, see SBA's Web site at www.sba.gov.)

h. Correction of Regulatory Waiver

The original February 18, 2011 Notice (76 FR 9626) included a waiver of 13 CFR 120.852(a). That regulation, which prohibits a CDC from investing in or being an affiliate of a lender participating in the 7(a) loan program, was moved to 13 CFR 120.820(c) effective April 21, 2014 (79 FR 15641). Therefore, in order to continue allowing CDCs or their affiliates to participate in the CA Pilot Program, SBA is waiving 13 CFR 120.820(c).

i. Application Forms

The original Notice required that CA Lenders utilize the application forms required of the Small/Rural Lenders Advantage (S/RLA) process, as set forth in SOP 50 10 5(C). As of October 1, 2013, that process ceased to exist. CA lenders now utilize the forms used for all SBA 7(a) lending processing methods: SBA Form 1919 ("Borrower Information Form") and SBA Form 1920 ("Lender's Application for Guaranty for All 7(a) Programs"). In addition, CA Lenders must also submit the CA Addendum (SBA Form 2449) with all CA loan applications.

4. General Information

The changes in this notice are limited to the CA Pilot Program only. All other SBA guidelines and regulatory waivers related to the CA Pilot Program remain unchanged.

SBA has provided more detailed guidance in the form of a Participant Guide which is being updated and is available on SBA's Web site at www.sba.gov. SBA may provide additional guidance, through SBA notices, which may also be published on SBA's Web site at <http://www.sba.gov/category/lender->

in San Antonio, Philadelphia, Los Angeles, Southeastern Kentucky, and the Choctaw Nation of Oklahoma, have each put forward a plan on how they will partner with local business and community leaders to make investments that reward hard work and expand opportunity. (<https://www.whitehouse.gov/the-press-office/2014/01/08/fact-sheet-president-obama-s-promise-zones-initiative>).

navigating/forms-notices-sops/notices. Questions regarding the CA Pilot Program may be directed to the Lender Relations Specialist in the local SBA district office. The local SBA district office may be found at <http://www.sba.gov/about-offices-list/2>.

Authority: 15 U.S.C. 636(a)(25) and 13 CFR 120.3.

Dated: December 17, 2015.

Maria Contreras-Sweet,
Administrator.

[FR Doc. 2015–32583 Filed 12–24–15; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2015–0069]

Finding Regarding Foreign Social Insurance or Pension System—Australia

AGENCY: Social Security Administration (SSA).

ACTION: Notice of Finding Regarding Foreign Social Insurance or Pension System—Australia.

Finding: Section 202(t)(1) of the Social Security Act (42 U.S.C. 402(t)(1)) prohibits payment of monthly benefits to any individual who is not a United States citizen or national for any month after he or she has been outside the United States for 6 consecutive months. This prohibition does not apply to such an individual where one of the exceptions described in section 202(t)(2) through 202(t)(5) of the Social Security Act (42 U.S.C. 402(t)(2) through 402(t)(5)) affects his or her case.

Section 202(t)(2) of the Social Security Act provides that, subject to certain residency requirements of Section 202(t)(11), the prohibition against payment shall not apply to any individual who is a citizen of a country which the Commissioner of Social Security finds has in effect a social insurance or pension system which is of general application in such country and which:

(a) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) permits individuals who are United States citizens but not citizens of that country and who qualify for such benefits to receive those benefits, or the actuarial equivalent thereof, while outside the foreign country regardless of the duration of the absence.

The Commissioner of Social Security has delegated the authority to make such a finding to the Associate Commissioner of the Office of International Programs. Under that

authority, the Associate Commissioner of the Office of International Programs has approved a finding that Australia, beginning September 27, 2001, has a social insurance system of general application which:

(a) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) permits United States citizens who are not citizens of Australia to receive such benefits, or their actuarial equivalent, at the full rate without qualification or restriction while outside Australia.

Accordingly, it is hereby determined and found that Australia has in effect, beginning September 27, 2001, a social insurance system which meets the requirements of section 202(t)(2) of the Social Security Act (42 U.S.C. 402(t)(2)).

In 1968, we determined that Australia's national pensions system did not meet the requirements of 202(t)(2)(A) of the Social Security Act (Act). However, under the provisions of section 202(t)(4) of the Act, citizens of Australia were afforded the limited exceptions to the alien nonpayment provision under section 202(t)(1) if the worker had 10 years of U.S. residence or 40 quarters of U.S. coverage. We published notice of our determination in the **Federal Register** December 20, 1968 (33 FR 19054).

In 1992, Australia enacted a new national coverage scheme called the Superannuation Guarantee (SG). The SG is a contribution system of mandatory individual accounts intended to supplement Australia's national residence based pension system as a second tier. The SG provides benefits at retirement age based on the accumulated value of invested contributions in the worker's account. Upon review, the SG was found to meet all of the requirements of the section 202(t)(2) provision. This review required a new determination under section 202(t)(2) for Australian citizens.

FOR FURTHER INFORMATION CONTACT: Donna L. Powers, 3700 Robert Ball Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–3558.

(Catalog of Federal Domestic Assistance: Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance)

Dated: December 16, 2015.

Vance Teel,

Associate Commissioner, Office of International Programs.

[FR Doc. 2015–32586 Filed 12–24–15; 8:45 am]

BILLING CODE 4191–02–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Public Comments on Review of Employment Impact of the Trans-Pacific Partnership

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of intent to conduct an employment impact review of the Trans-Pacific Partnership and request for comments.

SUMMARY: The Office of the United States Trade Representative (USTR) and the Department of Labor (DOL), through the Trade Policy Staff Committee (TPSC), are initiating an employment impact review of the Trans-Pacific Partnership (TPP) Agreement. USTR is seeking public comments on the impact of the TPP Agreement on U.S. employment, including labor markets.

DATES: Written comments are due by Wednesday, January 13, 2016.

ADDRESSES: Written comments should be submitted electronically via the Internet at www.regulations.gov. If you are unable to provide submissions at www.regulations.gov, please contact Yvonne Jamison, TPSC, at (202) 395–3475, to arrange for an alternative method of transmission.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning written comments, contact Yvonne Jamison at (202) 395–3475. All other questions should be directed to Greg Schoepfle, Director, Office of Economic and Labor Research, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, telephone (202) 693–4887 or Lewis Karesh, Assistant United States Trade Representative for Labor, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508, telephone (202) 395–3330.

SUPPLEMENTARY INFORMATION:

1. Background

On November 5, 2015, consistent with Trade Promotion Authority (Title I of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. 114–26) (19 U.S.C. 4201 *et seq.*) (“the Act”), the President notified Congress of his intent to enter into the Trans-Pacific Partnership (TPP) Agreement. Also on November 5, 2015, USTR requested that the U.S. International Trade Commission (USITC) prepare a report as specified in section 105(c)(2)–(3) of the Act assessing the likely impact of the TPP Agreement on the U.S. economy as a whole and on specific industry sectors and the interests of U.S. consumers. On

November 17, 2015, the USITC announced that it was instituting an investigation of the likely impact of the TPP Agreement on the U.S. economy as a whole and on specific industry sectors and the interests of U.S. consumers.

2. Employment Impact Review

Section 105(d)(2) of the Act directs the President to “(A) review the impact of future trade agreements on United States employment, including labor markets, modeled after Executive Order No. 13141 (64 FR 63169) to the extent appropriate in establishing procedures and criteria; and (B) submit a report on such reviews to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate at the time the President submits to Congress a copy of the final legal text of an agreement pursuant to section 106(a)(1)(E).” USTR and DOL are conducting the employment impact review through the TPSC.

Comments may be submitted on potentially significant sectoral or regional employment impacts in the United States as well as other likely labor market impacts of the TPP Agreement. Persons submitting comments should provide as much detail as possible in support of their submissions.

3. Requirements for Submissions

Persons submitting written comments must do so in English and must identify (on the first page of the submission) “TPP Employment Impact Review.”

In order to ensure the timely receipt and consideration of comments, USTR strongly encourages commenters to make on-line submissions, using the www.regulations.gov Web site. To submit comments via www.regulations.gov, enter docket number USTR-2015-0012 on the home page and click “search.” The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice and click on the link entitled “Comment Now!” (For further information on using the www.regulations.gov Web site, please consult the resources provided on the Web site by clicking on “How to Use This Site” on the left side of the home page.)

The www.regulations.gov Web site allows users to provide comments by filling in a “Type Comment” field, or by attaching a document using an “Upload File” field. USTR prefers that comments be provided in an attached document. If a document is attached, it is sufficient to type “See attached” in the “Type Comment” field. USTR prefers

submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If the submission is in an application other than those two, please indicate the name of the application in the “Type Comment” field.

For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters “BC.” Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page. Filers of submissions containing business confidential information must also submit a public version of their comments. The file name of the public version should begin with the character “P.” The “BC” and “P” should be followed by the name of the person or entity submitting the comments. Filers submitting comments containing no business confidential information should name their file using the name of the person or entity submitting the comments.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

As noted above, USTR strongly urges submitters to file comments through www.regulations.gov, if at all possible. Any alternative arrangements must be made with Yvonne Jamison in advance of transmitting the comment. Ms. Jamison should be contacted at (202) 395-3475. General information concerning USTR is available at www.ustr.gov.

Comments will be placed in the docket and open to public inspection, except business confidential information. Comments may be viewed on the www.regulations.gov Web site by entering the relevant docket number in the search field on the home page.

Edward Gresser,

Acting Chair, Trade Policy Staff Committee.

[FR Doc. 2015-32294 Filed 12-24-15; 8:45 am]

BILLING CODE 3290-F6-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2015-0007-N-33]

Agency Request for Emergency Processing of Collection of Information by the Office of Management and Budget

AGENCY: Federal Railroad Administration (FRA), United States Department of Transportation (USDOT).

ACTION: Notice.

SUMMARY: FRA hereby gives notice that it is submitting the following Information Collection request (ICR) to the Office of Management and Budget (OMB) for Emergency Processing under the Paperwork Reduction Act of 1995. FRA requests that OMB authorize the collection of information identified below seven days after publication of this Notice for a period of 180 days.

FOR FURTHER INFORMATION CONTACT: A copy of this individual ICR, with applicable supporting documentation, may be obtained by telephoning FRA’s Office of Safety Information Collection Clearance Officer, Robert Brogan (tel. (202) 493-6292), or FRA’s Office of Administration Clearance Information Collection Officer, Kimberly Toone (tel. (202) 493-6132); these numbers are not toll-free; or by contacting Mr. Brogan via facsimile at (202) 493-6216 or Ms. Toone via facsimile at (202) 493-6497, or via email by contacting Mr. Brogan at Robert.Brogan@dot.gov; or by contacting Ms. Toone at Kim.Toone@dot.gov. Comments and questions about the ICR identified below should be directed to OMB’s Office of Information and Regulatory Affairs, Attn: FRA OMB Desk Officer.

SUPPLEMENTARY INFORMATION: The recently enacted Positive Train Control Enforcement and Implementation (PTCEI) Act and The Fixing America’s Surface Transportation (FAST) Act (collectively, the “Acts”) amend certain portions of 49 U.S.C. 20157 relating to positive train control (PTC) system implementation. Most notably, the provisions within these Acts extend the implementation deadline originally established by the Rail Safety Improvement Act of 2008 (RSIA) and require covered railroads to each submit a revised PTC Implementation Plan (PTCIP) with additional information to meet its new deadline.

The Federal Railroad Administration (FRA) is proposing to provide a revised PTCIP template to assist each railroad pursuant to the new law. More specifically, each railroad may

voluntarily opt to use FRA's proposed template to concisely organize and present certain quantitative (i.e. measurable) data relating to its PTC implementation efforts, and its projected timeframe for completing PTC implementation. Although some of this information may have been provided by each railroad in the past, the Acts now require submission of specific measurable data as part of each railroad's revised PTCIP. This information includes, but is not limited to:

- The calendar year(s) when wireless spectrum required for PTC operation will be acquired and available for use;
- The total amount of PTC hardware the railroad must install (broken down by each major hardware category);
- The total amount of PTC hardware the railroad must install by the end of each

calendar year (broken down by each major hardware category);

- The total number of employees the railroad must train; and
- The total number of employees that will receive training by the end of each calendar year.

FRA believes that providing a template will serve as guidance to railroads by reducing confusion as to the necessarily level of detail required. Further, the template will help to expedite the conveyance of this information, and FRA's review for statutory and regulatory compliance, particularly for those railroads that may not have been tracking these details previously. FRA intends to provide the template on its Web site for use by all interested parties.

As provided under 49 CFR 1320.13, FRA is requesting Emergency processing

for this new collection of information as specified in the Paperwork Reduction Act of 1995 and its implementing regulations. FRA cannot reasonably comply with normal clearance procedures since they would be reasonably likely to disrupt the collection of information. Each railroad is required to submit its revised PTCIP by January 27, 2016. FRA cannot wait the typical 90-day period for public comment. Therefore, FRA is requesting OMB approval as soon as possible (i.e., 7 days after publication of this Notice) for this collection of information.

The associated collection of information is summarized below.

Title: PTC Implementation Plan (PTCIP) Template.

Reporting Burden:

PTCIP Template	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Form FRA F 6180.164	38 Railroads	38 Forms 0	50 hours	1,900 hours.

Form Number(s): FRA F 6180.164.
Respondent Universe: 38 Railroads.
Frequency of Submission: One-time; on occasion.
Total Estimated Responses: 38.
Total Estimated Annual Burden: 1,900 hours.

Status: Emergency Review.
 Pursuant to 44 U.S.C. 3507(a) and 5 CFR 320.5(b), 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.
 Issued in Washington, DC, on December 22, 2015.
Corey Hill,
Acting Executive Director.
 [FR Doc. 2015–32617 Filed 12–24–15; 8:45 am]
BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35979]

R.J. Corman Railroad Company/ Carolina Lines, LLC—Modified Certificate of Public Convenience and Necessity—Horry County, S.C.

On November 25, 2015, R.J. Corman Railroad Company/Carolina Lines, LLC (RJCS), a Class III rail carrier, filed a notice for a modified certificate of

public convenience and necessity, pursuant to 49 CFR pt. 1150 subpart C—*Modified Certificate of Public Convenience and Necessity*, to operate approximately 11.5 miles of rail line owned by Horry County, S.C., and located between RJCS's line at Station 9+34.65 (milepost 336.18) in the City of Conway, S.C., and the beginning of the concrete bridge deck on the Conway side of the Pine Island Bascule Bridge over the Intracoastal Waterway at Station 609+91 (milepost 347.55) (the Line).

The Line was authorized for abandonment by the Board's predecessor, the Interstate Commerce Commission, in *Seaboard System Railroad Inc.—Abandonment—in Horry County, S.C.*, AB–55 (Sub-No. 107) (ICC served Sept. 12, 1984). According to RJCS, Horry County, a political subdivision of the State of South Carolina, purchased the Line in 1984 pursuant to 49 CFR 1150.22 after it was abandoned by the Seaboard System Railroad.¹

Pursuant to a Lease Agreement entered into between R.J. Corman

Railroad Company, LLC (R.J. Corman), and Horry County, dated September 16, 2015, R.J. Corman will lease and maintain the Line for an initial term of 15 years with the option to renew the agreement for up to an additional 15 years. The Lease Agreement grants Horry County the right to cancel the lease upon 180-days written notice.

In a Lease Addendum and Assignment Agreement, dated November 6, 2015, R.J. Corman assigned its rights and obligations under the Lease Agreement to RJCS, with the written consent of Horry County. According to RJCS, under the terms of the agreement, RJCS has the exclusive right and responsibility to provide common carrier rail freight service on the Line to both existing and prospective customers that have facilities served by sidetracks or other connections to the Line. RJCS states that it must rehabilitate the Line before it can safely provide service and hopes that rehabilitation of the Line will be completed in January of 2016.

The Line qualifies for a modified certificate of public convenience and necessity. *See Common Carrier* and 49 CFR 1150.22. RJCS states that it will receive no subsidies in connection with its operations and that there will be no preconditions that shippers must meet to receive service.

This notice will be served on the Association of American Railroads (Car Service Division) as agent for all railroads subscribing to the car-service

¹ The Waccamaw Coast Line Railroad (WCLR), a division of the Baltimore and Annapolis Railroad Company, previously operated the Line pursuant to a modified certificate of public convenience and necessity obtained in 2001. *See Waccamaw Coast Line R.R.—Modified Rail Certificate*, FD 34064 (STB served July 13, 2001). WCLR provided notice to terminate its service on the Line on December 11, 2013, which became effective on February 9, 2014. *See Waccamaw Coast Line R.R.—Modified Rail Certificate*, FD 34064 et al., slip op. at 1 (STB served Jan. 31, 2014).

and car-hire agreement at 425 Third Street SW., Suite 1000, Washington, DC 20024; and on the American Short Line and Regional Railroad Association at 50 F Street NW., Suite 7020, Washington, DC 20001.

Board decisions and notices are available on our Web site at “WWW.STB.DOT.GOV.”

Decided: December 22, 2015.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Tia Delano,

Clearance Clerk.

[FR Doc. 2015–32615 Filed 12–24–15; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35802]

Northwest Tennessee Regional Port Authority—Construction and Operation Exemption—in Lake County, TN

AGENCY: Surface Transportation Board.

ACTION: Issuance of Draft Environmental Assessment; Request for Comments.

SUMMARY: The Surface Transportation Board’s (Board) Office of Environmental Analysis (OEA) has prepared an Environmental Assessment (EA) in response to a petition for exemption filed on June 27, 2014 by the Northwest Tennessee Regional Port Authority (NWTRPA) to construct and operate an approximately 5.5 mile line of railroad in Lake County, Tennessee. The proposed rail line would connect the Port of Cates Landing, a river port located on the Mississippi River, with an existing line of railroad operated by the Tennken Railroad at a connection near Tiptonville, Tennessee. The proposed rail line would provide rail service to customers at the Port of Cates Landing and at the Lake County Industrial Park, a proposed industrial park located adjacent to the Port of Cates Landing.

The EA evaluates the potential environmental impacts of three alternative rail alignments, as well as the No Action Alternative and preliminarily concludes that construction of the proposed rail line connection would have no significant environmental impacts if the Board imposes and NWTRPA implements the recommended mitigation measures set forth in the EA. The entire EA is available on the Board’s Web site (www.stb.dot.gov) by clicking on the “Decisions & Notices” button that

appears in the drop down menu for “ELIBRARY,” and searching by Service Date (December 28, 2015) or Docket Number (FD 35802).

DATES: The EA is available for public review and comment. Comments must be postmarked by January 27, 2016. OEA will consider and respond to comments received on the Draft EA in the Final EA. The Board will issue a final decision on the proposed transaction after issuance of the Final EA.

Filing Environmental Comments: Comments submitted by mail should be addressed to: Josh Wayland, Surface Transportation Board, 395 E Street SW., Washington, DC 20423. Comments on the Draft EA may also be filed electronically on the Board’s Web site, www.stb.dot.gov, by clicking on the “E FILING” link. Please refer Docket No. FD 35802 in all comments, including electronic filings.

FOR FURTHER INFORMATION CONTACT: Josh Wayland by mail at the address above, by telephone at 202–245–0330, or by email at waylandj@stb.dot.gov.

By the Board, Victoria Rutson, Director, Office of Environmental Analysis.

Tia Delano,

Clearance Clerk.

[FR Doc. 2015–32566 Filed 12–24–15; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 728]

Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. 24308(c) and (f)

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of Proposed Statement of Board Policy.

SUMMARY: The Surface Transportation Board (Board) is issuing a proposed Policy Statement to provide guidance to the public regarding complaint proceedings under 49 U.S.C. 24308(f) and related issues under 49 U.S.C. 24308(c). The Board seeks public comment on the proposed Policy Statement, and may revise it, as appropriate, after consideration of the comments received.

DATES: Comments on the proposed Policy Statement are due February 22, 2016. Reply comments are due March 14, 2016.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman, (202) 245–0386.

[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION:

Additional information is contained in the Board’s decision. Board decisions and notices are available on our Web site at WWW.STB.DOT.GOV.

Decided: December 16, 2015.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

Brendetta S. Jones,

Clearance Clerk.

[FR Doc. 2015–32412 Filed 12–24–15; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel’s Special Projects Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel’s Special Projects Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, January 14, 2016 and Friday, January 15, 2016.

FOR FURTHER INFORMATION CONTACT: Kim Vinci at 1–888–912–1227 or 916–974–5086.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel’s Special Projects Committee will be held Thursday, January 14, 2016, from 8:00 a.m. to 4:30 p.m. Mountain Time and Friday, January 15, 2016, from 8:00 a.m. until 12:00 p.m. Mountain Time at the IRS Office, 5338 Montgomery Blvd. Albuquerque, New Mexico 87109–1338. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Kim Vinci. For more information please contact Kim Vinci at 1–888–912–1227 or 916–974–5086, or write TAP Office, 4330 Watt Ave. Sacramento, CA 95821–7012 or contact us at the Web site:

<http://www.improveirs.org>. The agenda will include various IRS issues.

Dated: December 17, 2015.

Otis Simpson,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2015-32483 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Communications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, January 14, 2016 and Friday, January 15, 2016.

FOR FURTHER INFORMATION CONTACT: Antoinette Ross at 1-888-912-1227 or 202-317-4110.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Taxpayer Communications Project Committee will be held Thursday, January 14, 2016, from 8:00 a.m. to 4:30 p.m. Eastern Time and Friday, January 15, 2016, from 8:00 a.m. until 12:00 p.m. Eastern Time at the Charles Bennett Federal Building, 400 West Bay Street, Jacksonville, FL 32202. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Antoinette Ross. For more information please contact Antoinette Ross at 1-888-912-1227 or 202-317-4110, or write TAP Office, 1111 Constitution Ave. NW., Room 1509, Washington, DC 20224 or contact us at the Web site: <http://www.improveirs.org>. The agenda will include various IRS issues.

Dated: December 17, 2015.

Otis Simpson,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2015-32479 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Monday, January 11, 2016 and Tuesday, January 12, 2016.

FOR FURTHER INFORMATION CONTACT: Theresa Singleton at 1-888-912-1227 or 202-317-3329.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Notices and Correspondence Project Committee will be held Monday, January 11, 2016, from 1:00 p.m. to 4:30 p.m. and Tuesday, January 12, 2016, from 8:00 a.m. until 4:30 p.m. Eastern Time at the Charles Bennett Federal Building, 400 West Bay Street, Jacksonville, FL 32202. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Theresa Singleton. For more information please contact Theresa Singleton at 1-888-912-1227 or 202-317-3329, or write TAP Office, 1111 Constitution Ave. NW., Room 1509, Washington, DC 20224 or contact us at the Web site: <http://www.improveirs.org>. The agenda will include various IRS issues.

Dated: December 17, 2015.

Otis Simpson,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2015-32480 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Line Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Line Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Monday, January 11, 2016 and Tuesday, January 12, 2016.

FOR FURTHER INFORMATION CONTACT: Linda Rivera at 1-888-912-1227 or 202-317-3337.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Toll-Free Phone Line Project Committee will be held Monday, January 11, 2016, from 1:00 p.m. to 4:30 p.m. Central Time and Tuesday, January 12, 2016, from 8:15 a.m. until 4:30 p.m. Central Time at the IRS Office, 55 North Robinson Avenue, Oklahoma City, OK 73102. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Marianne Dominguez. For more information please contact Linda Rivera at 1-888-912-1227 or 202-317-3337, or write TAP Office, 1111 Constitution Ave. NW., Room 1509, Washington, DC 20224 or contact us at the Web site: <http://www.improveirs.org>. The agenda will include various IRS issues.

Dated: December 17, 2015.

Otis Simpson,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2015-32482 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 2210 and 2210-F

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 2210, Underpayment of Estimated Tax by Individuals, Estates, and Trusts, and Form 2210-F, Underpayment of Estimated Tax by Farmers and Fishermen.

DATES: Written comments should be received on or before February 26, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Michel A. Joplin, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Martha R. Brinson, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at Martha.R.Brinson@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Underpayment of Estimated Tax by Individuals, Estates, and Trusts (Form 2210), and Underpayment of Estimated Tax by Farmers and Fishermen (Form 2210-F).

OMB Number: 1545-0140.

Form Number: 2210 AND 2210-F.

Abstract: Internal Revenue Code section 6654 imposes a penalty for failure to pay estimated tax. Form 2210 is used by individuals, estates, and trusts and Form 2210-F is used by farmers and fisherman to determine whether they are subject to the penalty and to compute the penalty if it applies. The Service uses this information to determine whether taxpayers are subject to the penalty, and to verify the penalty amount.

Current Actions: There are no changes to the burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, and farms.

Estimated Number of Respondents: 599,999.

Estimated Time per Respondent: 4 hrs.

Estimated Total Annual Burden Hours: 2,405,663.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 16, 2015.

Michael A. Joplin,

Reports Clearance Officer, IRS.

[FR Doc. 2015-32356 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Monday, January 11, 2016 and Tuesday, January 12, 2016.

FOR FURTHER INFORMATION CONTACT: Donna Powers at 1-888-912-1227 or 954-423-7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be held Monday, January 11, 2016, from 1:00 p.m. to 4:30 p.m. Mountain time and Tuesday, January 12, 2016, from 8:00 a.m. until 4:30 p.m. Mountain Time at the 5338 Montgomery Blvd. Albuquerque, New Mexico 87109-1338. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Donna Powers. For more information please contact Donna Powers at 1-888-912-1227 or 954-423-7977, or write TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324 or contact us at the Web site: <http://www.improveirs.org>. The agenda will include various IRS issues.

Dated: December 17, 2015.

Otis Simpson,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2015-32484 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, January 14, 2016 and Friday, January 15, 2016.

FOR FURTHER INFORMATION CONTACT: Otis Simpson at 1-888-912-1227 or 202-317-3332.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance

Center Project Committee will be held Thursday, January 14, 2016, from 8:00 a.m. to 4:30 p.m. Central Time and Friday, January 15, 2016, from 8:00 a.m. until 12:00 p.m. Central Time at the IRS Office, 55 North Robinson Avenue, Oklahoma City, OK 73102. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Otis Simpson. For more information please contact Otis Simpson at 1-888-912-1227 or 202-317-3332, or write TAP Office, 1111 Constitution Ave. NW., Room 1509, Washington, DC 20224 or contact us at the Web site: <http://www.improveirs.org>. The agenda will include various IRS issues.

Dated: December 17, 2015.

Otis Simpson,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2015-32481 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Joint Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Joint Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, January 27, 2016.

FOR FURTHER INFORMATION CONTACT: Kim Vinci at 1-888-912-1227 or 916-974-5086.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Joint Committee will be held Wednesday, January 27, 2016, at 1:00 p.m. Eastern Time via teleconference. The public is invited to make oral comments or submit written statements for consideration. For more information please contact: Kim Vinci at 1-888-912-1227 or 916-974-5086, TAP Office, 4330 Watt Ave., Sacramento, CA 95821, or contact us at the Web site: <http://www.improveirs.org>.

The agenda will include various committee issues for submission to the IRS and other TAP related topics. Public input is welcomed.

Dated: December 17, 2015.

Otis Simpson,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2015-32478 Filed 12-24-15; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF VETERANS AFFAIRS

Research Advisory Committee on Gulf War Veterans' Illnesses; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C., App. 2, that the Research Advisory Committee on Gulf War Veterans' Illnesses will meet on January 26, 2016, at 810 Vermont Avenue NW., Washington, DC, Room C-7, from 9:00 a.m. until 5:30 p.m. All sessions will be open to the public, and for interested parties who cannot attend in person, there is a toll-free telephone number (800) 767-1750; access code 56978#.

The purpose of the Committee is to provide advice and make

recommendations to the Secretary of Veterans Affairs on proposed research studies, research plans, and research strategies relating to the health consequences of military service in the Southwest Asia Theater of Operations during the Gulf War in 1990-1991.

The Committee will review VA program activities related to Gulf War Veterans' illnesses, and updates on relevant scientific research published since the last Committee meeting. Presentations will include updates on the VA and DoD Gulf War research programs, along with research presentations describing neurological problems in Gulf War Veterans. There will also be a discussion of Committee business and activities.

The meeting will include time reserved for public comments in the afternoon. A sign-up sheet for 5-minute comments will be available at the meeting. Individuals who wish to address the Committee may submit a 1-2 page summary of their comments for inclusion in the official meeting record. Members of the public may also submit written statements for the Committee's review to Dr. Victor Kalasinsky via email at victor.kalasinsky@va.gov.

Because the meeting is being held in a government building, a photo I.D. must be presented as part of the clearance process. Therefore, any person attending should allow an additional 15 minutes before the meeting begins. Any member of the public seeking additional information should contact Dr. Victor Kalasinsky, Designated Federal Officer, at (202) 443-5682.

Date: December 22, 2015.

Jeffrey M. Martin,

Program Manager, Regulation Policy and Management, Office of the General Counsel.

[FR Doc. 2015-32628 Filed 12-24-15; 8:45 am]

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Part II

Securities and Exchange Commission

17 CFR Parts 270 and 274

Use of Derivatives by Registered Investment Companies and Business Development Companies; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270 and 274

[Release No. IC-31933; File No. S7-24-15]

RIN 3235-AL60

Use of Derivatives by Registered Investment Companies and Business Development Companies

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (the “Commission” or “SEC”) is proposing rule 18f-4, a new exemptive rule under the Investment Company Act of 1940 (the “Investment Company Act” or “Act”) designed to address the investor protection purposes and concerns underlying section 18 of the Act and to provide an updated and more comprehensive approach to the regulation of funds’ use of derivatives. The proposed rule would permit mutual funds, exchange-traded funds (“ETFs”), closed-end funds, and companies that have elected to be treated as business development companies (“BDCs”) under the Act (collectively, “funds”) to enter into derivatives transactions and financial commitment transactions (as those terms are defined in the proposed rule) notwithstanding the prohibitions and restrictions on the issuance of senior securities under section 18 of the Act, provided that the funds comply with the conditions of the proposed rule. A fund that relies on the proposed rule in order to enter into derivatives transactions would be required to: comply with one of two alternative portfolio limitations designed to impose a limit on the amount of leverage the fund may obtain through derivatives transactions and other senior securities transactions; manage the risks associated with the fund’s derivatives transactions by maintaining an amount of certain assets, defined in the proposed rule as “qualifying coverage assets,” designed to enable the fund to meet its obligations under its derivatives transactions; and, depending on the extent of its derivatives usage, establish a formalized derivatives risk management program. A fund that relies on the proposed rule in order to enter into financial commitment transactions would be required to maintain qualifying coverage assets equal in value to the fund’s full obligations under those transactions. The Commission also is proposing amendments to proposed Form N-PORT and proposed Form N-CEN that would require

reporting and disclosure of certain information regarding a fund’s derivatives usage.

DATES: Comments should be received on or before March 28, 2016.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/concept.shtml>);
- Send an email to rule-comments@sec.gov. Please include File Number S7-24-15 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-24-15. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission’s Web site. To ensure direct electronic receipt of such notifications, sign up through the “Stay Connected” option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT:

With respect to proposed rule 18f-4, Adam Bolter, Jamie Lynn Walter, or Erin C. Loomis, Senior Counsels; Thoreau A. Bartmann, Branch Chief; Brian McLaughlin Johnson, Senior Special Counsel; or Aaron Schlaphoff or Danforth Townley, Attorney Fellows; and with respect to the proposed amendments to Form N-PORT and

Form N-CEN, Jacob D. Krawitz, Senior Counsel, or Sara Cortes, Senior Special Counsel, at (202)-551-6792, Investment Company Rulemaking Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission is proposing rule 18f-4 [17 CFR 270.18f-4] under the Investment Company Act of 1940 [15 U.S.C. 80a] and amendments to proposed Form N-PORT and proposed Form N-CEN.

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I. Introduction

The activities and capital structures of funds are regulated extensively under the Investment Company Act,¹ Commission rules, and Commission guidance.² The use of derivatives by

funds implicates certain requirements under the Investment Company Act, including section 18 of that Act. As discussed in more detail below, section 18 limits a fund's ability to obtain leverage or incur obligations to persons other than the fund's common shareholders through the issuance of senior securities, as defined in that section.

Derivatives may be broadly described as instruments or contracts whose value is based upon, or derived from, some other asset or metric (referred to as the "reference asset," "underlying asset" or "underlier").³ Funds employ derivatives for a variety of purposes, including to: Seek higher returns through increased investment exposures; hedge interest rate, credit, and other risks in their investment portfolios; gain access to certain markets; and achieve greater transaction efficiency.⁴ At the same time, derivatives can raise risks for a fund relating to, for example, leverage, illiquidity (particularly with respect to complex over-the-counter ("OTC") derivatives), counterparties, and the ability of the fund to meet its obligations.⁵

We are committed, as the primary regulator of funds, to designing regulatory programs that respond to the risks associated with the increasingly complex portfolio composition and operations of the asset management

transactions) must comply with all other applicable statutory and regulatory requirements, such as other federal securities law provisions, the Internal Revenue Code (the "IRC"), Regulation T of the Federal Reserve Board ("Regulation T"), and the rules and regulations of the Commodity Futures Trading Commission (the "CFTC"). See also Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"), available at <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>.

³ See Use of Derivatives by Investment Companies under the Investment Company Act of 1940, Investment Company Act Release No. 29776 (Aug. 31, 2011) [76 FR 55237 (Sept. 7, 2011)] ("Concept Release"), at n.3.

⁴ See Concept Release, *supra* note 3, at n.5.

⁵ See Concept Release, *supra* note 3, at n.6. As discussed in Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release, Investment Company Act Release No. 31835 (Sept. 22, 2015) [80 FR 62273 (Oct. 15, 2015)] ("Liquidity Release"), long-standing Commission guidelines generally limit an open-end fund's aggregate holdings of "illiquid" assets to 15% of the fund's net assets. Under these guidelines, an asset is considered illiquid if it cannot be sold or disposed of in the ordinary course of business within seven days at approximately the value at which the fund has valued the investment. These guidelines apply to all investments (including derivatives) held by an open-end fund. Proposed rule 22e-4, which we proposed in September 2015, would codify this standard along with other requirements that are designed to promote effective liquidity risk management for open-end funds.

industry. The dramatic growth in the volume and complexity of the derivatives markets over the past two decades, and the increased use of derivatives by certain funds,⁶ led us to initiate a review of funds' use of derivatives under the Investment Company Act to evaluate whether the regulatory framework, as it applied to funds' use of derivatives, continues to fulfill the purposes and policies underlying the Act and is consistent with investor protection. We published a Concept Release on funds' use of derivatives in 2011 (the "Concept Release") to assist with this review and solicit public comment on the current regulatory framework.⁷ As noted in the Concept Release, our staff has been exploring the benefits, risks, and costs associated with funds' use of derivatives. Our staff's review of these and other matters, together with input from commenters on the Concept Release and others, have informed our consideration of the regulation of funds' use of derivatives, including in particular whether funds' current practices, based on their application of Commission and staff guidance, are consistent with the investor protection purposes and concerns underlying section 18 of the Investment Company Act.

Today, we are proposing new rule 18f-4, which is designed to address the investor protection purposes and concerns underlying section 18 and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives transactions and other transactions that implicate section 18 in light of the dramatic growth in the volume and complexity of the derivatives markets over the past two decades and the increased use of derivatives by certain funds. As discussed in more detail below, the proposed rule would permit a fund to enter into derivatives and financial commitment transactions, notwithstanding the prohibitions and restrictions on the issuance of senior securities under section 18 of the Act, provided that the fund complies with the conditions of the proposed rule. The proposed rule's conditions are designed both to impose a limit on the leverage a fund may obtain through the use of derivatives and financial commitment transactions and other senior securities transactions, and to require the fund to have assets available to meet its obligations arising from those transactions, both of which are central

⁶ See Concept Release, *supra* note 3, at n.7. See also *infra* section II.

⁷ See Concept Release, *supra* note 3.

¹ 15 U.S.C. 80a. Unless otherwise noted, all references to statutory sections are to the Investment Company Act, and all references to rules under the Investment Company Act, including proposed rule 18f-4, will be to title 17, part 270 of the Code of Federal Regulations, 17 CFR part 270.

² Our staff has also issued no-action and other letters that relate to fund use of derivatives. In addition to Investment Company Act provisions, funds using derivatives (and financial commitment

investor protection purposes and concerns underlying section 18. The proposed rule also would require funds that engage in more than a limited amount of derivatives transactions or that use certain complex derivatives transactions, as defined in the proposed rule, to establish formalized risk management programs to manage the risks associated with such transactions.

II. Background

A. Background Concerning the Use of Derivatives by Funds

As noted above, derivatives may be broadly described as instruments or contracts whose value is based upon, or derived from, some reference asset. Reference assets can include, for example, stocks, bonds, commodities, currencies, interest rates, market indices, currency exchange rates, or other assets or interests.⁸ Common examples of derivatives used by funds include forwards, futures, swaps, and options.⁹

Derivatives are often characterized as either exchange-traded or OTC.¹⁰ Exchange-traded derivatives—such as futures,¹¹ certain options,¹² and options

on futures¹³—are standardized contracts traded on regulated exchanges, such as the Chicago Mercantile Exchange and the Chicago Board Options Exchange. OTC derivatives—such as certain swaps,¹⁴ non-exchange traded options, and combination products such as swaptions¹⁵ and forward swaps¹⁶—are contracts negotiated and entered into outside of an organized exchange. Unlike exchange-traded derivatives, OTC derivatives may be significantly customized, and may not be cleared by a central clearing organization. OTC derivatives that are not centrally cleared may involve greater counterparty credit risk, and may be more difficult to value, transfer, or liquidate than exchange-traded derivatives.¹⁷ The Dodd-Frank Act and rules thereunder seek to establish a comprehensive new regulatory framework for two broad categories of derivatives—swaps and security-based swaps. The framework is designed to reduce risk, increase transparency, and promote market integrity within the financial system.¹⁸

¹³ Options on futures generally trade on the same exchange as the relevant futures contract. When a call option on a futures contract is exercised, the holder acquires from the writer a long position in the underlying futures contract plus a cash amount equal to the excess of the futures price over the strike price. When a put option on a futures contract is exercised, the holder acquires a short position in the underlying futures contract plus a cash amount equal to the excess of the strike price over the futures price. See Concept Release, *supra* note 3, at n.24.

¹⁴ A “swap” is generally an agreement between two counterparties to exchange periodic payments based upon the value or level of one or more rates, indices, assets, or interests of any kind. For example, counterparties may agree to exchange payments based on different currencies or interest rates. See Concept Release, *supra* note 3, at n.25. Except as otherwise specified or the context otherwise requires, we use the term “swap” in this Release to refer collectively to swaps, as defined in section 1a of the Commodity Exchange Act, 7 U.S.C. 1a (the “CEA”), and security-based swaps, as defined in section 3(a)(68) of the Exchange Act.

¹⁵ A “swaption” is an option to enter into an interest rate swap where a specified fixed rate is exchanged for a floating rate. See Concept Release, *supra* note 3, at n.26.

¹⁶ A forward swap (or deferred swap) is an agreement to enter into a swap at some time in the future (“deferred swap”). See Concept Release, *supra* note 3, at n.27.

¹⁷ An OTC derivative may be more difficult to transfer or liquidate than an exchange-traded derivative because, for example, an OTC derivative may provide contractually for non-transferability without the consent of the counterparty, or may be sufficiently customized that its value is difficult to establish or its terms too narrowly drawn to attract transferees willing to accept assignment of the contract, unlike most exchange-traded derivatives. See Concept Release, *supra* note 3, at n.28.

¹⁸ The Dodd-Frank Act, *supra* note 2, was signed into law on July 21, 2010. The Act mandates, among other things, substantial changes in the OTC derivatives markets, including new clearing, reporting, and trade execution mandates for swaps and security-based swaps, and both exchange-

While funds use derivatives for a variety of purposes, a common characteristic of most derivatives is that they involve leverage or the potential for leverage.¹⁹ We have stated that “[l]everage exists when an investor achieves the right to a return on a capital base that exceeds the investment which he has personally contributed to the entity or instrument achieving a return.”²⁰ Many derivatives transactions entered into by a fund, such as futures contracts, swaps, and written options, involve leverage or the potential for leverage in that they enable the fund to participate in gains and losses on an amount of reference assets that exceeds the fund’s investment, while also imposing a conditional or unconditional obligation on the fund to make a payment or deliver assets to a counterparty.²¹ Other derivatives transactions, such as purchased call options, provide the economic equivalent of leverage because they expose the fund to gains on an amount in excess of the fund’s investment but do not impose a payment obligation on the fund beyond its investment.²²

Funds use derivatives both to obtain investment exposures as part of their investment strategies and to manage risk.²³ A fund may use derivatives to

traded and OTC derivatives are contemplated under the new regime. See Dodd-Frank Act sections 723 (mandating clearing of swaps) and 763 (mandating clearing of security-based swaps). We have noted that these Dodd-Frank Act requirements “were designed to provide greater certainty that, wherever possible and appropriate, swap and security-based swap contracts formerly traded exclusively in the OTC market are centrally cleared.” Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Securities Exchange Act Release No. 67286 (June 28, 2012) [77 FR 41602 (July 13, 2012)], at text accompanying n.5.

¹⁹ See, e.g., *infra* notes 69–71.

²⁰ See Securities Trading Practices of Registered Investment Companies, Investment Company Act Release No. 10666 (Apr. 18, 1979) [44 FR 25128 (Apr. 27, 1979)] (“Release 10666”), at n.5. See also *infra* notes 21–22.

²¹ The leverage created by such an arrangement is sometimes referred to as “indebtedness leverage.” See Concept Release, *supra* note 3, at n.31. See *infra* notes 70–72 and accompanying text.

²² This type of leverage is sometimes referred to as “economic leverage.” See Concept Release, *supra* note 3, at n.32.

²³ See Concept Release, *supra* note 3, at n.33. A fund may also use derivatives to hedge current portfolio exposures (for example, when a fund’s portfolio is structured to reflect the fund’s long-term investment strategy and its investment adviser’s forecasts, interim events may cause the fund’s investment adviser to seek to temporarily hedge a portion of the portfolio’s broad market, sector, and/or security exposures). Industry participants believe that derivatives may also provide a more efficient hedging tool than reducing exposure by selling individual securities, offering greater liquidity,

⁸ For example, the reference asset of a Standard & Poor’s (“S&P”) 500 futures contract is the S&P 500 index.

⁹ See, e.g., Concept Release, *supra* note 3, at nn.35–46 and accompanying text.

¹⁰ See Concept Release, *supra* note 3, at n.22.

¹¹ A futures contract is a standardized contract between two parties to buy or sell a specified asset of standardized quantity and quality, for an agreed upon price (the “futures price” or “strike price”), with delivery and payment occurring at a specified future date (the “delivery date”). The contracts are negotiated on a futures exchange which acts as an intermediary between the two parties. The party agreeing to buy the underlying asset in the future, the “buyer” of the contract, is said to be “long,” and the party agreeing to sell the asset in the future, the “seller” of the contract, is said to be “short.” The long position (buyer) hopes or expects that the asset price is going to increase, while the short position (seller) hopes or expects that it will decrease. For a general discussion of futures contracts, see, e.g., John C. Hull, *Options, Futures, and Other Derivatives* (9th ed. 2015), at 24.

¹² An option is the right to buy or sell an asset. There are two basic types of options, a “call option” and a “put option.” A call option gives the holder the right (but does not impose the obligation) to buy the underlying asset by or at a certain date for a certain price. The seller, or “writer,” of a call option has the obligation to sell the underlying asset to the holder if the holder exercises the option. A put option gives the holder the right (but does not impose the obligation) to sell the underlying asset by or at a certain date for a certain price. The seller, or “writer,” of a put option has the obligation to buy from the holder the underlying asset if the holder exercises the option. The price that the option holder must pay to exercise the option is known as the “exercise” or “strike” price. The amount that the option holder pays to purchase an option is known as the “option premium,” “price,” “cost,” or “fair value” of the option. See Concept Release, *supra* note 3, at n.23.

gain, maintain, or reduce exposure to a market, sector, or security more quickly and/or with lower transaction costs and portfolio disruption than investing directly in the underlying securities.²⁴ The comments we received on the Concept Release reflect some of the various ways in which funds use derivatives, including, for example: To hedge risks associated with the fund's securities investments; to equitize cash to gain exposure quickly, such as by purchasing index futures rather than investing in the securities underlying the index; and to obtain synthetic positions.²⁵

At the same time and as noted above, funds' use of derivatives may entail risks relating to, for example, leverage, illiquidity (particularly with respect to complex OTC derivatives), and counterparty risk, among others.²⁶ A fund's use of derivatives presents challenges for its investment adviser and board of directors in managing derivatives use so that they are employed in a manner consistent with the fund's investment objectives, policies, and restrictions, its risk profile, and relevant regulatory requirements, including those under the federal securities laws.²⁷

lower round-trip transaction costs, lower taxes, and reduced disruption to the portfolio's longer-term positioning. *Id.* See also *infra* note 25 and accompanying text.

²⁴ See Concept Release, *supra* note 3, at section I.

²⁵ See, e.g., Comment Letter of BlackRock on Concept Release (Nov. 4, 2011) (File No. S7-33-11) ("BlackRock Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-39.pdf>; Comment Letter of AQR Capital Management on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("AQR Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-26.pdf>; Comment Letter of Vanguard on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("Vanguard Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-38.pdf>; Comment Letter of Oppenheimer Funds on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("Oppenheimer Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-44.pdf>; Comment Letter of Loomis, Sayles and Company on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("Loomis Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-25.pdf>; Comment Letter of Investment Company Institute on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("ICI Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-46.pdf>.

²⁶ See Concept Release, *supra* note 3, at n.34.

²⁷ See, e.g., Comment Letter of Mutual Fund Directors Forum on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("MFDF Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-32.pdf>, at 2 (agreeing with this statement in the Concept Release and suggesting that we "evaluate how any potential regulations will impact the ability of directors effectively to oversee their funds' use of derivatives").

B. Derivatives and the Senior Securities Restrictions of the Investment Company Act

1. Requirements of Section 18

Section 18 of the Act imposes various limitations on the capital structure of funds, including, in part, by restricting the ability of funds to issue "senior securities." The protection of investors against the potentially adverse effects of a fund's issuance of senior securities is a core purpose of the Investment Company Act.²⁸ Section 18(g) of the Investment Company Act defines "senior security," in part, as "any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness."²⁹

Congress' concerns underlying the limitations in section 18 were focused on: (1) Excessive borrowing and the issuance of excessive amounts of senior securities by funds which increased unduly the speculative character of their junior securities;³⁰ (2) funds operating without adequate assets and reserves;³¹ and (3) potential abuse of the purchasers of senior securities.³² To address these concerns, section 18(f)(1) of the Investment Company Act prohibits an open-end fund³³ from issuing or selling any "senior security" other than borrowing from a bank and subject to a requirement to maintain 300% "asset coverage."³⁴ Section 18(a)(1) of the

²⁸ See, e.g., sections 1(b)(7), 1(b)(8), 18(a), and 18(f) of the Investment Company Act.

²⁹ The definition of senior security in section 18(g) also includes "any stock of a class having priority over any other class as to the distribution of assets or payment of dividends" and excludes certain limited temporary borrowings.

³⁰ See section 1(b)(7) of the Investment Company Act; Release 10666, *supra* note 20, at n.8.

³¹ See section 1(b)(8) of the Investment Company Act; Release 10666, *supra* note 20, at n.8.

³² See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess., pt. 1 (1940) ("Senate Hearings") at 265-78. See also *Mutual Funds and Derivative Instruments*, Division of Investment Management Memorandum transmitted by Chairman Levitt to Representatives Markey and Fields (Sept. 26, 1994) ("1994 Report"), available at <http://www.sec.gov/news/studies/deriv.txt>, at 21 (describing the practices in the 1920s and 1930s that gave rise to section 18's limitations on leverage).

³³ Section 5(a)(1) of the Investment Company Act defines "open-end company" as "a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer."

³⁴ "Asset coverage" of a class of securities representing indebtedness of an issuer generally is defined in section 18(h) of the Investment Company Act as "the ratio which the value of the total assets of such issuer, less all liabilities and indebtedness not represented by senior securities, bears to the aggregate amount of senior securities representing indebtedness of such issuer." Take, for example, an open-end fund with \$100 in assets and with no liabilities or senior securities outstanding. The fund

Investment Company Act similarly prohibits a closed-end fund³⁵ from issuing or selling any "senior security that represents an indebtedness" unless it has at least 300% "asset coverage," although closed-end funds' ability to issue senior securities representing indebtedness is not limited to bank borrowings, and closed-end funds also may issue senior securities that are a stock, subject to limitations in section 18.³⁶ A BDC is also subject to the limitations of section 18(a)(1)(A) to the same extent as if it were a closed-end investment company except that the applicable asset coverage amount for any senior security representing indebtedness is 200%.³⁷

2. Investment Company Act Release 10666

In Investment Company Act Release 10666, issued in 1979, we considered the application of section 18's restrictions on senior securities to the following transactions: reverse repurchase agreements, firm commitment agreements, and standby commitment agreements.³⁸ As we described in more detail in Release 10666, in a reverse repurchase agreement, a fund transfers possession of a security to another party in return for a percentage of the value of the security; at an agreed upon future date, the fund repurchases the transferred security by paying an amount equal to the proceeds of the transaction plus interest.³⁹ A firm commitment agreement is a buy order for delayed delivery under which a fund agrees to purchase a security—a Ginnie Mae, in the example we provided in Release 10666⁴⁰—from a seller at a future date,

could, while maintaining the required coverage of 300% of the value of its assets subject to section 18 of the Act, borrow an additional \$50 from a bank; the \$50 in borrowings would represent one-third of the fund's \$150 in total assets, measured after the borrowing (or 50% of the fund's \$100 net assets).

³⁵ Section 5(a)(2) of the Investment Company Act defines "closed-end company" as "any management company other than an open-end company."

³⁶ Section 18(a)(1)(A).

³⁷ See section 61(a)(1) of the Investment Company Act. BDCs, like registered closed-end funds, also may issue a senior security that is a stock (e.g., preferred stock), subject to limitations in section 18. See section 18(a)(2) and section 61(a)(1) of the Investment Company Act.

³⁸ See Release 10666, *supra* note 20.

³⁹ See Release 10666, *supra* note 20, at discussion of "Reverse Repurchase Agreements" (noting that a reverse repurchase agreement may not have an agreed upon repurchase date, and in that case, the agreement would be treated as if it were reestablished each day).

⁴⁰ In Release 10666, we described reverse repurchase agreements and firm and standby commitment agreements involving debt securities guaranteed as to principal and interest by the

Continued

stated price, and fixed yield; a standby commitment agreement similarly involves an agreement by the fund to purchase a security with a stated price and fixed yield in the future upon the counterparty's exercise of its option to sell the security to the fund.⁴¹

We concluded that such agreements, while not securities for all purposes under the federal securities laws,⁴² "fall within the functional meaning of the term 'evidence of indebtedness' for purposes of section 18 of the Act," which we noted would generally include "all contractual obligations to pay in the future for consideration presently received," and thus may involve the issuance of senior securities.⁴³ Further, we stated that "trading practices involving the use by investment companies of such agreements for speculative purposes or to accomplish leveraging fall within the legislative purposes of section 18."⁴⁴

We recognized, however, that although reverse repurchase agreements, firm commitment agreements, and standby commitment agreements may involve the issuance of senior securities and thus generally would be prohibited for open-end funds by section 18(f) (and limited by the 300% asset coverage requirement for closed-end funds), these and similar arrangements nonetheless could appropriately be used by funds subject to the constraints we described in Release 10666. We analogized to short sales of securities by funds, as to which our staff had previously provided guidance that the issue of section 18 compliance would not be raised if funds

Government National Mortgage Associations, or "Ginnie Maes." We noted, however, that we referenced Ginnie Maes only as an example of the underlying security and the reference should not be construed as delimiting our general statement of policy; we further noted that we sought in Release 10666 to "address generally the possible economic effects and legal implications of all comparable trading practices which may affect the capital structure of investment companies in a manner analogous to the securities trading practices specifically discussed [in Release 10666]." *Id.*, at discussion of "Areas of Concern." See also *infra* section III.A.2.

⁴¹ See Release 10666, *supra* note 20, at discussion of "Firm Commitment Agreements," and "Standby Commitment Agreements."

⁴² See Release 10666, *supra* note 20, at "The Agreements as Securities" discussion. See also *infra* note 61.

⁴³ Release 10666, *supra* note 20, at "The Agreements as Securities" discussion.

⁴⁴ *Id.* (stating, among other things, that, "[t]he gains and losses from the transactions can be extremely large relative to invested capital; for this reason, each agreement has speculative aspects. Therefore, it would appear that the independent investment decisions involved in entering into such agreements, which focus on their distinct risk/return characteristics, indicate that, economically as well as legally, the agreements should be treated as securities separate from the underlying Ginnie Maes for purposes of section 18 of the Act.")

"cover" senior securities by maintaining "segregated accounts."⁴⁵

We concluded that the use of segregated accounts "if properly created and maintained, would limit the investment company's risk of loss."⁴⁶ To avail itself of the segregated account approach, we stated that a fund could establish and maintain with the fund's custodian a segregated account containing certain liquid assets, such as cash, U.S. government securities, or other appropriate high-grade debt obligations, equal to the obligation incurred by the fund in connection with the senior security ("segregated account approach").⁴⁷ We stated that the segregated account functions as "a practical limit on the amount of leverage which the investment company may undertake and on the potential increase in the speculative character of its outstanding common stock," and that it "[would] assure the availability of adequate funds to meet the obligations arising from such activities."⁴⁸

We did not specifically address derivatives in Release 10666.⁴⁹ We did,

⁴⁵ See Release 10666, *supra* note 20, at text accompanying n.15 (citing Guidelines for the Preparation of Form N-8B-1, Investment Company Act Release No. 7221 (June 9, 1972) at 6-8).

⁴⁶ See Release 10666, *supra* note 20, at discussion of "Segregated Account."

⁴⁷ We stated that, under the segregated account approach, the value of the assets in the segregated account should be marked to the market daily, additional assets should be placed in the segregated account whenever the total value of the account falls below the amount of the fund's obligation, and assets in the segregated account should be deemed frozen and unavailable for sale or other disposition. See *id.* We also cautioned that as the percentage of a fund's portfolio assets that are segregated increases, the fund's ability to meet current obligations, to honor requests for redemption, and to manage properly the investment portfolio in a manner consistent with its stated investment objective may become impaired. *Id.* We stated that the amount of assets to be segregated with respect to reverse repurchase agreements lacking a specified repurchase price would be the value of the proceeds received plus accrued interest; for reverse repurchase agreements with a specified repurchase price, the amount of assets to be segregated would be the repurchase price; and for firm and standby commitment agreements, the amount of assets to be segregated would be the purchase price. *Id.*

⁴⁸ *Id.*

⁴⁹ The derivatives markets have expanded substantially since we issued Release 10666 in 1979. For example, the Options Clearing Corporation reports that in 1979, only 64 million contracts were traded on 220 equity issues. By 2014, those numbers had risen to 3,845 million contracts traded on 4,278 equity issues. The CME Group reports that 313 of its 335 derivatives products began trading after 1979 (see http://www.cmegroup.com/company/history/cmegroup_information.html). For example, the Chicago Mercantile Exchange launched its first cash-settled futures contract in 1981 and its first successful stock index future (S&P 500 index) in 1982 (see <http://www.cmegroup.com/company/history/timeline-of-achievements.html>). See also Jennifer Lynch Koski & Jeffrey Pontiff, *How Are Derivatives*

however, state that although we were expressing our views about the particular trading practices discussed in that release, our views were not limited to those trading practices, in that we sought to "address generally the possible economic effects and legal implications of all comparable trading practices which may affect the capital structure of investment companies in a manner analogous to the securities trading practices specifically discussed in Release 10666."⁵⁰

3. Developments After Investment Company Act Release No. 10666

In the years following the issuance of Release 10666, our staff issued more than thirty no-action letters to funds concerning the maintenance of segregated accounts or otherwise "covering" their obligations in connection with various transactions that implicate section 18.⁵¹ In these letters and through other staff guidance, our staff has addressed questions as they were presented to the staff, generally on an instrument-by-instrument basis, regarding the application of our statements in Release 10666 to various types of derivatives and other transactions. As derivatives markets expanded and funds increased their use of derivatives,⁵² industry practices have developed over time, based at least in part on our staff's no-action letters and other staff guidance, concerning the appropriate amount and type of assets that should be segregated in order to

Used? Evidence from the Mutual Fund Industry, 54 *The J. of Fin.* 791, 792 (Apr. 1999), available at <http://onlinelibrary.wiley.com/doi/10.1111/0022-1082.00126/pdf> (observing that the Taxpayer Relief Act of 1997's repeal of the "short-short rule" would likely lead to increased derivative use by mutual funds because that rule "eliminate[d] preferential pass-through tax status for funds that realize more than 30 percent of their capital gains from positions held less than three months" and "inhibited derivative use because some derivative securities such as options and futures contracts involve realizing capital gains for holding periods of less than three months").

⁵⁰ Release 10666, *supra* note 20, at "Areas of Concern" and "Background" discussion.

⁵¹ The Concept Release includes a discussion of certain staff no-action letters. See Concept Release, *supra* note 3, at section I.

⁵² See, e.g., Comment Letter of Davis Polk & Wardwell LLP on Concept Release (Nov. 11, 2011) (File No. S7-33-11) ("Davis Polk Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-49.pdf> ("[T]he Commission and the Staff, over the years, have addressed issues pertaining to the use of derivatives transactions by registered funds on an intermittent case-by-case basis. While this guidance has been helpful, it has not been able to keep pace with the dramatic expansion of the derivatives market over the past twenty years, both in terms of the types of instruments that are available and the extent to which funds use them.")

“cover” various types of derivatives transactions.⁵³

With respect to the amount of assets that funds have segregated, two general practices have developed:

- For some derivatives, funds generally segregate an amount equal to the full amount of the fund’s potential obligation under the contract, where that amount is known at the outset of the transaction, or the full market value of the underlying reference asset for the derivative (collectively, “notional amount segregation”).⁵⁴ Funds have applied this approach to, among other transactions, futures, forward contracts and written options that permit physical settlement, and credit default swaps (“CDS”) regardless of whether physical settlement or cash settlement is contemplated.⁵⁵

- For certain derivatives that are required by their terms to be net cash settled, and thus do not involve physical settlement, funds often segregate an amount equal to the fund’s

⁵³ Our staff also has stated that it would not object to a fund covering its obligations by entering into certain cover transactions or holding the asset (or the right to acquire the asset) that the fund would be required to deliver under certain derivatives. See Concept Release, *supra* note 3, at text following nn.70–71.

⁵⁴ See, e.g., Concept Release, *supra* note 3, at n.78 and accompanying text (explaining that, “[i]n determining the amount of assets required to be segregated to cover a particular instrument, the Commission and its staff have generally looked to the purchase or exercise price of the contract (less margin on deposit) for long positions and the market value of the security or other asset underlying the agreement for short positions, measured by the full amount of the reference asset, i.e., the notional amount of the transaction rather than the unrealized gain or loss on the transaction, i.e., its current mark-to-market value”). See also, e.g., Davis Polk Concept Release Comment Letter, at 3 (“In Release 10666 and in no-action letters, the Commission and the Staff generally indicated that funds relying on the segregation method should segregate assets equal to the full notional value of the reference asset for a derivative (the ‘notional amount’), less any collateral or margin on deposit.”).

⁵⁵ For example, if a fund enters into a long, physically settled forward contract, and the contract specifies the forward price that the fund will pay at settlement, the fund would, consistent with staff positions, segregate this forward/contract price. See, e.g., Dreyfus Strategic Investing and Dreyfus Strategic Income, SEC Staff No-Action Letter (June 22, 1987) (“Dreyfus No-Action Letter”), available at <http://www.sec.gov/divisions/investment/imsecurities/dreyfusstrategic033087.pdf>. As another example, if a fund enters into a short, physically settled forward and the contract obligates the fund to deliver a specific quantity of an asset at settlement—but the total value of that deliverable obligation is unknown at the contract’s outset—the fund would, consistent with staff positions, segregate, on a daily basis, liquid assets with a value equal to the daily market value of the deliverable. See *id.*; Robertson Stephens Investment Trust, SEC Staff No-Action Letter (Aug. 24, 1995) (“Robertson Stephens No-Action Letter”), available at <http://www.sec.gov/divisions/investment/imsecurities/robertsonstephens040395.pdf>. See also *supra* note 47.

daily mark-to-market liability, if any (“mark-to-market segregation”).⁵⁶ Funds initially applied this approach to specific types of transactions addressed through guidance by our staff: first interest rate swaps and later cash-settled futures and non-deliverable forwards (“NDFs”).⁵⁷ We understand, however, that many funds now apply mark-to-market segregation to a wider range of cash-settled instruments.⁵⁸ Our staff has observed that some funds appear to apply the mark-to-market approach to any derivative that is cash settled.

As noted above, in Release 10666, we stated that the assets eligible to be included in segregated accounts should be “liquid assets,” such as cash, U.S. government securities, or other appropriate high-grade debt obligations. In a 1996 staff no-action letter, the staff took the position that a fund could cover its senior securities-related obligations by depositing any liquid asset, including equity securities and non-investment grade debt securities, in a segregated account.⁵⁹ With respect to the manner in which segregation may be effected, the staff took the position that a fund could segregate assets by designating such assets on its books, rather than establishing a segregated account at its custodian.⁶⁰

As this discussion reflects, funds and their counsel, in light of the guidance we provided in Release 10666 and that provided by our staff through no-action letters and otherwise, have applied the

⁵⁶ See, e.g., Concept Release, *supra* note 3, at nn.75–77 and accompanying text (explaining that “[c]ertain swaps, for example, that settle in cash on a net basis, appear to be treated by many funds as requiring segregation of an amount of assets equal to the fund’s daily mark-to-market liability, if any”).

⁵⁷ Our staff provided this guidance in the context of its review of certain funds’ registration statements.

⁵⁸ See, e.g., Comment Letter of Ropes & Gray LLP on Concept Release (Nov. 7, 2011) (File No. S7–33–11) (“Ropes & Gray Concept Release Comment Letter”), available at <http://www.sec.gov/comments/s7-33-11/s73311-21.pdf>, at 4 (“It now appears to be an increasingly common practice for funds that engage in cash-settled swaps to segregate assets only to the extent required to meet the fund’s daily mark-to-market liability, if any, relating to such swaps.”); Davis Polk Concept Release Comment Letter, at 3 (“[F]und registration statements indicate that, in recent years, the Staff has not objected to the adoption by funds of policies that require segregation of the mark-to-market value, rather than the notional amount, for a variety of swaps as well as for cash-settled futures and forward contracts.”).

⁵⁹ See Merrill Lynch Asset Management, L.P., SEC Staff No-Action Letter (July 2, 1996) (“Merrill Lynch No-Action letter”), available at <http://www.sec.gov/divisions/investment/imsecurities/merrilllynch070196.pdf>.

⁶⁰ See Dear Chief Financial Officer Letter from Lawrence A. Friend, Chief Accountant, Division of Investment Management (Nov. 7, 1997), available at <http://www.sec.gov/divisions/investment/imsecurities/imcfo120797.pdf>.

segregated account approach to, or otherwise sought to cover, many types of transactions other than those specifically addressed in Release 10666, including various derivatives and other transactions that implicate section 18. These transactions include, for example, futures, written options, and swaps (both swaps and security-based swaps).

4. Current Views Concerning Section 18

As we stated in Release 10666, we view the transactions described in that release as falling within the functional meaning of the term “evidence of indebtedness,” for purposes of section 18.⁶¹ The trading practices described in Release 10666, as well as short sales of securities for which the staff initially developed the segregated account approach we applied in Release 10666, all impose on a fund a conditional or unconditional contractual obligation to pay or deliver assets in the future to a counterparty and thus involve the issuance of a senior security for purposes of section 18.⁶²

We apply the same analysis to derivatives transactions under which the fund is or may be required to make any payment or deliver cash or other assets during the life of the instrument or at maturity or early termination, whether as a margin or settlement payment or otherwise (a “future payment obligation”). As was the case with respect to the trading practices we described in Release 10666, where the fund has entered into a derivatives transaction and has a future payment obligation—a conditional or unconditional contractual obligation to

⁶¹ See Release 10666, *supra* note 20, at “The Agreements as Securities” discussion. In addition, as we noted in the Concept Release, the Investment Company Act’s definition of the term “security” is broader than the term’s definition in other federal securities laws. Compare section 2(a)(36) of the Investment Company Act with sections 2(a)(1) and 2A of the Securities Act of 1933 (“Securities Act”) and sections 3(a)(10) and 3A of the Exchange Act. See also Concept Release, *supra* note 3, at n.57 and accompanying text (explaining that we have interpreted the term “security” in light of the policies and purposes underlying the Investment Company Act).

⁶² See Release 10666, *supra* note 20, at “The Agreements as Securities” discussion. See also section 18(g) (defining the term “senior security,” in part, as “any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness”). Under the proposal, a fund would be permitted to enter into reverse repurchase agreements, short sale borrowings, or any firm or standby commitment agreement or similar agreement (collectively, “financial commitment transactions”), notwithstanding the prohibitions and restrictions on the issuance of senior securities under section 18, provided the fund complies with the proposed rule’s conditions. See *infra* section III.A.

pay in the future⁶³—we believe that such a transaction involves an evidence of indebtedness that is a senior security for purposes of section 18.⁶⁴

This interpretation is supported by the express scope of section 18, which defines the term senior security broadly to include instruments and transactions that might not otherwise be considered securities under other provisions of the federal securities laws.⁶⁵ For example, section 18(f)(1) generally prohibits an open-end fund from issuing or selling any senior security “except [that the fund] shall be permitted to borrow from any bank.”⁶⁶ This statutory permission to engage in a specific borrowing makes clear that such borrowings are senior securities, which otherwise would be prohibited absent this specific permission.⁶⁷ Section 18(c)(2) similarly

⁶³ Unless otherwise specified or the context otherwise requires, the term “derivative” or “derivatives transaction” as used in this Release means a “derivatives transaction,” as defined in proposed rule 18f-4(c)(2), which describes derivatives that impose a payment obligation on the fund.

⁶⁴ As we explained in Release 10666, we believe that an evidence of indebtedness, for purposes of section 18, includes not only a firm and un-contingent obligation, but also a contingent obligation, such as the obligation created by a standby commitment or a “put” (or call) option sold by a fund. See Release 10666, *supra* note 20, at “Standby Commitment Agreements” discussion. We understand that it has been asserted that a contingent obligation created by a standby commitment or similar agreement does not implicate section 18 unless and until the fund would be required under generally accepted accounting principles (“GAAP”) to recognize the contingent obligation as a liability on the fund’s financial statements. The treatment of derivatives transactions under GAAP, including whether the derivatives transaction constitutes a liability for financial statement purposes at any given time or the extent of the liability for that purpose, is not determinative with respect to whether the derivatives transaction involves the issuance of a senior security under section 18. This is consistent with our analysis of a fund’s obligation, and the corresponding segregated asset amounts, under the trading practices described in Release 10666. See *supra* note 47 (describing the amount of assets to be segregated for the trading practices described in Release 10666, including that a fund should segregate the full purchase price of a standby commitment beginning on the date the fund entered into the agreement, which would represent a contingent obligation of the fund).

⁶⁵ Consistent with Release 10666, we are only expressing our views concerning section 18 of the Investment Company Act.

⁶⁶ Recognizing the breadth of the term “senior security,” we observed in the Concept Release that, “[t]o address [Congress] concerns underlying section 18, section 18(f)(1) of the Investment Company Act prohibits an open-end fund from issuing or selling any ‘senior security’ other than borrowing from a bank.” (footnotes omitted)

⁶⁷ We similarly observed in Release 10666 that section 18(f)(1), “by implication, treats all borrowings as senior securities,” and that “[s]ection 18(f)(1) of the Act prohibits such borrowings unless entered into with banks and only if there is 300% asset coverage on all borrowings of the investment company.” See Release 10666, *supra* note 20, at “Reverse Repurchase Agreements” discussion.

treats all promissory notes or evidences of indebtedness issued in consideration of any loan as senior securities except as specifically otherwise provided in that section.⁶⁸

This view also is consistent with the fundamental statutory policy and purposes underlying the Act, as expressed in section 1(b) of the Act. Section 1(b) provides that the provisions of the Act shall be interpreted to mitigate and “so far as is feasible” to eliminate the conditions and concerns enumerated in that section. These include the conditions and concerns enumerated in sections 1(b)(7) and 1(b)(8) which declare, respectively, that “the national public interest and the interest of investors are adversely affected” when funds “by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character” of securities issued to common shareholders and when funds “operate without adequate assets or reserves.” Funds’ obligations under derivative transactions can implicate each of these concerns.

As we stated in Release 10666, leveraging an investment company’s portfolio through the issuance of senior securities “magnifies the potential for gain or loss on monies invested and therefore results in an increase in the speculative character of the investment company’s outstanding securities” and “leveraging without any significant limitation” was identified “as one of the major abuses of investment companies prior to the passage of the Act by Congress.” We emphasized in Release 10666, and we continue to believe today, that the prohibitions and restrictions under the senior security provisions of section 18 should “function as a practical limit on the amount of leverage which the investment company may undertake and on the potential increase in the speculative character of its outstanding common stock” and that funds should not “operate without adequate assets or reserves.”⁶⁹ Funds’ use of derivatives, like the trading practices we addressed in Release 10666, implicate the undue

⁶⁸ Section 18(c) provides further limitations on a closed-end fund’s ability to issue senior securities, in addition to the asset coverage and other limitations provided in section 18(a), with the proviso in section 18(c)(2) that “promissory notes or other evidences of indebtedness issued in consideration of any loan, extension, or renewal thereof, made by a bank or other person and privately arranged, and not intended to be publicly distributed, shall not be deemed to be a separate class of senior securities representing indebtedness within the meaning of [section 18(c)].”

⁶⁹ See Release 10666, *supra* note 20, at “Segregated Account” discussion.

speculation concern expressed in section 1(b)(7) and the asset sufficiency concern expressed in section 1(b)(8) as discussed below.

First, with respect to the undue speculation concern expressed in section 1(b)(7), we noted above and in the Concept Release that a common characteristic of most derivatives is that they involve leverage or the potential for leverage because they typically enable the fund to participate in gains and losses on an amount that substantially exceeds the fund’s investment while imposing a conditional or unconditional obligation on the fund to make a payment or deliver assets to a counterparty. For example, a fund can enter into a total return swap referencing an equity or debt security and, in exchange for a contractual obligation to make payments in respect of changes in the value of the referenced security and the delivery of a limited amount of collateral, obtain exposure to the full notional value of the referenced security.⁷⁰ As one commenter observed, “a fund’s purchase of an equity total return swap produces an exposure and economic return substantially equal to the exposure and economic return a fund could achieve by borrowing money from the counterparty in order to purchase the equities that are reference assets.”⁷¹ This same analysis applies to various other types of derivatives under which the fund posts a small percentage of the notional amount as initial margin or collateral—or is not required to make any up-front payment or receives a premium payment—but is exposed to the gains or losses on the full notional amount of the reference asset.⁷²

⁷⁰ See, e.g., *The Report of the Task Force on Investment Company Use of Derivatives and Leverage*, Committee on Federal Regulation of Securities, ABA Section of Business Law (July 6, 2010) (“2010 ABA Derivatives Report”), available at <https://apps.americanbar.org/buslaw/blt/content/ibl/2010/08/0002.pdf>, at 8 (stating that “[f]utures contracts, forward contracts, written options and swaps can produce a leveraging effect on a fund’s portfolio” because “for a relatively small up-front payment made by a fund (or no up-front payment, in the case with many swaps and written options), the fund contractually obligates itself to one or more potential future payments until the contract terminates or expires”). See also *infra* notes 72–74.

⁷¹ BlackRock Concept Release Comment Letter, at 4.

⁷² See, e.g., *Board Oversight of Derivatives*, Independent Directors Council Task Force Report (July 2008) (“2008 IDC Report”), available at http://www.ici.org/pdf/ppr_08_derivatives.pdf, at 3 (“The leverage inherent in these [derivatives] instruments magnifies the effect of changes in the value of the underlying asset on the initial amount of capital invested. For example, an initial 5% collateral deposit on the total value of the commodity would result in 20:1 leverage, with a potential 80% loss (or gain) of the collateral in response to a 4% movement in the market price of the underlying commodity.”); Andrew Ang, Sergiy Gorovyy &

As discussed in more detail in sections II.D and III.B.1.c, our staff's evaluation of the use of derivatives by funds also indicates that some funds make extensive use of derivatives to obtain notional investment exposures far in excess of the funds' respective net asset values.⁷³ Our staff's review of funds' use of derivatives found that, although many funds do not use derivatives, and most funds do not use a substantial amount of derivatives, some funds do use derivatives extensively. Some of the funds that use derivatives more extensively have derivatives notional exposures that are substantially in excess of the funds' net assets, with notional exposures ranging up to almost ten times a fund's net assets.⁷⁴ These highly leveraged investment exposures appear to be inconsistent with the purposes and concerns underlying section 18 of the Act.⁷⁵

We noted in Release 10666 that, given the potential for reverse repurchase agreements to be used for leveraging and their ability to magnify the risk of investing in a fund, "one of the important policies underlying section 18 would be rendered substantially nugatory" if funds' use of reverse repurchase agreements were not subject to limitation. We similarly believe that if funds' use of derivatives that impose a future payment obligation on the fund were not viewed as involving senior securities subject to appropriate limitations under section 18, the concerns underlying section 18, including the undue speculation

Gregory B. van Inwegen, *Hedge Fund Leverage*, NBER Working Paper 16801 (Feb. 2011) ("Ang, Gorovyy & Inwegen"), available at <http://www.nber.org/papers/w16801.pdf>, at Table 1 (showing that under prevailing margin rates as of March 2010, a market participant could in theory obtain 10 times implied leverage under a total return swap (because the exposure under the swap would be ten times the initial margin amount); 33 times implied leverage under a financial future; and 100 times implied leverage under a foreign exchange or interest rate swap).

⁷³ For more information on the staff's review, including the staff's measurement of derivatives exposures, see *infra* section III.B.1.c and the White Paper entitled "Use of Derivatives by Investment Companies," which was prepared by staff in the Division of Economic and Risk Analysis ("DERA") and will be placed in the comment file for this Release contemporaneously with our publication of the Release. Daniel Deli, Paul Hanouna, Christof Stahel, Yue Tang & William Yost *Use of Derivatives by Registered Investment Companies* Division of Economic and Risk Analysis (2015) ("DERA White Paper"), available at <http://www.sec.gov/dera/staff-papers/white-papers/derivatives12-2015.pdf>.

⁷⁴ *Id.*

⁷⁵ See also *infra* section II.D (discussing concerns with the current approach and providing examples of situations in which funds' use of derivatives has led to substantial losses).

concern expressed in section 1(b)(7) as discussed above, would be frustrated.⁷⁶

Second, a fund's use of derivatives under which the fund has a future payment obligation also raises concerns with respect to a fund's ability to meet its obligations, implicating the asset sufficiency concern expressed in section 1(b)(8) of the Act. Many derivatives investments entered into by a fund, such as futures contracts, swaps, and written options, pose a risk of loss that can result in payment obligations owed to the fund's counterparties.⁷⁷ Losses on derivatives therefore can result in payment obligations that can directly affect the capital structure of a fund and the relative rights of the fund's counterparties and fund shareholders, in that the fund would be required to make payments or deliver fund assets to its derivatives counterparties under the terms negotiated with its counterparties. Because of the leverage present in many types of derivatives as discussed above, these senior payments of additional collateral or termination payments to counterparties can be substantially greater than any collateral initially delivered by the fund to initiate the derivatives transaction.⁷⁸

Losses on a fund's derivatives transactions, and the resulting payment obligation imposed on the fund, can force a fund's adviser to sell the fund's investments to generate liquid assets in order for the fund to meet its obligations. The use of derivatives for leveraging purposes can exacerbate this risk and make it more likely that a fund would be forced to sell assets, potentially generating losses for the fund.⁷⁹ In an extreme situation, a fund

⁷⁶ One commenter made this point directly. See Comment Letter of Stephen A. Keen on Concept Release (Nov. 8, 2011) (File No. S7-33-11) ("Keen Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-45.pdf>, at 3 ("If permitted without limitation, derivative contracts can pose all of the concerns that section 18 was intended to address with respect to borrowings and the issuance of senior securities by investment companies."). See also, e.g., ICI Concept Release Comment Letter, at 8 ("The Act is thus designed to regulate the degree to which a fund issues any form of debt—including contractual obligations that could require a fund to make payments in the future.").

⁷⁷ Some derivatives transactions, like physically settled futures and forwards, can require the fund to deliver the underlying reference assets regardless of whether the fund experiences losses on the transaction.

⁷⁸ See, e.g., *supra* note 72.

⁷⁹ See, e.g., Peter Breuer, *Measuring Off-Balance-Sheet Leverage*, IMF Working Paper (Dec. 2000) ("Off-Balance-Sheet Leverage IMF Working Paper"), available at <http://www.imf.org/external/pubs/ft/wp/2000/wp00202.pdf>, at 7-8 ("[A] more leveraged investor facing a given adverse price movement may be forced by collateral requirements (*i.e.* margin calls) to unwind the position sooner than if the position were not leveraged. The unwinding

could default on its payment obligations.⁸⁰ The risks associated with derivatives transactions that impose a payment obligation on the fund differ from the risk of loss on other investments, which may result in a loss of asset value but would not require the fund to deliver cash or assets to a counterparty. The examples of fund losses discussed below in section II.D demonstrate the substantial and rapid losses that can result from a fund's investments in derivatives, as well as the forced sales and other measures a fund may be required to take to meet its derivatives payment obligations, implicating the undue speculation concern expressed in section 1(b)(7) and the asset sufficiency concern expressed in section 1(b)(8).⁸¹

We recognize, however, that not every derivative will involve the issuance of a senior security because not every derivative imposes a future payment obligation on the fund. A fund that purchases an option, for example, generally will make a non-refundable premium payment to obtain the right to acquire (or sell) securities under the option but generally will not have any subsequent obligation to deliver cash or assets to the counterparty unless the fund chooses to exercise the option. A derivative that does not impose a future payment obligation on a fund in this respect generally resembles non-derivative securities investments in that these investments may lose value but will not require the fund to make any

decision of an unleveraged investor depends merely on the investor's risk preferences and not on potentially more restrictive margin requirements.").

⁸⁰ See, e.g., ICI Concept Release Comment Letter, at 11 (noting that, "[h]ypothetically, in an extreme scenario, a fund that used derivatives heavily and segregated most of its liquid assets to cover its obligation on a pure mark-to-market basis could potentially find itself with insufficient liquid assets to cover its derivative positions").

⁸¹ In this regard, we note that proposed rule 22e-4 would, among other things, require an open-end fund (other than a money market fund) to: Classify, and review on an ongoing basis the classification of, the liquidity of each of the fund's portfolio positions (or portions of a position), including derivatives, into one of six liquidity categories; and assess and periodically review the fund's liquidity risk, considering various factors specified in the rule, including the fund's use of borrowings and derivatives for investment purposes. Assessing liquidity risk under rule 22e-4 would involve an assessment of the fund's derivatives positions themselves, and also may generally include an evaluation of the potential liquidity demands that may be imposed on the fund in connection with its use of derivatives. To the extent the fund is required to make payments to a derivatives counterparty, those assets would not be available to meet shareholder redemptions. See Liquidity Release, *supra* note 5, at sections III.B.2. and III. C.1.c.

payments in the future.⁸² Consistent with the views expressed by commenters, we preliminarily believe that a derivative that does not impose a future payment obligation on the fund would not involve a senior security transaction for purposes of section 18.⁸³

C. Review of Funds' Use of Derivatives

As we explained in the Concept Release, we now seek to take an updated and more comprehensive approach to the regulation of funds' use of derivatives.⁸⁴ To inform our consideration of the regulation of funds' use of derivatives, we initiated a review of funds' use of derivatives under the Investment Company Act. As we noted in the Concept Release, our staff has been exploring the benefits, risks, and costs associated with funds' use of derivatives, as well as various issues relating to the use of derivatives by funds, including whether funds' current practices, based on their application of Commission and staff guidance, are consistent with the investor protection purposes and concerns underlying section 18 of the Investment Company Act.

In considering these and other issues, our staff has engaged in a range of activities to inform our policymaking relating to the use of derivatives by funds. These include reviewing funds' derivatives holdings and other sources of information concerning funds' use of derivatives; examining advisers to funds that make use of derivatives; discussing funds' use of derivatives with market

participants; and considering other relevant information provided to the Commission concerning funds' use of derivatives, including comment letters submitted in response to the Concept Release. This review has also included an evaluation of the comment letters submitted in response to a notice issued by the Financial Stability Oversight Council ("FSOC") requesting comment on aspects of the asset management industry.⁸⁵ Although our proposal is independent of FSOC, some commenters responding to the FSOC notice discussed issues concerning leverage, and we have considered and cited to relevant comments throughout this Release.⁸⁶

The staff's review of funds' use of derivatives includes, as discussed below, a review of the derivatives and other holdings of a random sample of funds, as reported by those funds in their annual reports to shareholders. As part of this effort, the staff reviewed and compiled information concerning the holdings of randomly selected mutual funds (including a focused review and separate sampling of alternative strategy funds⁸⁷), closed-end funds, ETFs, and BDCs. Information derived from this review is discussed throughout this Release, and more details concerning the staff's review and findings are provided in the DERA White Paper, which was prepared by staff in the Division of Economic and Risk Analysis and which will be placed in the comment file for this Release contemporaneously with our publication of the Release.⁸⁸ As discussed below, in developing proposed rule 18f-4, we considered the information derived from our staff's review concerning funds' use of derivatives and other considerations, including the investor protection purposes and concerns underlying section 18 as reflected in sections 1(b)(7) and 1(b)(8).

D. Need for a New Approach

1. The Current Regulatory Framework and the Purposes and Policies Underlying the Act

a. Background and Overview

We have determined to propose a new approach to funds' use of derivatives in order to address the investor protection purposes and concerns underlying section 18 of the Act and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives transactions in light of the dramatic growth in the volume and complexity of the derivatives markets over the past two decades and the increased use of derivatives by certain funds. In Release 10666, we took the position that funds might engage in the transactions described in that release using the segregated account approach, notwithstanding the limitations in section 18.⁸⁹ We took this position because we believed that the segregated account approach would address the investor protection purposes and concerns underlying section 18 by: (1) Imposing a "practical limit on the amount of leverage which the investment company may undertake and on the potential increase in the speculative character of its outstanding common stock"; and (2) "assur[ing] the availability of adequate funds to meet the obligations arising [from the transactions described in Release 10666]." ⁹⁰

We continue to believe that these are relevant considerations and that it may be appropriate for a fund to enter into transactions that create fund indebtedness, notwithstanding the prohibitions in section 18, if such transactions are subject both to a limit on leverage to prevent undue speculation and to measures designed to require the fund to have sufficient assets to meet its obligations.⁹¹ We are

⁸² At least one commenter on the Concept Release asserted that a purchased option would impose a payment obligation on the fund because "[i]f the option is in the money at the time it expires, the fund's manager has a fiduciary obligation to realize the intrinsic value of the option" and "to exercise the option, the fund must either pay the full strike price (for a call) or deliver the notional amount of the underlying asset (for a put)." See Keen Concept Release Comment Letter, at 16.

⁸³ See, e.g., ICI Concept Release Comment Letter, at 8 ("The Act is thus designed to regulate the degree to which a fund issues any form of debt—including contractual obligations that could require a fund to make payments in the future. By adopting a definition of 'leverage' in the context of section 18 that relates solely to indebtedness leverage and clearly distinguishes it from economic leverage, the Commission could alleviate some of the confusion in this area while appropriately protecting investors and serving the purposes of the Act."). Although some derivatives instruments may not involve the issuance of a senior security for purposes of section 18, we generally would expect the fund's adviser to consider the potential risks associated with these instruments, including the "economic" leverage they involve.

⁸⁴ See Concept Release, *supra* note 3, at section I ("The Commission or its staff, over the years, has addressed a number of issues relating to derivatives on a case-by-case basis. The Commission now seeks to take a more comprehensive and systematic approach to derivatives-related issues under the Investment Company Act.").

⁸⁵ See Notice Seeking Comment on Asset Management Products and Activities 79 FR 77488 (Dec. 24, 2014) ("FSOC Request for Comment").

⁸⁶ Comments submitted in response to the FSOC Notice are available at <http://www.regulations.gov/#/docketDetail;D=FSOC-2014-0001>.

⁸⁷ We refer to alternative strategy funds in the same manner as the staff classified "Alt Strategies" funds in the DERA White Paper, *supra* note 73, as including the Morningstar categories of "alternative," "nontraditional bond" and "commodity" funds.

⁸⁸ See *supra* note 73.

⁸⁹ Section 18 provides very limited statutory permission for open-end funds to borrow from any bank subject to the 300% asset coverage requirement and excludes from the definition of the term "senior security" any loans made for temporary purposes by a bank or other person and privately arranged in an amount not exceeding 5% of total assets. Release 10666 thus provided guidance for certain transactions that would otherwise be prohibited under the requirements of section 18, and open-end funds have used this guidance to enter into derivatives transactions that would otherwise be prohibited under section 18. See also *infra* note 141.

⁹⁰ Release 10666, *supra* note 20, at "Segregated Account" discussion. These concerns are reflected in sections 1(b)(7) and 1(b)(8) of the Act, as discussed above. We also noted in Release 10666 that "segregated accounts, if properly created and maintained, would limit the investment company's risk of loss." *Id.*

⁹¹ We also believe these considerations are relevant when considering, as we are required to do

concerned, however, that funds' current practices, including their application of the segregated account approach to certain derivatives transactions, in some cases may not adequately address these considerations.

The segregated account approach described in Release 10666 required a fund engaging in the transactions described in that release to segregate liquid assets, such as cash, U.S. government securities, or other appropriate high-grade debt obligations, equal in value to the full amount of the obligations incurred by the fund.⁹² A fund segregating an amount of the highly liquid assets described in Release 10666 equal in value to the full amount of potential obligations incurred through the transactions described in Release 10666 would be subject to a practical limit on the amount of leverage the fund could obtain through those transactions. The fund would not be able to incur obligations in excess of liquid assets that the fund could place in a segregated account, which generally would limit the fund's obligations to the fund's net assets, even if the fund's net assets consisted solely of the high-quality assets we described in Release 10666.⁹³ Segregating liquid assets equal in value to the full amount of the fund's obligations—and doing so with the types of high-quality liquid assets we described in Release 10666—also provided assurances that the fund would have adequate assets to meet its obligations.⁹⁴ The liquid assets we described in Release 10666 generally are less likely to experience volatility or to decline in value than lower quality debt securities or equity securities, for example, and the amount of the fund's

for this proposed rule for purposes of section 6(c) of the Act, whether it would be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act to provide an exemption from the requirements of sections 18 and 61 of Act and the appropriate conditions for any exemption.

⁹² See Release 10666, *supra* note 20, at "Segregated Account" discussion. See also *supra* note 47.

⁹³ See, e.g., Ropes & Gray Concept Release Comment Letter, at 3 (in the context of Release 10666 "[a]s originally conceived by the Commission," explaining that "[a]s a practical matter, requiring the segregation of assets but not limiting the permitted segregation to cash equivalents effectively permitted funds to incur investment leverage up to a theoretical limit equal to 100% of a fund's net assets.") In addition and as we explained in Release 10666, as the percentage of a fund's portfolio assets that are segregated increases, the fund's ability to meet current obligations, to honor requests for redemption, and to manage properly the investment portfolio in a manner consistent with its stated investment objective may become impaired. See Release 10666, *supra* note 20, at "Segregated Account" discussion.

⁹⁴ See also *supra* note 47.

obligation under the trading practices addressed in Release 10666 generally would be known at the outset of the transaction.⁹⁵

Today, in contrast, many funds apply the mark-to-market segregation approach to certain net cash-settled derivatives, and some funds use this form of asset segregation extensively.⁹⁶ Under this approach, funds segregate an amount equal to the fund's daily mark-to-market liability on the derivative, if any.⁹⁷ Although funds initially applied this approach to a few specific types of transactions addressed through guidance by our staff (interest rate swaps, futures required to cash-settle and NDFs), many funds now apply mark-to-market segregation to other cash-settled instruments, including total return swaps ("TRS") and cash-settled written options.⁹⁸ As we noted above, our staff has observed that some funds appear to apply the mark-to-market approach to any derivative that is cash settled.

The amount of assets that a fund would segregate under the mark-to-market approach is substantially less than under the approach contemplated in Release 10666. The mark-to-market approach therefore allows a fund to obtain greater exposures through derivatives transactions than the fund could obtain using the approach we contemplated in Release 10666 with respect to the trading practices described in that release, and also may result in a fund segregating an amount of assets that may not be sufficient to enable the fund to meet its potential obligations under the derivatives transactions, as discussed below.

In addition to the smaller amount of segregated assets under the mark-to-market approach, funds now segregate various types of liquid assets, rather than the more narrow range of high-quality assets described in Release 10666, in reliance on a no-action letter issued by our staff.⁹⁹ A fund that segregates any liquid asset may be able to obtain greater leverage than a fund that segregates only the types of assets we described in Release 10666, especially when the fund also is applying the mark-to-market segregation

⁹⁵ See also, e.g., *infra* note 115 and accompanying text.

⁹⁶ See *supra* notes 56–58 and accompanying text.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Merrill Lynch No-Action Letter, *supra* note 59 (staff no-action letter in which the staff took the position that a fund could cover its derivatives-related obligations by depositing any liquid asset, including equity securities and non-investment grade debt securities, in a segregated account).

approach.¹⁰⁰ This is because a fund segregating only the types of assets we described in Release 10666 would be more constrained in its ability to enter into transactions requiring asset coverage by the requirement to maintain those kinds of high-quality assets. A fund that segregates any liquid asset, in contrast, may invest in various types of securities, consistent with its investment strategy, while potentially also using a large portion of its portfolio to cover transactions implicating section 18.¹⁰¹ This facilitates the fund's ability to obtain leverage because the fund, by using securities consistent with its strategy to cover derivatives transactions, can add additional exposure through derivatives without having to also maintain lower-risk assets.¹⁰²

b. Concerns Regarding Funds' Ability To Obtain Leverage

Together, funds' use of the mark-to-market segregation approach with respect to various types of derivatives, plus the segregation of any liquid asset, enables funds to obtain leverage to a greater extent than was contemplated in Release 10666. Segregating only a fund's daily mark-to-market liability—and using any liquid asset—enables the fund, using derivatives, to obtain exposures substantially in excess of the fund's net assets.¹⁰³ For derivatives for

¹⁰⁰ See, e.g., Vanguard Concept Release Comment letter, at 6 ("[The Merrill Lynch No-Action Letter] greatly increased the amount funds could invest in derivatives because most of a fund's portfolio securities could be used to cover its derivatives positions."); Ropes & Gray Concept Release Comment Letter, at 3 ("The Staff's subsequent no-action letter issued to Merrill Lynch in 1996 provided greater flexibility by allowing a fund to segregate any liquid assets, including equity securities and non-investment grade debt—thus potentially expanding the nature of the investment leverage risks associated with derivatives."); 2010 ABA Derivatives Report, *supra* note 70, at 14 ("This position [taken in the Merrill Lynch No-Action Letter] greatly increased the degree to which funds could use derivatives because all or substantially all of their portfolio securities could be used to 'cover' their derivatives positions.>").

¹⁰¹ See, e.g., *id.*

¹⁰² For example, in a settled enforcement action discussed below involving funds that obtained exposure to certain commercial mortgage-backed securities ("CMBS") mainly through TRS contracts, our order issued in connection with the matter noted that, unlike an actual purchase of CMBS, the TRS contracts required no initial commitment of cash, which allowed the funds to take on large amounts of CMBS exposure without having to liquidate other positions, but it also caused them to take on leverage by adding market exposure on top of other assets on their balance sheets. See *infra* note 123 and accompanying text.

¹⁰³ See, e.g., Ropes & Gray Concept Release Comment Letter, at 3 (in the context of Release 10666 "[a]s originally conceived by the Commission," explaining that "[a]s a practical matter, requiring the segregation of assets but not

Continued

which there is no loss for a given day, a fund applying the mark-to-market approach might not segregate *any* assets.¹⁰⁴ This may be the case, for example, because the derivative is currently in a gain position, or because the derivative has a market value of zero (as will generally be the case at the inception of a transaction). The mark-to-market approach therefore generally will not limit a fund's ability to obtain substantial exposures through derivatives.

To evaluate the extent of funds' derivatives exposure, our staff reviewed funds' holdings and compared the amount of exposure under the funds' derivatives, based on the derivatives' notional amounts, with the fund's net assets.¹⁰⁵ As discussed in more detail in the DERA White Paper, our staff found that, although many funds do not use derivatives, and most funds do not use a substantial amount of derivatives, some funds do use derivatives extensively. Some of the funds making extensive use of derivatives obtained notional exposures through derivatives that were substantially in excess of their net assets under a mark-to-market approach and these funds could obtain even higher exposures by applying such an approach. Funds included in our staff's review sample had notional exposures ranging up to almost ten times a fund's net assets. Although we recognize that funds use derivatives for various reasons, a fund with derivatives notional exposures of almost ten times its net assets and having the potential for additional exposures, for example, does not appear to be subject to a

limiting the permitted segregation to cash equivalents effectively permitted funds to incur investment leverage up to a theoretical limit equal to 100% of a fund's net assets"; also noting that "industry practice has evolved further since 1996 [when the staff issued the Merrill Lynch No-Action Letter, *supra* note 59] in a manner that could, in some instances, allow for investment leverage that exceeds the 100% limit that was implicit in earlier Commission and Staff positions".)

¹⁰⁴ The fund may, however, still be required to post collateral to comply with other regulatory or contractual requirements. *See, e.g.*, Comment Letter of Rafferty Asset Management, LLC on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("Rafferty Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-40.pdf>, at 12 (noting that "all swap" contracts have an "out of the money value of the contract [of] zero" at inception, but that the firm's swap contracts "typically require the Funds to post collateral equal to approximately 20% of the notional value of the swap transaction").

¹⁰⁵ Our staff also reviewed the extent to which funds used financial commitment transactions and the extent to which the funds entered into other types of senior securities transactions pursuant to section 18 or 61.

practical limit on leverage as we contemplated in Release 10666.¹⁰⁶

Funds are able to obtain such high levels of derivatives exposures relative to the funds' net assets primarily because of their use of the mark-to-market approach with respect to various types of derivatives, as discussed above.¹⁰⁷ We observed the argument in the Concept Release that segregating only the mark-to-market liability "may understate the risk of loss to the fund [and] permit the fund to engage in excessive leveraging" ¹⁰⁸ Concerns about the efficacy of the mark-to-market approach may be exacerbated by funds' application of the mark-to-market approach to TRS in particular. This greatly expands the potential use of the mark-to-market approach because a TRS can reference any asset, including a range of securities, commodities, or other derivatives.¹⁰⁹ Nearly any type of investment that a fund could make directly can be transformed into a cash-settled TRS which, as noted above, may "produce[] an exposure and economic return substantially equal to the exposure and economic return a fund could achieve by borrowing money from the counterparty in order to purchase

¹⁰⁶ *See, e.g.*, Ropes & Gray Concept Release Comment Letter, at 4 (noting that "[i]t now appears to be an increasingly common practice for funds that engage in cash-settled swaps to segregate assets only to the extent required to meet the fund's daily mark-to-market liability, if any, relating to such swaps" but that, "[o]f course, in many cases this liability will not fully reflect the ultimate investment exposure associated with the swap position" and that, "[a]s a result, a fund that segregates only the market-to-market liability could theoretically incur virtually unlimited investment leverage using cash-settled swaps"); Keen Concept Release Comment Letter, at 20 (stating that the mark-to-market approach, as applied to cash settled swaps, "imposes no effective control over the amount of investment leverage created by these swaps, and leaves it to the market to limit the amount of leverage a fund may use").

¹⁰⁷ Our staff also has stated that it would not object to a fund covering its obligations by entering into certain cover transactions or holding the asset (or the right to acquire the asset) that the fund would be required to deliver under certain derivatives. *See supra* note 53. *See also infra* section III.B.1.d.

¹⁰⁸ *See* Concept Release, *supra* note 3, at text accompanying n.83. *See also supra* note 106.

¹⁰⁹ When a fund purchases a total return swap, the fund agrees with a counterparty that the fund will periodically pay a specified fixed or floating rate and will receive any appreciation and any interest or dividend payments on a specified reference asset(s), and will pay any depreciation on the reference asset(s). *See, e.g.*, ISDA Product Descriptions and Frequently Asked Questions, available at <http://www.isda.org/educat/faqs.html#28> ("A total return swap is a agreement in which one party (total return payer) transfers the total economic performance of a reference obligation to the other party (total return receiver). Total economic performance includes income from interest and fees, gains or losses from market movements, and credit losses.").

the equities that are reference assets" under the TRS.¹¹⁰

c. Concerns Regarding Funds' Ability To Meet Their Obligations

Funds' current practices also may not "assure the availability of adequate [assets] to meet the obligations arising from [funds' derivatives transactions]," as we contemplated in Release 10666, and thus may implicate the asset sufficiency concern expressed in section 1(b)(8) of the Act. In Release 10666, we stated a fund should segregate liquid assets equal in value to the fund's full obligation under the transactions described in that release from the outset of the transaction.¹¹¹ Consistent with Release 10666, funds applying the notional amount segregation approach segregate an amount of assets equal in value to the full amount of the fund's potential obligation under derivatives, where that amount is known at the outset of the transaction, or the full market value of the underlying reference asset for the derivative.¹¹² Segregating assets equal in value to the fund's full potential obligation under a derivative generally would be expected to enable the fund to meet that obligation.

A fund using the mark-to-market approach, however, segregates assets the fund deems liquid in an amount equal to the fund's daily mark-to-market liability on the derivative, if any. This approach looks only to losses, and corresponding potential payment obligations under the derivative, that the fund already has incurred. A fund that follows this approach is not necessarily segregating assets in anticipation of possible future losses and any corresponding payment obligations, and the fund's segregation of assets equal to its mark-to-market liability on any particular day provides no assurances that future losses will not exceed the amount of assets the fund has segregated or would otherwise have available to meet the payment obligations resulting from such losses. A fund's mark-to-market liability on any particular day could be substantially smaller than the fund's ultimate obligations under a derivative.¹¹³ As

¹¹⁰ *See* BlackRock Concept Comment Letter, at 4 and accompanying text.

¹¹¹ *See supra* note 47.

¹¹² *See supra* notes 54-55 and accompanying text.

¹¹³ *See, e.g.*, ICI Concept Release Comment Letter, at 11 (noting that "calculating a fund's exposure daily based only on its net obligations—the 'mark-to-market' approach—may create a risk that market movements could increase a fund's exposure, so that the segregated assets are worth less than the fund's obligation" and that "[h]ypothetically, in an extreme scenario, a fund that used derivatives heavily and segregated most of its liquid assets to cover its obligation on a pure mark-to-market basis

noted above, if there is no mark-to-market liability for the fund on a given day, for example because the derivative is currently in a gain position or the fund has just entered into a derivative like a swap for which there is no daily loss for either party at inception, the fund might not segregate *any* assets.¹¹⁴

Where a fund segregates any liquid asset, rather than the more narrow range of high-quality assets we described in Release 10666, the segregated assets may be more likely to decline in value at the same time as the fund experiences losses on its derivatives than if the fund had segregated the types of liquid assets we described in Release 10666.¹¹⁵ In this case, or when a fund's derivatives payment obligations are substantial relative to the fund's assets, the fund may be forced to sell portfolio securities to meet its derivatives payment obligations, potentially in stressed market conditions.¹¹⁶ That a fund has

could potentially find itself with insufficient liquid assets to cover its derivative positions"); Vanguard Concept Release Comment Letter, at n.15 (noting that "using a market value [asset segregation] test for certain transactions can result in the under-segregation of assets"); AQR Concept Release Comment Letter, at 4 ("The current asset segregation approach, while it has been effective in mitigating the risks section 18 was designed to address (*i.e.*, excessive borrowing and operating without adequate assets and reserves), has some weaknesses. In particular, as applied to swaps, the daily end-of-day segregation of changes in market value do not reflect the likelihood of loss or volatility of the reference instrument. Intra-day value fluctuations are ignored. For futures, the issues are similar."); Ropes & Gray Concept Release Comment Letter, at 4 (noting that a swap's mark-to-market liability, if any, "in many cases . . . will not fully reflect the ultimate investment exposure associated with the swap position").

¹¹⁴ See *supra* note 104 and accompanying text.

¹¹⁵ See, *e.g.*, Comment Letter of Better Markets, Inc. on Concept Release (Nov. 7, 2011) (File No. S7-33-11), available at <http://www.sec.gov/comments/s7-33-11/s73311-42.pdf>, at 5 (stating that "the broadening of segregated assets [permitted by the Merrill Lynch No-Action letter] increases the probability that the embedded credit associated with the derivatives will result in a senior payment of money from the Funds" . . . and, in addition, "the assets could be positively correlated with the derivatives risk being offset" and that "[l]oss on the derivatives risk could be compounded by loss on the asset"); 2010 ABA Derivatives Report, *supra* note 70, at 16 (where only the mark-to-market liability, if any, is segregated, "a fund's exposure under a derivative contract could increase significantly on an intraday basis, resulting in the segregated assets being worth less than the fund's obligations (until the fund is able to place additional assets in the segregated account . . . To the extent that a fund relying on the Merrill Lynch Letter segregates assets whose prices are somewhat volatile, this 'shortfall' could be magnified").

¹¹⁶ We noted in Release 10666 that "in an extreme case an investment company which has segregated all its liquid assets might be forced to sell non-segregated portfolio securities to meet its obligations upon shareholder requests for redemption. Such forced sales could cause an investment company to sell securities which it wanted to retain or to realize gains or losses which it did not originally intend." See Release 10666,

segregated assets it deems sufficiently liquid to cover a derivative's daily mark-to-market liability, if any, thus may not effectively assure the fund will have liquid assets to meet its future obligations under the derivative.¹¹⁷

Some commenters on the Concept Release appear to have recognized that segregation of a fund's daily mark-to-market liability alone may not be sufficient in at least some cases. As discussed in more detail below in section III.C of this Release, some commenters have suggested that we impose asset segregation requirements under which a fund would include in its segregated account for a derivative an amount determined by the fund, in addition to the daily mark-to-market liability, designed to address future losses.¹¹⁸ Some commenters stated that it may be appropriate for a fund to maintain this additional amount, sometimes referred to as a "cushion" by commenters, in addition to assets used to cover any daily mark-to-market liability.¹¹⁹ Some of these commenters

supra note 20, at "Segregated Account" discussion. See also *infra* note 123 and accompanying text.

¹¹⁷ See, *e.g.*, Keen Concept Release Comment Letter, at 20 ("The out-of-the money value of a swap [segregated under the mark-to-market approach] only represents how much the fund *already* has lost, not the *potential* loss that might be incurred during the term of the swap. The potential loss represents the risk of investment leverage, but the Division's position [regarding the mark-to-market approach] does not require the fund to maintain any assets to cover this risk. The only practical limit is the fund's need to maintain a buffer of unsegregated assets to cover fluctuations in the swap's out-of-the-money value.") (emphasis in original); MFDF Concept Release Comment Letter, at 4 ("A fund can also have significant liability exposures connected with a derivative position, particularly if that position does not perform as expected. Because the extent of these liabilities can far outweigh the initial investment in the instrument, the use of derivatives raises potentially serious concerns under the Investment Company Act of 1940 . . .").

¹¹⁸ See, *e.g.*, ICI Concept Release Comment Letter; Comment Letter of Invesco Advisers, Inc. on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("Invesco Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-20.pdf> (supporting the ICI's recommendation concerning asset segregation); BlackRock Concept Release Comment letter; Comment Letter of Securities Industry and Financial Markets Association on Concept Release (Nov. 23, 2011) (File No. S7-33-11) ("SIFMA Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-51.pdf>; Vanguard Concept Release Comment Letter.

¹¹⁹ See, *e.g.*, ICI Concept Release Comment Letter, at 3 ("When segregating less than the most conservative full notional amount, the segregation policy should require a more in depth analysis to ensure that the fund has a 'cushion' to address the potential loss from derivative contracts that could arise before the next time obligations are marked to market (often, the end of the next day)"); SIFMA Concept Release Comment Letter, at 4 ("The 'cushion' would address some potential shortcomings of a simple mark-to-market value measure, such as the risk that a Fund's indebtedness under a derivative could increase

further recommended that such an asset segregation requirement be complemented by additional guidance or requirements, with at least one commenter suggesting that we may wish to consider also imposing an "overall leverage limit."¹²⁰

For all of these reasons, funds' current practices, based on their application of Commission and staff guidance, may in some cases fail to impose an effective limit on the amount of leverage that funds can obtain through derivatives or necessarily require that funds have adequate assets to meet their obligations arising under the derivatives transactions.¹²¹ This is not consistent with our stated expectations in Release 10666 that funds' use of the segregated account approach as described in that release would achieve these goals, consistent with the undue speculation concern expressed in section 1(b)(7) and the asset sufficiency concern expressed in section 1(b)(8).¹²²

d. Examples of Substantial Derivatives-Related Losses

Three relatively recent settled enforcement actions provide examples of situations in which funds' use of derivatives caused significant losses and

significantly on an intraday basis, resulting in a gap between the value of a Fund's segregated assets and its actual payment obligations under the derivative.".)

¹²⁰ See Vanguard Concept Release Comment Letter, at n.18 ("We recognize that the SEC may have concerns about allowing funds to develop their own asset segregation approach based upon SEC examples. To allay those concerns, the SEC may wish to consider adopting an overall leverage limit that funds would be required to comply with, notwithstanding that they have segregated liquid assets to back their obligations."). See also, *e.g.*, ICI Concept Release Comment Letter, at 12 ("For funds that choose to segregate assets at less than the most conservative levels, we recommend that the SEC or its staff set forth general guidance that provides 'guardrails' to ensure appropriate protections for investors.".)

¹²¹ We observed in the Concept Release the concern that the mark-to-market segregation approach, which we understand is increasingly used by funds with respect to various derivatives, "may understate the risk of loss to the fund, permit the fund to engage in excessive leveraging, fail to adequately set aside sufficient assets to cover the fund's ultimate exposure, and, therefore, perhaps not adequately fulfill the purposes underlying the segregated account approach and section 18." See Concept Release, *supra* note 3, at text accompanying n.83.

¹²² See Release 10666, *supra* note 20, at "Segregated Account" discussion (stating that "[i]f an investment company continues to engage in the described securities trading practices and properly segregates assets, the segregated account *will* function as a practical limit on the amount of leverage which the investment company may undertake and on the potential increase in the speculative character of its outstanding common stock" and that "such accounts *will* assure the availability of adequate funds to meet the obligations arising from such activities") (emphasis added).

are relevant to our consideration of whether funds' current practices, based on their application of Commission and staff guidance, are consistent with the investor protection purposes and concerns underlying section 18 of the Investment Company Act. The funds' experiences in these cases demonstrate the substantial and rapid losses that can result from a fund's investments in derivatives. The first action also demonstrates the further losses that can arise when a fund's portfolio securities also experience declines in value at the same time that the fund is required to make additional payments under the derivatives contracts.

The first action involved two mutual funds that suffered losses driven primarily by their exposure to certain commercial mortgage-backed securities ("CMBS"), obtained mainly through TRS.¹²³ Unlike an actual purchase of CMBS, these TRS contracts required no initial commitment of cash; this allowed the funds to take on large amounts of CMBS exposure without having to liquidate other positions, but it also caused them to take on leverage by adding market exposure on top of other assets on their balance sheets.

In late 2008, CMBS spreads widened to unprecedented levels, triggering substantial payment obligations for the funds under the TRS contracts while market values for the funds' portfolio securities also fell, further driving down the funds' net asset value per share. Amidst this declining market the funds also were required to sell portfolio securities to raise cash to meet their obligations under the TRS contracts. In addition, the adviser provided sponsor support to one of the funds by investing \$150 million in the fund in November 2008 to provide the fund with liquidity after its anticipated TRS payments for that month totaled approximately one-third of the fund's net assets and almost twice its available cash. Both of the funds experienced losses far greater than those suffered by their peer funds. One fund's share price declined nearly 80% (compared to an average decline of approximately 26% among its peers), far more than any sector in which the fund invested. This occurred because the fund was substantially leveraged as a result of its derivatives, particularly TRS contracts. The other fund's share price declined approximately 36% (compared to an average decline of approximately 4% among its peers).

¹²³ See In the matter of OppenheimerFunds, Inc. and OppenheimerFunds Distributor, Inc., Investment Company Act Release No. 30099 (June 6, 2012) (settled action).

The second action¹²⁴ involved a registered closed-end fund that pursued an investment strategy involving written out-of-the-money put options and short variance swaps.¹²⁵ These derivatives transactions led to substantial losses for the fund in September and October 2008, when the fund realized a loss of approximately \$45.4 million, or 45% of the fund's net assets as of the end of August 2008, on five written put options and variance swaps, contributing to a 72.4% two-month decline in the Fund's net asset value. The fund was liquidated in May 2009.

The third action¹²⁶ involved a registered closed-end fund that primarily invested in distressed debt until 2008, when it changed course and shorted credit by purchasing large amounts of CDS. In 2008 and early 2009, the fund's short exposure significantly increased as a result of large CDS purchases. The large CDS portfolio dramatically changed the fund's risk profile. Starting around April 2009, credit conditions began to improve and distressed debt increased in value, leading to large mark-to-market losses for the fund's CDS portfolio. In addition, the high cost of maintaining the CDS positions contributed to the fund's losses. In 2012, the fund performed very poorly in large part because of its short-credit CDS portfolio, and the fund's board voted to liquidate the fund.

Examples of the use of derivatives by investment funds that are not subject to the limitations under the Investment Company Act, including private funds, such as hedge funds, that are excluded from regulation under the Investment Company Act by section 3(c)(1) or 3(c)(7) of the Act also may be relevant in considering registered funds' use of derivatives.¹²⁷ Private funds' experience

¹²⁴ See In the matter of Claymore Advisors, LLC, Investment Company Act Release No. 30308 (Dec. 19, 2012); In the matter of Fiduciary Asset Management, LLC, Investment Company Act Release No. 30309 (Dec. 19, 2012) (settled actions).

¹²⁵ Variance swaps are essentially a bet on whether the actual or realized market volatility will be higher or lower than the market's expectation for volatility (or "implied volatility"). A party with a "long variance" position profits when realized volatility for the contract period is greater than the implied volatility. A party with a "short variance" position profits whenever realized volatility is less than the implied volatility.

¹²⁶ See In the Matter of UBS Willow Management L.L.C. and UBS Fund Advisor L.L.C., Investment Company Act Release No. 31869 (Oct. 16, 2015) (settled action).

¹²⁷ Section 3(c)(1) excludes from the definition of "investment company" any issuer whose outstanding securities are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities (other than short term paper). Section 3(c)(7) excludes from the

with the use of derivatives can help demonstrate the risks associated with derivatives generally, and private funds' experience also may be more directly relevant to the extent registered funds are obtaining leverage to a similar extent as private funds and pursuing similar investment strategies.

As one example, a private fund with approximately \$10.2 billion of net assets lost \$4.9 billion in natural gas futures positions in a period of a few weeks in August and September 2006 and was forced to liquidate its entire portfolio and close.¹²⁸ While the fund engaged in a range of investment strategies, its primary strategy involved a long-short strategy in one type of energy commodity—natural gas—that it traded through NYMEX futures and OTC swaps. The fund's exposure on its long and short natural gas positions in August 2006 could have been viewed as balanced or hedged at the time it made the investments, in that the fund reportedly had a net exposure that was much less substantial than the fund's substantial long and short gross exposures.¹²⁹ However, losses incurred on a portion of the fund's positions (which were not offset by gains on its other positions) resulted in substantial margin calls on the fund that it was unable to meet with its available cash, and the fund's adviser liquidated the fund's entire portfolio of natural gas positions and closed the fund, with losses to investors of almost 50% of the fund's net asset value.

This example demonstrates the challenges in assessing whether ostensibly hedged or covered positions will perform as intended (for example, whether a position intended to hedge another exposure may fail to have a hedging effect and instead result in additional, speculative exposure). In the example above, the private fund's adviser may have expected that the fund's long and short positions would

definition of "investment company" any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities. Private funds that rely on section 3(c)(1) or 3(c)(7) are not required to comply with any of the capital structure or leverage limitations under the Act, and the use of leverage by private funds, including hedge funds, may be an important component of their investment strategies.

¹²⁸ See Ludwig B. Chincarini, *A Case Study on Risk Management: Lessons from the Collapse of Amaranth Advisors L.L.C.*, 18 J. of Applied Fin. 152 (Spring/Summer 2008), available at <http://ludwigbc.com/pubs/pub9.pdf>.

¹²⁹ See *id.*, at 159 ("The position is 'hedged' in the sense that if natural gas futures prices rise or fall, one position's loss will be partly offset by the other's gain. However, the position is focusing on a spread bet.").

hedge a substantial amount of the risk inherent in each set of positions, and this could have been the case under various circumstances. But it was not the case in August and September of 2006, when the fund experienced the substantial losses discussed above leading to its liquidation.

2. Need for an Updated and More Comprehensive Approach

We now propose to take an updated and more comprehensive approach to the regulation of funds' use of derivatives and the application of the senior security restrictions in section 18. The current approach has developed over the years since we issued Release 10666 as funds and our staff sought to apply our statements in Release 10666 to various types of derivatives and other transactions on an instrument-by-instrument basis. We understand that, in determining how they will comply with section 18, funds consider various no-action letters issued by our staff. These letters were issued in the 1970s, 1980s, and 1990s, and addressed particular questions presented to the staff concerning the application of the approach enunciated in Release 10666 to various types of derivatives on an instrument-by-instrument basis.¹³⁰ We understand that funds also consider, in addition to these letters, other guidance they may receive from our staff and the practices that other funds disclose in their registration statements.

The current approach's development on an instrument-by-instrument basis, together with the dramatic growth in the volume and complexity of the derivatives markets over the past two decades, has resulted in situations for which there is no specific guidance from us or our staff with respect to various types of derivatives.¹³¹ We noted in the Concept Release the concern that the segregated account approach, by calling for an instrument-by-instrument assessment of the amount of cover required, may create uncertainty about the treatment of new products, and that new product development will inevitably lead to circumstances in which available guidance does not specifically address

¹³⁰ See *Registered Investment Company Use of Senior Securities-Select Bibliography*, available at <http://www.sec.gov/divisions/investment/seniorsecurities-bibliography.htm> (prepared by the staff and citing staff no-action letters).

¹³¹ See, e.g., ICI Concept Release Comment Letter, at 9 ("A principles based approach is necessary because the SEC staff's traditional instrument by instrument approach to guidance has created, and would continue to create, regulatory uncertainty.")

each new instrument subject to section 18 constraints.¹³²

Under the current approach, different funds may treat the same kind of derivative differently, based on their own application of our staff's guidance and observation of industry practice, which at least one commenter noted "may unfairly disadvantage some funds."¹³³ Where there is no specific guidance, or where the application of existing guidance is unclear, funds may take approaches that involve a more extensive use of derivatives and that may not address the purposes and concerns underlying section 18 of the Act, as discussed above. The lack of guidance addressing some derivatives may create competitive pressures for funds to take approaches that involve a more extensive use of derivatives. The current approach, having developed over time, may treat similar derivatives in a manner that results in substantially different amounts of segregated assets, and may itself influence funds' investment decisions.¹³⁴ The lack of comprehensive guidance also makes it difficult for funds and our staff to evaluate and inspect for funds' compliance with section 18. A number of commenters on the Concept Release supported a more comprehensive and systematic approach, rather than an approach in which we or our staff provide guidance on an instrument-by-instrument basis, which these commenters generally suggested would be less effective.¹³⁵

¹³² See Concept Release, *supra* note 3, at n.79 and accompanying text.

¹³³ See, e.g., Davis Polk Concept Release Comment Letter, at 1–2 (noting that "funds and their sponsors may interpret the available guidance differently, even when applying it to the same instruments, which may unfairly disadvantage some funds").

¹³⁴ See, e.g., ICI Concept Release Comment Letter, at n.19 (noting that funds segregate the notional amount of physically settled futures contracts, consistent with the Dreyfus no-action letter, while some funds disclose that they segregate only the marked-to-market obligation in respect of cash-settled futures and agreeing with the concern reflected in the Concept Release that this "results in differing treatment of arguably equivalent products"); Davis Polk Concept Release Comment Letter, at 3 (noting that "[t]he current approach to segregation leaves many open questions and may lead to inconsistent results for financially similar instruments," noting for example that very few funds use physically settled futures contracts because staff guidance has applied the notional segregation approach to these contracts and, "[i]nstead, funds enter into over-the-counter swaps that provide similar economic exposure, even though swaps tend to be more expensive and present other potential risks, such as counterparty risk and lack of liquidity").

¹³⁵ See, e.g., ICI Concept Release Comment Letter, at 9 (advocating for a principles-based approach and noting, among other things, that "the SEC staff's approach to date of providing guidance with respect to specific types of instruments has created

A fund's use of derivatives may involve counterparty, liquidity, leverage, market, and operational risks, as noted above. As we observed in the Concept Release, "[a] fund's use of derivatives presents challenges for its investment adviser and board of directors to ensure that the derivatives are employed in a manner consistent with the fund's investment objectives, policies, and restrictions, its risk profile, and relevant regulatory requirements, including those under federal securities laws."¹³⁶ In light of these considerations and those we discuss in section III.D below, we believe that funds that make significant use of derivatives, or that use certain complex derivatives, should have formalized risk management programs to manage the risks that derivatives may pose and to help address the challenges and investor protection concerns presented by their use.¹³⁷

a patchwork of interpretations that is neither practical nor sustainable"); Davis Polk Concept Release Comment Letter, at 1 (noting that while guidance from the Commission and staff "has been helpful, it has not been able to keep pace with the dramatic expansion of the derivatives market over the past twenty years, both in terms of the types of instruments that are available and the extent to which funds use them," and that resulting "regulatory uncertainty may lead a fund to select one type of instrument or transaction over another for non-investment reasons, or to avoid certain instruments or transactions altogether," which "can lead to inefficiencies that are detrimental to funds and their shareholders"); BlackRock Concept Release Comment Letter, at 5 ("Any set of mechanical rules cannot take account of the diversity of derivatives and the multiplicity of ways they may be used by portfolio managers."); Invesco Concept Release Comment Letter; Loomis Concept Release Comment Letter; Comment Letter of American Bar Association on Concept Release (Nov. 11, 2011) (File No. S7-33-11) ("ABA Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-47.pdf>; MFD Concept Release Comment Letter; Comment Letter of T. Rowe Price Associates, Inc. on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("T. Rowe Price Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-35.pdf>; Vanguard Concept Release Comment Letter.

¹³⁶ Concept Release, *supra* note 3, at 14. See also, e.g., Comment Letter of Capital Market Risk Advisors on Concept Release (Nov. 1, 2011) (File No. S7-33-11), available at <http://www.sec.gov/comments/s7-33-11/s73311-19.pdf> (supporting risk management for derivatives, but also for all more complex and less liquid instruments).

¹³⁷ See, e.g., Oppenheimer Concept Release Comment Letter, at 3 (stating that "a core component in the oversight of the use of derivatives by funds should be the board's awareness of the controls in place, and the effectiveness of the adviser's governance of risk in maintaining this awareness" and that "[w]e believe it is reasonable for the SEC to expect large and sophisticated investment advisers to have in place a well-developed risk governance framework incorporating an independent risk management function, governance structures designed to ensure the comprehensive review by appropriate levels of management of risk issues and reporting to a fund's

III. Discussion

As noted above, the dramatic growth in the volume and complexity of the derivatives markets over the past two decades, and the increased use of derivatives by certain funds, led us to initiate a review of funds' use of derivatives under the Investment Company Act. Based on that review, including the considerations we discussed in section II.D above and throughout this Release, we are today proposing rule 18f-4, an exemptive rule designed to address the investor protection purposes and concerns underlying section 18 and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives transactions and financial commitment transactions. This proposal is part of a broader set of initiatives designed to address the increasingly complex portfolio composition and operations of the asset management industry.¹³⁸

Proposed rule 18f-4 would permit a fund to enter into derivatives transactions, as defined in the rule, provided that the fund complies with three primary sets of conditions of the rule designed to address the purposes and concerns underlying section 18.¹³⁹ First, the fund would be required to

board designed to facilitate and enhance effective board oversight").

¹³⁸ Other initiatives include modernizing investment company reporting and disclosure and proposing liquidity risk management programs for open-end funds, including exchange-traded funds. See Investment Company Reporting Modernization, Investment Company Act Release No. 31610 (May 20, 2015) [80 FR 33590 (June 12, 2015)] ("Investment Company Reporting Modernization Release"); Amendments to Form ADV and Investment Advisers Act Rules, Advisers Act Release No. 4091 (May 20, 2015) [80 FR 33718 (June 12, 2015)]; Liquidity Release, *supra* note 5.

¹³⁹ The proposed rule would provide an exemption from certain provisions of section 18 and 61 of the Act, subject to conditions. The proposed rule could be used by any fund subject to the requirements of section 18 or 61, including mutual funds, closed-end funds, BDCs, most ETFs, and exchange-traded managed funds. (Exchange-traded managed funds, a hybrid between a traditional mutual fund and an ETF, are open-end funds that the Commission has approved. See Eaton Vance Management, et al., Investment Company Act Release Nos. 31333 (Nov. 6, 2014) (notice) and 31361 (Dec. 2, 2014) (order)). The rule would not apply to unit investment trusts ("UITs"), including ETFs structured as UITs, because UITs are not subject to the requirements of section 18. However, as the Commission has noted (in addressing futures contracts and commodities options), derivatives transactions generally require a significant degree of management and may not meet the requirements imposed on a UIT by the Investment Company Act, including section 4(2) thereof. See section 4 of the Act; see also Custody Of Investment Company Assets With Futures Commission Merchants And Commodity Clearing Organizations, Investment Company Act Release No. 22389 (Dec. 11, 1996), at n.18 (explaining that UIT portfolios are generally unmanaged).

comply with one of two alternative portfolio limitations designed to impose a limit on the amount of leverage the fund may obtain through derivatives transactions and other senior securities transactions. The first portfolio limitation would place an overall limit on the amount of exposure (as defined in the rule) to underlying reference assets, and potential leverage, that a fund would be able to obtain through derivatives transactions and other senior securities transactions by limiting the fund's exposure under these transactions to 150% of the fund's net assets. The second portfolio limitation would focus primarily on a risk assessment of the fund's use of derivatives, and would permit a fund to obtain exposure in excess of that permitted under the first portfolio limitation where the fund's derivatives transactions, in aggregate, result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives, evaluated using a value-at-risk-based test.

Second, the fund would be required to manage the risks associated with the fund's derivatives transactions by maintaining an amount of certain assets, defined in the proposed rule as "qualifying coverage assets," designed to enable the fund to meet its obligations under its derivatives transactions. To satisfy this requirement the fund would be required to maintain qualifying coverage assets to cover the fund's mark-to-market obligations under a derivatives transaction, as well as an additional amount, determined in accordance with policies and procedures approved by the fund's board, designed to address potential future losses and resulting payment obligations under the derivatives transaction. The fund's qualifying coverage assets for its derivatives transactions generally would be required to consist of cash and cash equivalents.

Third, except with respect to funds that engage in only a limited amount of derivatives transactions and that do not use certain complex derivatives transactions as defined in the proposed rule, the fund would be required to establish a formalized derivatives risk management program administered by a designated derivatives risk manager. The derivatives risk management program requirement is designed to complement the proposed rule's portfolio limitations and asset segregation requirements applicable to every fund that engages in derivatives transactions by requiring funds subject to the requirement to adopt and implement a derivatives risk

management program that addresses the program elements specified in the rule, including the assessment and management of the risks associated with the fund's derivatives transactions. The program would be administered by a derivatives risk manager designated by the fund and approved by the fund's board of directors.

The proposed rule also would permit a fund to enter into financial commitment transactions, which include the trading practices we described in Release 10666 and short sale borrowings, provided that the fund complies with conditions requiring the fund to maintain qualifying coverage assets equal in value to the fund's full obligations under its financial commitment transactions. Because in many cases the timing of the fund's payment obligations may be specified under the terms of a financial commitment transaction or the fund may otherwise have a reasonable expectation regarding the timing of the fund's payment obligations with respect to its financial commitment transactions, a fund relying on the proposed rule would be able to maintain as qualifying coverage assets for a financial commitment transaction assets that are convertible to cash or that generate cash prior to the date on which the fund expects to be required to pay its obligations under the transaction, determined in accordance with policies and procedures approved by the fund's board of directors.¹⁴⁰

The proposed rule would supersede the guidance we provided in Release 10666, as well as the guidance provided by our staff concerning funds' use of derivatives and financial commitment transactions, which we would rescind if we adopt the proposed rule.¹⁴¹

A. Structure and Scope of Proposed Rule 18f-4

1. Structure of Proposed Rule 18f-4

Proposed rule 18f-4, as summarized above, is designed both to impose a limit on the leverage a fund relying on the rule may obtain through derivatives transactions and financial commitment transactions, and to require the fund to have qualifying coverage assets to meet its obligations under those transactions, in order to address the undue speculation concern expressed in

¹⁴⁰ A fund relying on the proposed rule would also be able to maintain as qualifying coverage assets for a financial commitment transaction fund assets that have been pledged with respect to the financial commitment obligation and can be expected to satisfy such obligation, determined in accordance with policies and procedures approved by the fund's board of directors.

¹⁴¹ See *infra* section III.I.

section 1(b)(7) and the asset sufficiency concern expressed in section 1(b)(8). We discuss in this section of the Release the structure and general approach of proposed rule 18f-4, and discuss the scope of the defined terms “derivatives transactions” and “financial commitment transactions” in section III.A.2 below.

As discussed in more detail in the sections that follow, in order to rely on the exemption provided by proposed rule 18f-4 to enter into derivatives transactions, a fund would be required to comply with one of two alternative portfolio limitations and, separately, to maintain qualifying coverage assets designed to enable the fund to meet its obligations under those transactions and to require the fund to manage the risks associated with those transactions. The proposed rule’s portfolio limitations are designed primarily to address concerns about a fund’s ability to obtain leverage through derivatives transactions, whereas the proposed rule’s requirements to maintain qualifying coverage assets are designed primarily to address concerns about a fund’s ability to meet its obligations. We believe that this approach for derivatives transactions—providing separate portfolio limitations and asset segregation requirements—would be more effective than an approach focusing only on asset segregation, particularly when it is coupled with a formalized risk management program for funds that engage in more than a limited amount of derivatives transactions or that use certain complex derivatives transactions, as we are proposing today.

We have determined to propose portfolio limitation and risk management requirements for derivatives transactions, in addition to an asset segregation requirement, because as discussed in section II.D above, asset segregation alone in some cases may not provide a sufficient limit on the amount of leverage a fund can obtain through derivatives or sufficient assurances that a fund would have adequate assets to meet its obligations arising under derivatives transactions. The asset segregation approach described in Release 10666 achieved both of these goals—limiting leverage and addressing availability of assets—because that release contemplated that funds would segregate high-quality liquid assets equal in value to the fund’s full obligations. A fund that segregated liquid assets equal to the purchase price in a standby commitment agreement, for example, would be limited in its ability to enter into standby commitment agreements because the fund could not

incur obligations under those agreements in excess of the fund’s available liquid assets; by segregating liquid assets equal to the purchase price of the standby commitment agreement, the fund would have assets available to meet its obligations under the agreement.

Although this approach appears to have addressed the concerns underlying section 18 for the particular instruments described in Release 10666 and is similar to the approach we are proposing today for financial commitment transactions, applying it to derivatives transactions by requiring funds to segregate the kinds of liquid assets we described in Release 10666 equal in value to the full notional amount of each derivative could in some cases require funds to hold more liquid assets than may be necessary to address the investor protection purposes and concerns underlying section 18. The notional amount of a derivatives transaction does not necessarily equal, and often will exceed, the amount of cash or other assets that a fund ultimately would likely be required to pay or deliver under the derivatives transaction. By addressing concerns related to a fund’s ability to obtain leverage through derivatives transactions primarily through the proposed portfolio limitations and separately addressing concerns related to a fund’s ability to meet its derivatives obligations primarily through the proposed requirements to maintain qualifying coverage assets, the proposed rule is designed to address each concern more directly, while still providing a flexible framework that can be applied by funds to various types of derivatives as they are developed in the marketplace.

These requirements also would be complemented by the proposed rule’s risk management requirements, which would require funds that engage in more than a limited amount of derivatives transactions or that use certain complex derivatives transactions, as defined in the proposed rule, to develop formalized risk management programs reasonably designed to assess and manage the risk associated with those transactions based on the fund’s own facts and circumstances. This requirement should serve to establish a standardized level of risk management for funds that engage in more than a limited amount of derivatives transactions or that use complex derivatives transactions.

2. Definitions of Derivatives Transactions and Financial Commitment Transactions

The proposed rule defines the term “derivatives transaction” to mean any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument (“derivatives instrument”) under which a fund is or may be required to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination.¹⁴² This definition is designed to describe those derivatives transactions that in our view involve the issuance of a senior security, as discussed in section II.B.4 above, because they involve a future payment obligation, that is, an obligation or potential obligation of the fund to make payments or deliver assets to the fund’s counterparty.

The proposed rule’s definition of “derivatives transaction” incorporates a list of derivatives instruments. We believe this list of derivatives instruments, together with the proposed rule’s inclusion of “similar instruments,” covers the types of derivatives that funds currently use and that involve fund obligations that implicate section 18, and that this list is sufficiently comprehensive to include derivatives that may be developed in the future.¹⁴³ We believe that this approach is preferable to having a more conceptual definition of derivatives transaction, such as an instrument or contract whose value is based upon, or derived from, some other asset or metric, which could be too broad or more difficult to apply, in that it could be understood to include or potentially include instruments or transactions that are sometimes referred to as “derivatives” but which typically would not be expected to implicate section 18.

The proposed rule would define a “financial commitment transaction” as any reverse repurchase agreement, short sale borrowing, or any firm or standby commitment agreement or similar agreement.¹⁴⁴ This definition is designed to describe the trading practices addressed in Release 10666, as well as short sales of securities, for which the staff initially developed the

¹⁴² Proposed rule 18f-4(c)(2).

¹⁴³ Title VII of the Dodd-Frank Act established a comprehensive framework for the regulation of swaps and security-based swaps. The definitions of these terms under section 1a of the Commodity Exchange Act and section 3(a)(68) of Securities Exchange Act, respectively, are detailed and expansive, and were designed to encompass a wide range of derivatives, including those that could be developed in the future.

¹⁴⁴ Proposed rule 18f-4(c)(4).

segregated account approach we applied in Release 10666. These transactions involve a conditional or unconditional contractual obligation to pay or deliver assets in the future and thus involve the issuance of a senior security, as discussed in section II.B.4 of this Release.

The proposed rule's definition of financial commitment transactions includes firm and standby commitment agreements, which we addressed in Release 10666,¹⁴⁵ as well as any similar agreement.¹⁴⁶ The rule includes, as a similar agreement, an agreement under which a fund has obligated itself, conditionally or unconditionally, to make a loan to a company or to invest equity in a company, including by making a capital commitment to a private fund that can be drawn at the discretion of the fund's general partner.¹⁴⁷ We understand that funds often refer to these transactions as "unfunded commitments." In these transactions, as with respect to firm and standby commitment agreements, the fund has incurred a conditional or unconditional contractual obligation to pay or deliver assets in the future.

The fund would be exposed to risks as a result of these transactions in that the fund may be required to liquidate other assets of the fund to obtain the cash needed by the fund to satisfy its obligations, and if the fund is unable to meet its obligations, the fund would be subject to default remedies available to its counterparty. For example, if a fund fails to fulfill its commitments to invest in a private fund when called to do so, the fund could be subject to the remedies specified in the limited partnership agreement (or similar document) relating to that private fund, which can include, for example, a forfeiture of some or all of the fund's investment in the private fund.¹⁴⁸

¹⁴⁵ See Release 10666, *supra* note 20, at "Reverse Repurchase Agreements," "Firm Commitment Agreements," and "Standby Commitment Agreements" discussions.

¹⁴⁶ Proposed rule 18f-4(c)(4).

¹⁴⁷ The definition would not include a transaction under which a fund merely is required to deliver cash or assets as part of regular-way settlement of a securities transaction (rather than a forward-settling transaction or transaction in which settlement is deferred). Cf. Release 10666, *supra* note 20, at n.11.

¹⁴⁸ See, e.g., Phyllis A. Schwartz & Stephanie R. Breslow, *Private Equity Funds: Formation and Operation* (June 2015 ed.), at 2-34 (remedies private equity funds may apply in event of investor default include, among other things, the right to charge high interest on late payments, the right to force a sale of the defaulting investor's interest, the right to continue to charge losses and expenses to defaulting investors while cutting off their interest in future profits, and the right to take any other action permitted at law or in equity).

The rule's definitions of the terms "derivatives transactions" and "financial commitment transactions," discussed above, would specify the types of transactions in which a fund would be permitted to engage under the rule, subject to its conditions. Other senior securities transactions that do not fall within either of these definitions, such as borrowings from a bank by mutual funds or the issuance of other debt securities or preferred equity by closed-end funds or BDCs, could only be done pursuant to the requirements of section 18 (or section 61 in the case of BDCs) or in accordance with some other exemption, rather than proposed rule 18f-4.

We request comment on all aspects of the proposed rule's definitions of the terms "derivatives transaction" and "financial commitment transaction."

- Is the definition of "derivatives transaction" sufficiently clear? Are there additional types of derivatives instruments that we should include or any that we should exclude?

- The proposed rule's definition of the term derivatives transactions is designed to describe those derivatives transactions that would involve the issuance of a senior security. Do commenters agree that this is an appropriate approach? Does the rule effectively describe all of the types of derivatives transactions that would involve the issuance of a senior security? The proposed rule's definition of "derivatives transaction" incorporates a list of derivatives instruments, rather than a conceptual definition such as an instrument or contract whose value is based upon, or derived from, some other asset or metric, because we believe that the definition's list of derivatives instruments would more clearly describe the types of derivatives that implicate section 18 than a conceptual definition. Do commenters agree? Why or why not?

- The proposed rule would define a "financial commitment transaction" as any reverse repurchase agreement, short sale borrowing, or any firm or standby commitment agreement or similar agreement. The proposed rule includes, as a similar agreement, an agreement under which a fund has obligated itself, conditionally or unconditionally, to make a loan to a company or to invest equity in a company, including by making a capital commitment to a private fund that can be drawn at the discretion of the private fund's general partner. Do commenters agree with the scope of this definition? Are these terms sufficiently clear? Do commenters agree

that it is appropriate to include these transactions?

- Are there additional types of transactions that we should include in the definition of a "financial commitment transaction"? Adding additional transactions to the definition would permit the fund to engage in those transactions by complying with the proposed rule, rather than section 18 or 61. Are there transactions that we should exclude from the definition and for which a fund should be required to comply with the requirements of section 18 (to the extent permitted under section 18), rather than the proposed rule's conditions?

- Our staff has expressed the view that a fund's loan of portfolio securities may involve the issuance of a senior security in light of the fund's obligation to return the collateral upon termination of the loan and has expressed the view that "a mutual fund should not have on loan at any given time securities representing more than one-third of its total asset value."¹⁴⁹ Should we address funds' compliance with section 18 in connection with securities lending by, instead, including a fund's obligation to return securities lending collateral as a financial commitment transaction? Alternatively, should we require a fund to include the obligation to return securities lending collateral for purposes of the proposed rule's exposure limits, as discussed in more detail in section III.B? Or does the current approach under which funds do not have on loan at any given time securities representing more than one-third of the funds' total assets, together with other guidance from our staff concerning securities lending by funds, effectively address the senior security implications of securities lending such that we should not address securities lending in the proposed rule? Which approach would be most appropriate and why?

- The proposed rule would permit a fund to enter into a derivatives transaction or financial commitment transaction, notwithstanding the requirements of section 18 or 61 of the Act, if the fund complies with the rule's conditions. Are there other rules or forms we should consider modifying if

¹⁴⁹ See, e.g., The Brinson Funds, SEC Staff No-Action Letter (Nov. 25, 1997), available at <https://www.sec.gov/divisions/investment/noaction/1997/brinsonfunds112597.pdf> (stating that, "[a]s a general matter, securities lending arrangements are regulated under Section 17(f) of the Investment Company Act of 1940, which governs custody arrangements," but that "[t]he staff has stated that a fund's loan of portfolio securities may involve the issuance of a senior security in light of the fund's obligation to return the collateral upon termination of the loan").

we adopt the proposed rule? Should we, for example, amend Form N-2 to provide that funds required to file on that form should not include derivatives transactions and financial commitment transactions in the senior securities table? Are there other aspects of our rules and forms that we should consider amending if we were to adopt the proposed rule? If so, which rules and form items and why?

- Should any final rule address, or should we provide guidance concerning, funds' compliance with other aspects of section 18 in connection with funds' use of derivatives transactions or financial commitment transactions? For example, because the proposed rule would permit a fund to enter into derivatives transactions and financial commitment transactions notwithstanding section 18(a)(1) and section 18(f)(1), a fund relying on the proposed rule would not be required to comply with section 18's 300% asset coverage requirement (or section 61's 200% asset coverage requirement) with respect to such transactions.¹⁵⁰ Should we, however, address in any final rule or provide guidance concerning the application of the asset coverage requirements under section 18 or 61 when a fund also enters into senior securities transactions in reliance on section 18 or 61 (such as bank borrowings or, in the case of a closed-end fund or BDC, the issuance of senior debt or preferred stock)? When a fund is calculating asset coverage under section 18(h) for senior securities transactions permitted by section 18 or 61, how should the fund treat its derivatives transactions or financial commitment transactions? When determining the "aggregate amount of senior securities representing indebtedness," how should the fund treat any liabilities and indebtedness associated with the fund's derivatives transactions and financial commitment transactions? Currently, when funds are determining the amount of their liabilities and indebtedness and the amount of their senior securities for purposes of calculations under section 18(h), are funds determining these amounts in accordance with U.S. generally accepted accounting principles? Should a fund also include any liabilities and indebtedness associated with derivatives transactions

¹⁵⁰ "Asset coverage" of a class of securities representing indebtedness of an issuer generally is defined in section 18(h) of the Investment Company Act as "the ratio which the value of the total assets of such issuer, less all liabilities and indebtedness not represented by senior securities, bears to the aggregate amount of senior securities representing indebtedness of such issuer." See *supra* note 34.

and financial commitment transactions based on U.S. generally accepted accounting principles? Alternatively, should a fund treat any liabilities and indebtedness for these transactions as "liabilities and indebtedness not represented by senior securities"? What approach would be appropriate and why?

- Is there any guidance we should provide concerning funds' compliance with other provisions of the Investment Company Act in connection with funds' use of derivatives transactions or financial commitment transactions in reliance on the proposed rule?

B. Portfolio Limitations for Derivatives Transactions

The proposed rule would require a fund that engages in derivatives transactions in reliance on the rule to comply with one of two alternative portfolio limitations.¹⁵¹ As explained in more detail below, under the first portfolio limitation (the "exposure-based portfolio limit"), a fund generally would be required to limit its aggregate exposure to 150% of the fund's net assets. A fund's "exposure" for this purpose generally would be calculated as the aggregate notional amount of its derivatives transactions, together with its obligations under financial commitment transactions and other senior securities transactions. The second portfolio limitation (the "risk-based portfolio limit") would permit a fund to obtain exposure in excess of that permitted under the exposure-based portfolio limit where the fund's derivatives transactions, in aggregate, result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives, evaluated using a test based on value-at-risk ("VaR"). A fund electing the risk-based portfolio limit generally would be required to limit its exposure under derivatives transactions, financial commitment transactions, and other senior securities transactions to 300% of the fund's net assets. As discussed below, these portfolio limitations are designed primarily to address the undue speculation concern expressed in section 1(b)(7) by imposing an overall limit on the amount of exposure to underlying reference assets, and potential leverage, that a fund would be able to obtain through derivatives and other senior securities transactions, while also providing flexibility for a fund to use derivatives for a variety of purposes.¹⁵²

¹⁵¹ Proposed rule 18f-4(a)(1).

¹⁵² The proposed rule's portfolio limitations, although designed to impose a limit on potential

1. Exposure-Based Portfolio Limit

a. Overview

The first portfolio limit would be based on the fund's overall exposure to: (1) Derivatives transactions, (2) financial commitment transactions, and (3) other transactions involving a senior security entered into by the fund pursuant to section 18 or 61 of the Act without regard to the exemption that would be provided by the proposed rule (*i.e.*, senior securities transactions engaged in by a fund in reliance on the requirements of those provisions, rather than in reliance on the exemption that would be provided by the proposed rule).¹⁵³ The proposed rule would collectively define these transactions as "senior securities transactions."¹⁵⁴ A fund that relies on the exposure-based portfolio limit would be required to operate so that its aggregate exposure under senior securities transactions, measured immediately after entering into any such transaction, does not exceed 150% of the fund's net assets.¹⁵⁵

The exposure-based portfolio limit is designed to impose an overall limit on the amount of exposure, and thus the amount of potential leverage, that a fund would be able to obtain through derivatives and other senior securities transactions. We discuss and seek comment below on the exposure-based portfolio limit, including the proposed rule's method of calculating a fund's exposure and the rule's limitation of exposure to 150% of the fund's net assets.

leverage, also could help to address concerns about a fund's ability to meet its obligations. As noted above, the use of derivatives for leveraging purposes can exacerbate the risk that losses on the derivatives, and resulting payment obligations imposed on the fund, can force the fund's adviser to sell the fund's investments to generate liquid assets in order for the fund to meet its obligations. The proposed rule would directly address concerns about a fund's ability to meet its obligations under its derivatives transactions primarily through the proposed rule's requirements to maintain qualifying coverage assets, as discussed below in section III.C.

¹⁵³ Proposed rule 18f-4(a)(1)(i); proposed rule 18f-4(c)(10) (defining the term "senior securities transaction" to mean any derivatives transaction, financial commitment transaction, or any transaction involving a senior security entered into by the fund pursuant to section 18 or 61 of the Act without regard to the exemption provided by the proposed rule).

¹⁵⁴ Proposed rule 18f-4(c)(10).

¹⁵⁵ Proposed rule 18f-4(a)(1)(i). As discussed below in section III.B.2, the risk-based portfolio limit also includes an outside limit on a fund's exposure. A fund's exposure for purposes of the risk-based portfolio limit would be calculated as described in this section of the Release, but the exposure limit would be 300% of the fund's net assets rather than 150%. Proposed rule 18f-4(a)(1)(ii).

b. Calculation of Exposure

The proposed rule would define a fund's "exposure" as the sum of: (1) The aggregate notional amounts of the fund's derivatives transactions, subject to certain adjustments discussed below; (2) the aggregate obligations of the fund under its financial commitment transactions; and (3) the aggregate indebtedness (and with respect to any closed-end fund or business development company, involuntary liquidation preference) with respect to any other senior securities transactions entered into by the fund pursuant to section 18 or 61 of the Investment Company Act.¹⁵⁶ We discuss each aspect of this definition below.

i. Exposure for Derivatives Transactions

1. Determination of Notional Amounts

Under the proposed rule, a fund's exposure would include the aggregate notional amounts of its derivatives transactions.¹⁵⁷ The proposed rule would generally define the "notional

amount" of a derivatives transaction, subject to certain adjustments required by the rule (discussed below), as the market value of an equivalent position in the underlying reference asset for the derivatives transaction, or the principal amount on which payment obligations under the derivatives transaction are calculated.¹⁵⁸

We believe that, although derivatives vary widely in terms of structure, asset class, risks and potential uses, for most types of derivatives the notional amount generally serves as a measure of the fund's economic exposure to the underlying reference asset or metric.¹⁵⁹ A total return swap, for example, can provide economic exposure equivalent to a long or short position in the reference asset for the swap. Similarly, a fund can sell or buy a CDS to obtain exposure similar to a long or short position in the credit risk of an issuer of a fixed-income security. We also note that notional amounts are used in numerous other regulatory regimes as a

means of determining the scale of the derivatives activities of market participants.¹⁶⁰ We also believe that the definition of notional amount under the proposed rule is consistent with the way the term "notional amount" (or in some cases "notional value") generally is used with respect to derivatives transactions.¹⁶¹

Table 1 below sets forth a list of different types of derivatives transactions that are commonly used by funds, together with the method by which we understand a fund, for risk management, reporting or other purposes, typically would calculate the transaction's notional amount. We believe that the proposed rule's definition of notional amount generally would allow a fund to use the calculation methods below to determine the notional amounts of such derivatives transactions (before applying any of the adjustments discussed below) for purposes of calculating the fund's exposure under the proposed rule.¹⁶²

TABLE 1

Forwards:	
FX forward	Notional contract value of currency leg(s).
Forward rate agreement	Notional principal amount.
Futures:	
Treasury futures	Number of contracts * notional contract size * (futures price * conversion factor + accrued interest).
Interest rate futures	Number of contracts * contract unit (e.g., \$1,000,000).
FX futures	Number of contracts * notional contract size (e.g., 12,500,000 Japanese yen).
Equity index futures	Number of contracts * contract unit (e.g., \$50 per index point) * futures index level.
Commodity futures	Number of contracts * contract size (e.g., 1,000 barrels of oil) * futures price.
Options on futures	Number of contracts * contract size * futures price * underlying delta. ¹⁶³
Swaps:	
Credit default swap	Notional principal amount or market value of underlying reference asset.
Standard total return swap	Notional principal amount or market value of underlying reference asset.
Currency swap	Notional principal amount.
Cross currency interest rate swaps	Notional principal amount.
Standardized Options:	

¹⁵⁶ Proposed rule 18f-4(c)(3).

¹⁵⁷ Proposed rule 18f-4(c)(3)(i) (defining "exposure").

¹⁵⁸ Proposed rule 18f-4(c)(7) (defining "notional amount").

¹⁵⁹ Derivatives may be broadly described as instruments or contracts whose value is based upon, or derived from, an underlying reference asset (see *supra* at text preceding note 8). The notional amount generally serves a measure of the underlying economic exposure because it reflects the value of the underlying reference asset for that derivative or the amount of the underlying reference asset on which payment obligations are based.

¹⁶⁰ See, e.g., Margin and Capital Requirements for Covered Swap Entities, 80 FR 74839 (Nov. 30, 2015) ("Prudential Regulator Margin and Capital Adopting Release"); Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 FR 59898 (Oct. 3, 2014) ("CFTC Margin Proposing Release") (defining "material swaps exposure" by reference to average daily aggregate notional amounts of derivatives transactions). See also 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)] ("Swap Dealer/Major Swap Participant Release"), at section II.D (discussing use of notional amounts as basis for *de minimis* exemption to swap dealer registration requirements). See also CFTC regulations 4.5(c)(ii)(3)(b) and 4.13(a)(3)(ii)(B) (exclusion from definition of commodity pool operator and exemption from commodity pool operator registration requirement, respectively, in respect of certain pools whose commodity interest positions do not exceed 100% of the liquidation value of the pool's portfolio). See also *infra* section IV.E (discussing use of notional amounts under UCITS regulatory regime).

¹⁶¹ For example, "notional value" with respect to futures has been defined as "the underlying value (face value), normally expressed in U.S. dollars, of the financial instrument or commodity specified in a futures or options on futures contract." See *CME Group Glossary*, available at <http://www.cmegroup.com/education/glossary.html>. "Notional principal" or "notional amount" of a derivative contract is a hypothetical underlying quantity upon which interest rate or other payment obligations are computed." ISDA Online Product Descriptions and Frequently Asked Questions, available at <http://www.isda.org/educat/faqs.html#7>. The Bank for International Settlements

describes "notional amounts outstanding" as "a reference from which contractual payments are determined in derivatives markets." *Guide to the International Financial Statistics*, Bank for International Settlements (July 2009) ("BIS Guide"), available at <http://www.bis.org/statistics/intfinstatguide.pdf>, at 31. See also 2010 ABA Derivatives Report, *supra* note 70, at n.11 (noting that the term "notional amount" is used differently by different people in different contexts, but is used, in the Report, to refer to "the nominal or face amount that is used to calculate payments made on a particular instrument, without regard to whether its obligation under the instrument could be netted against the obligation of another party to pay the fund under the instrument").

¹⁶² The methods for determining the notional amounts in the table are similar to those required to be used by UCITS funds that follow the commitment approach (discussed further below in section IV.E). See European Securities and Markets Authority (formerly Committee of European Securities Regulators), *Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS*, CESR/10-788 (July 28, 2010) ("CESR Global Guidelines"), available at http://www.esma.europa.eu/system/files/10_788.pdf.

TABLE 1—Continued

Security options	Number of contracts * notional contract size (e.g., 100 shares per option contract) * market value of underlying equity share * underlying delta.
Currency options	Notional contract value of currency leg(s) * underlying delta.
Index options	Number of contracts * notional contract size * index level * underlying delta.

Although we believe that the notional amount generally serves as a measure of the fund's exposure to the underlying reference asset or metric,¹⁶⁴ we recognize that a derivative's notional amount does not reflect the way in which the fund uses the derivative and that the notional amount is not a risk measure. An exposure-based test based on notional amounts therefore could be viewed as a relatively blunt measurement in that different derivatives transactions having the same notional amount but different underlying reference assets—for example, an interest rate swap and a credit default swap having the same notional amount—may expose a fund to very different potential investment risks and potential payment obligations.¹⁶⁵ We also recognize that there are other approaches to evaluating leverage associated with a fund's derivatives activities, including approaches that disregard or subtract the notional value of hedging transactions from the calculation of a fund's exposure.¹⁶⁶ Leverage can be calculated in numerous ways, however, and the appropriateness of a particular leverage metric may depend on various considerations, such as a fund's strategy and types of investments, and the specific leverage-related risks that are being considered.¹⁶⁷ On balance, we believe

¹⁶³ Delta refers to the ratio of change in the value of an option to the change in value of the asset into which the option is convertible. The delta-adjusted notional value of options is needed to have an accurate measurement of the exposure that an option creates to the underlying reference asset. See, e.g., Comment Letter of Morningstar, Inc. on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("Morningstar Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-23.pdf>, at 2.

¹⁶⁴ See *supra* notes 158–160.

¹⁶⁵ While credit default swaps are often considered riskier than typical interest rate or currency derivatives, the staff has observed that even "plain vanilla" interest rate and currency derivatives can lead to significant losses for funds. See, e.g., Katherine Burton, *Swiss Franc Trade Is Said to Wipe Out Everest's Main Fund*, Bloomberg (Jan. 18, 2015), available at <http://www.bloomberg.com/news/articles/2015-01-17/swiss-franc-trade-is-said-to-wipe-out-everest-s-main-fundv> (noting significant and widespread losses following the Swiss National Bank's decision to decouple the Swiss franc from the euro).

¹⁶⁶ See *infra* section III.B.1.d.

¹⁶⁷ See, e.g., *An Overview of Leverage*, AIMA Canada (Oct. 2006) ("An Overview of Leverage"), available at <http://www.aima.org/filemanager/root/>

that, for purposes of the proposed rule, a notional amount limitation would be a more effective and administrable means of limiting potential leverage from derivatives than a limitation which relies on other leverage measures that may be more difficult to adapt to different types of fund strategies or different uses of derivatives, including types of fund strategies and derivatives that may be developed in the future.

The proposed rule would allow a fund operating under the exposure-based portfolio limit to have exposure of up to 150% of the fund's net assets (*i.e.*, more than the fund's net assets) in recognition of the various ways in which funds may use derivatives. The 150% limit, discussed in more detail below, is designed to balance concerns about the limitations of an exposure measurement based on notional amounts with the benefits of using notional amounts, such as the ability of funds to readily determine the notional amounts of their derivatives transactions and the expectation that notional amounts can generally serve as a measure of the size of a fund's exposure to underlying reference assets or metrics, as discussed above.

We believe that, for purposes of the exposure-based portfolio limit, a test that focuses on the notional amounts of funds' derivatives transactions, coupled with an appropriate exposure limit, will better accommodate the broad diversity of registered funds and the ways in which they use derivatives than a test that would require consideration of the

site_assets/canada/publications/strategy_paper_-_leverage.pdf (distinguishing between financial, construction and instrument leverage and describing the measurement of leverage using gross market exposure vs. net market exposure). See also Off-Balance-Sheet Leverage IMF Working Paper, *supra* note 79 (discussing means of measuring leverage in various types of derivatives and other off-balance-sheet transactions). See also Ang, Gorovyy & Inwegen, *supra* note 72 (discussing differences among gross leverage, net leverage and long-only leverage calculations, as applied to long-only, dedicated long-short, general leveraged and dedicated short funds). See also Comment Letter of BlackRock, Inc. on Investment Company Reporting Modernization (Aug. 11, 2015) (File No. S7-08-15) ("BlackRock Modernization Comment Letter"), available at <http://www.sec.gov/comments/s7-08-15/s70815-318.pdf>. In the BlackRock Reporting Modernization Comment Letter, the commenter proposed a high-level framework for an approach to measuring economic leverage that could potentially be applied across different types of funds and investment strategies, using comprehensive analysis of multiple different types of risk exposures.

manner in which a fund uses derivatives in its portfolio (*e.g.*, for hedging).¹⁶⁸ The rule seeks to achieve a balance between providing flexibility regarding the use of derivatives while limiting the potential risks associated with leverage by, in addition to the exposure limits in the proposed rule, conditioning the rule's exemptive relief on other requirements, such as the asset coverage requirements discussed in section III.C below and, if applicable, the derivatives risk management program requirements discussed in section III.D below, which must be tailored in light of the fund's particular strategy and other characteristics.

Although we believe that an exposure test that focuses on limiting the aggregate notional amounts of funds' derivatives transactions is an appropriate means of limiting leverage, in some cases, the notional amount for a derivatives transaction may not produce a measure of exposure that we believe would be appropriate for purposes of the proposed rule's exposure limitations. The proposed rule therefore includes three provisions relating to the calculation of exposure in respect of certain types of derivatives transactions for which we believe that an adjusted notional amount would better serve as a measure of a fund's investment exposure for purposes of the rule.

First, for derivatives that provide a return based on the leveraged performance of an underlying reference asset, the rule would require the notional amount to be multiplied by the applicable leverage factor.¹⁶⁹ Thus, for example, the rule would require a total return swap that has a notional amount of \$1 million and provides a return equal to three times the performance of an equity index to be treated as having a notional amount of \$3 million. Absent this provision, a fund could enter into a derivative with a stated notional amount that did not reflect the magnitude of the fund's leveraged investment exposure under the derivative.¹⁷⁰ Such a transaction, if not

¹⁶⁸ See *infra* section III.B.1.d.

¹⁶⁹ Proposed rule 18f-4(c)(7)(iii)(A).

¹⁷⁰ A similar requirement applies to the determination of *de minimis* thresholds for swap dealer and security-based swap dealer registration. See Swap Dealer/Major Swap Participant Release,

Continued

measured based on the leverage inherent in the derivative instrument, could otherwise provide a means of structuring transactions to avoid the proposed rule's exposure limitations.

Second, the proposed rule includes a "look-through" for calculating the notional amount in respect of derivatives transactions for which the underlying reference asset is a managed account or entity formed or operated primarily for the purpose of investing in or trading derivatives transactions, or an index that reflects the performance of such a managed account or entity.¹⁷¹ We understand that some funds, including funds that engage in managed futures or foreign currency strategies, obtain their investment exposures for such strategies by entering into a swap that references the performance of a managed account or entity, which in turn is managed on a discretionary basis by a third-party trading manager (such as a commodity trading advisor). Such swaps can be used by a fund to obtain a return that is economically nearly identical to a direct investment by the fund in the derivatives traded by the third-party trading manager for the managed account or entity.¹⁷² Absent a look-through to the derivatives transactions of the underlying reference vehicle, such structures could be used to avoid the exposure limitations that would be applicable under the proposed rule if the fund directly owned the managed account or securities issued by the reference entity.¹⁷³ Accordingly, for

supra note 160, at n.427 and accompanying text (stating that, for purposes of the *de minimis* threshold for registration of swap dealers, "notional standards will be based on 'effective notional' amounts when the stated notional amount is leveraged or enhanced by the structure of the swap or security-based swap").

¹⁷¹ Proposed rule 18f-4(c)(7)(iii)(B). The managed account or interests in the entity may be owned by the fund's counterparty (*e.g.*, a swap dealer), which hedges its obligations under the derivative through its ownership of such account or interests. In some cases, the derivative contract may describe the reference asset as an index comprising the performance of transactions "notionally" entered into by the trading manager, or the "notional" performance of an index comprising the managed account or entity together with cash and/or other positions. The proposed rule's "look-through" for calculating notional amounts thus applies to derivatives transactions for which the underlying reference asset is a managed account or entity formed or operated primarily for the purpose of investing in or trading derivatives transactions, as well as an index that reflects the performance of such a managed account or entity. *Id.*

¹⁷² Some funds appear to use these swaps in such a way that nearly all of the fund's investment exposure is indirectly attributable to the derivatives traded by the third-party manager for the underlying managed account or entity, while the fund's direct investments (other than the swap) are limited to cash and cash equivalents.

¹⁷³ For example, a fund might enter into a swap having a notional value of \$10, corresponding to the

such derivatives transactions, the rule would require a fund to calculate the notional amount by reference to the fund's *pro rata* portion of the notional amounts of the derivatives transactions of the underlying reference vehicle, which in turn must be calculated in a manner consistent with the requirements of the proposed rule.¹⁷⁴ The provision thus would apply to transactions such as swaps on pooled investment vehicles that are formed or operated primarily for the purpose of investing in or trading derivatives transactions, which could include hedge funds, managed futures funds and leveraged ETFs, in order to prevent a fund from entering into a leveraged swap on the performance of shares or other interests issued by such vehicles and thereby indirectly obtain leverage in excess of what the rule would permit a fund to obtain directly.

Third, the proposed rule contains specific provisions for calculating the notional amount for certain defined complex derivatives transactions. As explained further below, the proposed rule includes these provisions because, for complex derivatives transactions, the notional amounts of such transactions determined without regard to these specific provisions may not serve as an appropriate measure of the underlying market exposure obtained by a fund.

The proposed rule would define a complex derivatives transaction as any derivatives transaction for which the amount payable by either party upon settlement date, maturity or exercise: (1) is dependent on the value of the underlying reference asset at multiple points in time during the term of the transaction; or (2) is a non-linear function of the value of the underlying reference asset, other than due to optionality arising from a single strike price.¹⁷⁵ We address each of these provisions below.

value of an equity security issued by a trading entity. The fund's counterparty could then invest \$10 in the trading entity, which in turn could use these funds as margin or collateral for leveraged futures or currency forward transactions having a much larger aggregate notional amount, *e.g.*, \$100. Proposed rule 18f-4(c)(7)(iii)(B) would require the fund to treat the swap in this example as having a notional amount of \$100 rather than \$10.

¹⁷⁴ Thus, for example, if a fund enters into a swap on the performance of a trading entity that, in turn, enters into a swap that provides a return based on the leveraged performance of an equity index, the notional amount of the equity index would need to be multiplied by the applicable leverage factor, consistent with the method set forth in proposed rule 18f-4(c)(7)(iii)(A), for purposes of calculating the fund's *pro rata* share of the notional amounts of the trading entity's derivatives transactions in accordance with proposed rule 18f-4(c)(7)(iii)(B).

¹⁷⁵ See proposed rule 18f-4(c)(1) (defining "complex derivatives transaction") and proposed rule 18f-4(c)(7)(iii)(C) (describing the method for

The first type of complex derivatives transaction is a derivatives transaction for which the amount payable by either party upon settlement date, maturity or exercise is dependent on the value of the underlying reference asset at multiple points in time during the term of the transaction.¹⁷⁶ This provision is designed to capture derivatives whose payouts are path dependent, *i.e.*, the payouts depend on the path taken by the value of the underlying asset during the term of the transaction. Many types of non-standard options exhibit path dependency.¹⁷⁷ An example of a path dependent derivative would be a barrier option. Barrier options (also known as knock-in or knock-out options) have a payoff that is contingent on whether the price of the underlying asset reaches some specified level prior to expiration.¹⁷⁸ Another example would be an Asian option, which has a payoff that depends on the average value of the underlying asset from inception until expiration.¹⁷⁹ By contrast, a standard put or call option having a single strike price would not be a complex derivatives transaction under this provision of the definition, because the payout of a standard put or call option depends on the value of the reference asset only upon exercise, *i.e.*, at a single point rather than multiple points in time during the term of the transaction.

The second type of complex derivatives transaction is a derivatives transaction for which the amount

calculating the notional amount for a complex derivatives transaction for purposes of the proposed rule).

¹⁷⁶ See proposed rule 18f-4(c)(1)(i).

¹⁷⁷ See Paul Wilmott, Paul Wilmott on Quantitative Finance (2nd ed. 2006) ("Wilmott"), at 371 (options that "have payoffs that depend on the path taken by the underlying asset, and not just the asset's value at expiration . . . are called path dependent." See also CESR Global Guidelines, *supra* note 162, at 12 (noting that "[c]ertain derivative instruments exhibit risk characteristics that mean the standard conversion approach is not appropriate as it does not adequately capture the inherent risks relating to this type of product. Some derivatives, for example, may exhibit path-dependency, such features emphasising the need to have both robust models for risk management and pricing purposes, but also to reflect their complexity in the commitment calculation methodology").

¹⁷⁸ Wilmott, *supra* note 177, at 371.

¹⁷⁹ *Id.* A third example would be an option with a lookback feature, which has a payoff that depends on whether a maximum or minimum value of the underlying asset occurred during some period prior to expiration. A lookback call option, for example, pays at settlement the difference between the final asset price and the lowest price of the asset observed during the term of the option. Because the payoff is contingent on two prices—the final asset price and the lowest observed price—a lookback call option would be a complex derivatives transaction. See *id.* at 383; see also Robert Whaley, Derivatives: Markets, Valuation, and Risk Measurement (2006) ("Whaley"), at 291.

payable by either party upon settlement date, maturity or exercise is a non-linear function of the value of the underlying reference asset, other than due to optionality arising from a single strike price.¹⁸⁰ Most types of derivatives traded on an exchange or with standardized terms (other than exchange-traded or standardized options) involve payment amounts between the parties that change on a dollar-for-dollar basis tracking changes in the value of the underlying reference asset. We refer to these calculations under relatively standardized terms as involving a linear function of the value of the underlying reference assets. An example of a “non-linear” derivatives transaction that would be a complex derivatives transaction under this provision of the definition would be a variance swap. A variance swap is an instrument that allows investors to profit from the difference between the current implied volatility and future realized volatility of an asset; however, the payoff for a variance swap is a function of the difference between current implied variance and future realized variance of the asset.¹⁸¹ Because variance is the square of volatility, the payment obligations under a variance swap are non-linear.¹⁸²

This second provision of the definition of complex derivatives transaction includes a carve-out that would exclude derivatives for which payout upon settlement date, maturity or exercise is non-linear due to optionality arising from a single strike price. This exception is designed to exclude standard put or call options from the complex derivatives transaction definition, which would otherwise be captured because their payout is non-linear. For example, the payout for a standard cash-settled written call option is either equal to zero (if the price of the underlying asset at maturity is less than or equal to the strike price) or equal to the difference between the value of the underlying asset and the strike price (if the price of the underlying asset at maturity is greater than the strike price), and is therefore non-linear. We believe that it is unnecessary to treat standard put and

call options as complex derivatives transactions because the method for determining the notional amount for such derivatives, *i.e.*, the market value of the underlying asset multiplied by its delta, serves as an appropriate measure of a fund’s exposure for purposes of the rule because it generally would result in a notional amount that reflects the market value of an equivalent position in the underlying reference asset for the derivatives transaction.¹⁸³

The proposed rule would include a special provision for calculating the notional amount of complex derivatives transactions for purposes of determining a fund’s exposure.¹⁸⁴ This provision is designed to address two primary concerns. The first is that the notional amount for some complex derivatives, if determined without regard to this provision, may not appropriately reflect the fund’s underlying market exposure for purposes of the portfolio limitation. For example, the notional amount of a variance swap is typically expressed in terms of “vega notional,” *i.e.*, a measure of volatility. This vega notional amount is used to calculate the payout for a variance swap, but it does not correspond to the market value or principal amount of a reference asset that can appropriately be compared against a fund’s net assets for purposes of the exposure-based portfolio limit.¹⁸⁵ A second concern is that complex derivatives can have market risks that are difficult to estimate due to the presence of multiple forms of optionality or other non-linearities, which similarly may not be adequately reflected in a notional amount calculated without separately considering each of the risks as with the special provision in the proposed rule for complex derivatives transactions.¹⁸⁶

¹⁸³ See, e.g., Mark Rubinstein & Hayne E. Leland, *Replicating Options with Positions in Stock and Cash*, 51 *Financial Analysts J.* 113 (Jan./Feb. 1995) (demonstrating how a long or short position in a standard put or call can be replicated by holding a long or short position in a number of shares of the underlying stock corresponding to the option’s delta, which would have a value equal to the option delta multiplied by the underlying stock price).

¹⁸⁴ Proposed rule 18f-4(c)(7)(iii)(C).

¹⁸⁵ For example, a fund that invests in a total return swap on an equity index having a notional amount of \$100 can be said to have exposure similar to a \$100 investment in the index components. By contrast, it is not possible to draw a comparison between the notional amount of a variance swap on the same equity index and a direct investment in the index components.

¹⁸⁶ The UCITS Commitment Approach Guidelines express a similar concern. See CESR Global Guidelines, *supra* note 162, at 12 (noting that a common feature of non-standard derivatives is “the existence of a highly volatile delta which could, for example, result in significant losses” and therefore “many of these instruments will need to be assessed on a case by case basis”).

The proposed rule seeks to address these concerns by specifying an alternative approach for determining the notional amount for a complex derivatives transaction. Under this approach, the notional amount of a complex derivatives transaction would be equal to the aggregate notional amount(s) of other derivatives instruments, excluding other complex derivatives transactions (together, “substituted instruments”), reasonably estimated to offset substantially all of the market risk of the complex derivatives transaction at the time the fund enters into the transaction.¹⁸⁷ This approach is designed to address the difficulty of determining the notional amount for some complex derivatives transactions and the concern that the reference asset or metric may not by itself be an appropriate measure of the underlying market exposure, by substituting, in effect, the notional amounts of non-complex instruments that mirror the market risk of the complex derivatives transaction.¹⁸⁸ For example, a barrier option in some cases can be hedged using standard put and call options (which would not be complex derivatives transactions provided that they had a single strike price).¹⁸⁹ In that case, a fund could use the aggregate notional amount of such puts and calls (*i.e.*, the strike price multiplied by the delta) as the notional

¹⁸⁷ Proposed rule 18f-4(c)(7)(iii)(C). As discussed in section III.F below, the proposed rule would require the fund to maintain a written record demonstrating that immediately after the fund entered into any senior securities transaction, the fund complied with the portfolio limitation applicable to the fund immediately after entering into the senior securities transaction, including the fund’s aggregate exposure, among other things. Where the fund enters into a complex derivatives transaction, the fund, in documenting its exposure immediately after entering into the transaction, would be required to document the way it determined the notional amount of the complex derivatives transaction, that is, the notional amount(s) of substituted instruments that could reasonably be expected to offset substantially all of the market risk of the complex derivatives transaction at the time the fund entered into the transaction.

¹⁸⁸ The UCITS Global Exposure Guidelines similarly call for derivatives with complex structures to be “broken down into component parts” so that “the effect of layers of derivative exposures [can] be adequately captured.” CESR Global Guidelines, *supra* note 162, at 12. See also Wilmott, *supra* note 177, at 506 (stating, with regard to “exotic” derivatives, that “[i]f a contract can be decomposed into simpler, vanilla products, then that’s what you should do for pricing and hedging”).

¹⁸⁹ See generally Wilmott, *supra* note 177, at 969–987 (describing methods for hedging barrier options using “vanilla” exchange-traded options); see also Peter Carr, Katrina Ellis & Vishal Gupta, *Static Hedging of Exotic Options*, 53 *J. of Fin.* 1165, 1169 (June 1998) (describing methods for hedging barrier options, lookback options and other “exotic” options using standard put and call options).

¹⁸⁰ See proposed rule 18f-4(c)(1)(ii).

¹⁸¹ See, e.g., Sebastien Bossu, *Introduction to Variance Swaps*, Wilmott Magazine, available at http://www.wilmott.com/pdfs/111116_bossu.pdf, at 50–51.

¹⁸² See, e.g., Peter Allen, Stephen Eincomb & Nicolas Granger, *Variance Swaps*, JPMorgan Investment Strategies: No. 28 (Nov. 17, 2006), at 11 (noting that “variance swap strikes are quoted in terms of volatility, not variance; but pay out based on the difference between the level of variance implied by the strike (in fact the strike squared) and the subsequent realised variance”).

amount for purposes of determining the fund's exposure.¹⁹⁰

(2) Netting of Certain Derivatives Transactions

The proposed rule includes a netting provision that would permit a fund, in determining its aggregate notional exposure, to net any directly offsetting derivatives transactions that are the same type of instrument and have the same underlying reference asset, maturity and other material terms.¹⁹¹ This limited netting provision is designed to apply to those types of derivatives transactions for which, due to regulation, transaction structure or market practice, a fund typically would use an offsetting transaction to effectively settle all or a portion of the transaction prior to expiration or maturity, such as certain futures and forward transactions. It would also apply to situations in which a fund seeks to reduce or eliminate its economic exposure under a derivatives transaction without terminating the transaction. This may be the case, for example, if terminating the transaction would be more costly to the fund (for example, because the fund would need to pay an early termination fee) than entering into an offsetting transaction with another counterparty, or if terminating the transaction would cause the fund to realize gain or loss for tax purposes earlier than would be required if the fund entered into an offsetting transaction. The netting provision under the proposed rule accordingly would permit a fund to exclude from its aggregate exposure the notional amounts associated with transactions that are entered into by the fund to eliminate the fund's exposure under another transaction through a directly offsetting transaction as described under the proposed rule.¹⁹²

With respect to transactions that are directly offsetting but involve different counterparties, we note that, although a fund would remain exposed to counterparty risk, such offsetting

transactions could reasonably be expected to eliminate market risk associated with the offsetting transactions if they are the same type of instrument and have the same underlying reference asset, maturity and other material terms. Accordingly, we believe that such transactions are an appropriate means to eliminate or reduce market exposure under derivatives transactions even if entered into with different counterparties for purposes of the rule's exposure limits, which are designed to limit the extent of the fund's exposure.

By contrast, the netting provision would not apply to transactions that may have certain offsetting risk characteristics but do not have the same underlying reference asset, maturity and other material terms or involve different types of derivatives instruments. For example, while a long position in a March 2016 copper futures contract could directly offset a short position in the same March 2016 copper futures contract, it would not directly offset a short position with respect to copper options or April 2016 copper futures. Similarly, a purchased option would not offset a written option that has a different maturity date or a different underlying reference asset. With respect to transactions that do not have the same underlying reference asset, maturity and other material terms, we are concerned that these transactions may not merely have the effect of eliminating or reducing market exposure. For example, they might instead be used as paired "collar" or "spread" investment positions that could raise potential risks associated with strategies that seek to capture small changes in the value of such paired investments. We also believe that it would be difficult to develop standards for determining circumstances under which such transactions should be considered to have eliminated the market and leverage risks associated with the positions in a manner that would appropriately limit the potential for funds to incur excessive leverage or unduly speculative exposures.

ii. Exposure for Financial Commitment Transactions and Other Senior Securities

A fund also would be required to include, in calculating its exposure: (1) The amount of cash or other assets that the fund is conditionally or unconditionally obligated to pay or deliver under any financial commitment transactions ("financial commitment obligations");¹⁹³ and (2) the aggregate

indebtedness (and with respect to any closed-end fund or business development company, involuntary liquidation preference) with respect to any other senior securities transaction entered into by the fund pursuant to section 18 or 61 of the Act without regard to the exemption provided by the proposed rule.¹⁹⁴ As explained below, these aspects of the exposure calculation are designed to require a fund that enters into derivatives transactions in reliance on the exemption provided by the proposed rule to include in its aggregate exposure all of the fund's indebtedness or exposure obtained through senior securities transactions.

Under the proposed rule, a fund would be required to include its exposure under these types of transactions in determining its compliance with the 150% exposure limit because, although we have determined to propose an exemption from the requirements of section 18 and 61 to permit funds to enter into derivatives and financial commitment transactions, we believe that, in order to address the investor protection purposes and concerns underlying section 18, a fund relying on the exemption should be subject to an overall limit on leverage. As discussed in more detail below in section III.B.1.b.2, we have proposed to set this limit at 150% of net assets (and at 300% of net assets for a fund operating under the risk-based portfolio limit) because we believe that is an appropriate limit on a fund's exposure from derivatives, financial commitment transactions, and other senior securities transactions.

If the proposed rule did not require exposure from all senior securities transactions to be included for purposes of calculating a fund's exposure, a fund relying on the exemption the rule would provide could obtain aggregate exposure in excess of the proposed rule's exposure limits. For example, a fund having net assets of \$100 that complies with the exposure-based portfolio limit might otherwise, in theory, obtain \$150 of leveraged exposure through

¹⁹⁰ The proposed rule would not require a fund to actually invest in substituted instruments instead of investing in the complex derivatives transaction, but rather would require a fund to use the notional amounts of substituted instruments in order to determine its exposure for purposes of the proposed rule's portfolio limitations.

¹⁹¹ Proposed rule 18f-4(c)(3)(i).

¹⁹² The netting provision under the proposed rule is not designed to enable a fund generally to disregard or subtract from the calculation of a fund's exposure the notional amount of transactions that the fund deems to be hedging or risk mitigating. See section III.B.1.d. The netting provision applies only to directly offsetting derivatives transactions that are the same type of instrument and have the same underlying reference asset, maturity and other material terms.

¹⁹³ Proposed rule 18f-4(c)(3)(ii).

¹⁹⁴ Proposed rule 18f-4(c)(3)(iii). This could include, for example, bank borrowings and, for a closed-end fund or BDC, the issuance of debt or preferred shares. Section 18(g) of the Act excludes from the definition of senior security "any such promissory note or other evidence of indebtedness in any case where such a loan is for temporary purposes only and in an amount not exceeding 5 per centum of the value of the total assets of the issuer at the time when the loan is made." Such borrowings that meet the requirements of the exclusion for temporary borrowings under section 18(g) would not be considered senior securities transactions for purposes of the proposed rule, and thus would not be included in the proposed rule's exposure calculations.

derivatives plus additional leverage in the form of financial commitment transactions and other borrowings. We have determined to address this concern by requiring a fund to include exposure from all senior securities transactions, but subject to a 150% limit, rather than proposing a substantially lower limit that might be appropriate if the exposure calculation were based solely on derivatives exposure.

We request comment on all aspects of the exposure determinations for derivatives transactions.

- Is the proposed rule's use of notional amounts as the basis for calculating a fund's exposure under a derivatives transaction appropriate? Does the notional amount of a derivatives transaction generally serve as an appropriate means of measuring a fund's exposure to the applicable reference asset or metric? Are there particular types of derivatives transactions or reference assets for which the notional amount would or would not be effective in this regard? For such derivatives, what alternative measures might be used and why would they be more appropriate? Would such alternative measures be easier for funds and compliance staff to administer?

- For derivatives transactions that provide a return based on the leveraged performance of an underlying reference asset, the rule would require the notional amount to be multiplied by the applicable leverage factor. Do commenters agree that this is appropriate?

- The proposed rule includes a "look-through" for calculating the notional amount in respect of derivatives transactions for which the underlying reference asset is a managed account or entity formed or operated primarily for the purpose of investing in or trading derivatives transactions, or an index that reflects the performance of such a managed account or entity. Do commenters agree that this is appropriate? Is this requirement sufficiently clear? Would the look-through provision capture swaps or other derivatives on reference entities or assets that should not be covered by this provision? Why or why not? Would a fund that uses these types of transactions be able to obtain information from its counterparty regarding the fund's *pro rata* portion of the notional amounts of the derivatives transactions of the underlying reference vehicle, in order for the fund to be able to determine its compliance with the exposure limitations under the proposed rule? Why or why not? Would funds that currently use these transactions find it necessary to amend

their existing contracts with counterparties in order to obtain such information? Are there other ways we should consider addressing the concern, noted above, that absent a look-through to the derivatives transactions of the underlying reference vehicle, such structures could be used to avoid the exposure limitations that would be applicable under the proposed rule if the fund directly owned the managed account or securities issued by the reference entity? We understand that the accounts or entities that serve as the reference assets for these transactions generally are actively managed, such that the notional amounts of the derivatives transactions of such accounts or entities may change frequently. In light of this, and given the concern that the look-through requirement seeks to address, should the proposed rule also require a fund to determine its compliance with the exposure limitations of the rule whenever the notional amount of the fund's *pro rata* portion of the notional amounts of the derivatives transactions of the underlying reference vehicle changes? Why or why not?

- To what extent do funds enter into derivatives transactions for which pooled investment vehicles (*e.g.*, hedge funds or other registered funds, such as ETFs and mutual funds) serve as reference assets? For what purposes do funds enter into such derivatives transactions? To what extent do the referenced pooled investment vehicles themselves use derivatives, such that funds could use derivatives for which a pooled investment vehicle serves as a reference asset in order to obtain leverage in excess of the limits provided under the proposed rule? Would a fund that uses these types of derivatives transactions be able to obtain information from the underlying pooled investment vehicle regarding the notional amounts of the underlying pooled investment vehicle's derivatives transactions, in order for the fund to be able to determine its compliance with the exposure limitations under the proposed rule's look-through requirement? Why or why not? Should we specify standards for determining whether a pooled investment vehicle should be considered formed or operated primarily for the purpose of investing in or trading derivatives? What would be an appropriate standard?

- Do commenters agree with the proposed definition of "complex derivatives transaction"? Are there derivatives transactions that may be considered complex derivatives transactions under the proposed

definition but should not be, or vice versa? Does the method for calculating exposure for complex derivatives transactions create the potential for transactions to be structured to avoid this aspect of the rule? If so, how might that be avoided (*e.g.*, by modifying the definition or through other means)?

- The proposed rule would require a fund to calculate the notional amount for a complex derivatives transaction by using the notional amount(s) of one or more instruments, excluding other complex derivatives transactions (collectively, "substituted instruments," as noted above), that could reasonably be expected to offset substantially all of the market risk of the complex derivatives transaction. Do commenters agree with this method for calculating exposure in respect of complex derivatives transactions? Should the rule specify a particular test or tests that a fund could elect to use, or be required to use, in order to establish that the notional amount it uses for a complex derivatives transaction meets this requirement? For example, should the rule provide that a group of substituted instruments will be deemed to reasonably be expected to offset substantially all of the market risk associated with a complex derivatives transaction if the fund can demonstrate, using a VaR model that meets the requirements of paragraph (c)(11)(ii)¹⁹⁵ of the proposed rule, that the combined VaR of the substituted instruments and the complex derivatives transaction is less than 1%, or some other percentage, of the VaR of the complex derivatives transaction by itself (in other words, if a complex derivative had a VaR of \$100 but the combined VaR of the complex derivatives transaction and the substituted instruments were less than \$1, the substituted instruments would be deemed to have offset substantially all of the market risk associated with the complex derivative)? What other approaches might a fund use?

- Are there complex derivatives transactions for which substantially all of the market risk cannot be offset using substituted instruments, and for which the fund would not be able to determine a notional amount under the proposed rule? What kinds of transactions, and do funds use such transactions? To the extent there are complex derivatives transactions for which a fund would not be able to offset substantially all of the market risks using substituted instruments, would the fund's inability to offset substantially all of the market risks using substituted instruments indicate that the fund would be unable

¹⁹⁵ See *infra* section III.B.2.b.

effectively to determine the degree of market risk inherent in the transaction? Would such transactions pose greater risks for funds because, for example, they are less liquid or more likely to expose funds to potential losses that may be difficult to quantify?

- We note that, under the CESR Global Guidelines, if the exposure for a non-standard derivative cannot be determined based on the market value of an equivalent position in underlying reference assets and such derivatives represent more than a negligible portion of the UCITS portfolio, a UCITS fund cannot use the commitment approach.¹⁹⁶ Should the proposed rule similarly restrict a fund's ability to use these kinds of transactions? Should the proposed rule prohibit a fund from using such transactions? If not, should the proposed rule provide an alternative method for determining the notional amount for a complex derivative for which substantially all of the market risk cannot be offset using substituted instruments? What method?

- Is the netting provision for calculating a fund's exposure appropriate? Are there other circumstances under which netting should be permitted? Are there transactions that the provision would permit to be netted but should not be?

- Are there other adjustments pertaining to the use of notional amounts for purposes of determining a fund's exposure appropriate that we should consider, either with respect to certain types of derivatives transactions or in general? For example, we understand that the notional amounts for Euribor and Eurodollar futures are often referenced by market participants by dividing the amount of the contract by four in order to reflect the three-month length of the interest rate transaction, and our staff took this approach in evaluating funds' notional exposures, as discussed in the DERA White Paper. For these very short-term derivatives transactions, calculating notional amounts without dividing by four would reflect a notional amount that could be viewed as overstating the magnitude of the fund's investment exposure. Should the proposed rule permit or require this practice? Why or why not? Would a derivative's notional amount adjusted in this way serve as a better measure of the fund's exposure than the derivative's unadjusted notional amount? Are there other futures contracts (or other standardized derivatives) for which an analogous

adjustment should be permitted? Why or why not?

- Should we consider permitting or requiring that the notional amounts for interest rate futures and swaps be adjusted so that they are calculated in terms of 10-year bond equivalents or make other duration adjustments to reflect the average duration of a fund that invests primarily in debt securities? Would this result in a better assessment of a fund's exposure to interest rate risk? Why or why not?

- Could derivatives transactions be restructured so that they provide a level of exposure to an underlying reference asset or metric that exceeds the notional amount as defined in our proposed rule, while nonetheless complying with the rule's conditions? If so, what modifications should we make to address this?

- Should the calculation of exposure be broadened to include not only derivatives that involve the issuance of senior securities (because they involve a payment obligation) but also derivatives that would not generally be considered to involve senior securities, such as purchased options, structured notes, or other derivatives that provide economic leverage, given that such instruments can increase the volatility of a fund's portfolio and thus cause an investment in a fund to be more speculative than if the fund's portfolio did not include such instruments?

- Should the proposed rule require a fund to include the exposure associated with certain so-called "basket option" transactions, which are derivatives instruments that may nominally be documented in the form of an option contract but are economically similar to a swap transaction? We understand that these types of basket option transactions often involve a deposit by an investor of a cash "premium" that functions as collateral for the transaction, and all or a portion of which may be returned to the investor depending on the performance of the basket of reference assets.¹⁹⁷ Should we require a fund to include the exposure associated with these transactions because they operate in a manner similar to swap transactions and differ significantly from the typical

purchased option contract with a non-refundable premium payment?¹⁹⁸

- Do commenters agree that it is appropriate to include exposure associated with a fund's financial commitment transactions and other senior securities transactions in the calculation of the fund's exposure for purposes of the 150% exposure limit in the exposure-based portfolio limit (and the 300% limit under the risk-based portfolio limit), as proposed, so that the exposure limit would include the fund's exposure from all senior securities transactions? Should we, instead, include only exposure associated with a fund's derivatives transactions but reduce the exposure limits so that a fund that would rely on the exemption provided by the proposed rule would be subject to a limit on leverage or potential leverage from all senior securities transactions? If we were to take this approach should we, for example, reduce the exposure limits to 50% in the case of the exposure-based portfolio limit and 100% in the case of the risk-based limit?

c. 150% Exposure Limit

As noted above, a fund that elects to comply with the exposure-based portfolio limit under the proposed rule would be required to limit its derivatives transactions, financial commitment transactions and obligations under other senior securities transactions, such that the fund's aggregate exposure under these transactions, immediately after entering into any senior securities transaction, does not exceed 150% of the fund's net assets.¹⁹⁹

The exposure-based portfolio limit is designed to impose a limit on the amount of leverage a fund may obtain through senior securities transactions while also providing flexibility for funds to use derivatives transactions for a variety of purposes.²⁰⁰ As discussed above, and as noted by several commenters to the Concept Release, many derivatives transactions result in investment exposures that are economically similar to direct

¹⁹⁸ These basket options, which typically have a strike price that is in-the-money at inception (reflecting the value of the initial premium payment) together with provisions that require the delivery of additional premium amounts or termination if the reference basket declines in value, thus function in a manner very similar to a swap that requires the delivery of collateral at inception and can be terminated if additional collateral is not delivered if the reference basket under the swap declines in value.

¹⁹⁹ Proposed rule 18f-4(a)(1)(i).

²⁰⁰ The proposed rule's portfolio limitations, although designed to impose a limit on leverage, also could help to address concerns about a fund's ability to meet its obligations. See *supra* note 152.

¹⁹⁶ See CESR Global Guidelines, *supra* note 162, at 7, 12.

¹⁹⁷ See *Abuse of Structured Financial Products: Misusing Basket Options to Avoid Taxes and Leverage Limits*, Report of the Permanent Subcommittee on Investigations, United States Senate (July 22, 2014), at p. 79 ("The hedge funds told the Subcommittee that, rather than tax, a major motivating factor behind their participation in the basket options was the opportunity to obtain high levels of leverage, beyond the federal leverage limit of 2:1 normally applicable to [regulatory margin requirements for] brokerage accounts, an assertion supported by the banks.").

investments in the underlying reference assets financed through borrowings. According to one commenter, for example, an equity total return swap “produces an exposure and economic return substantially equal to the exposure and economic return a fund could achieve by borrowing money from the counterparty in order to purchase the equities that are reference assets.”²⁰¹ Because derivatives transactions can readily be used for leveraging purposes, we believe that limiting the aggregate notional amount of a fund’s derivatives transactions (subject to certain adjustments under the proposed rule) can appropriately serve to limit the amount of leverage the fund could potentially obtain through such transactions. We also believe that an exposure limitation based, in part, on the aggregate notional amount of a fund’s derivatives transactions should be set at an appropriate amount that reflects the various ways in which funds may use derivatives, while also imposing a limit on the amount of leverage a fund may obtain through derivatives transactions (and other senior securities transactions), consistent with the investor protection purposes and concerns underlying section 18.

In determining to propose a 150% exposure limitation, we evaluated a range of considerations. First, we considered the extent to which a fund could borrow in compliance with the requirements of section 18. As discussed in more detail in section II, funds generally can incur indebtedness through senior securities under section 18 subject to the asset coverage requirement specified in that section,

²⁰¹ See Comment Letter of BlackRock on the FSOC Request for Comment (Mar. 25, 2015) (FSOC 2014–0001) (“BlackRock FSOC Comment Letter”), available at <http://www.blackrock.com/corporate/en-us/literature/publication/fsoc-request-for-comment-asset-management-032515.pdf>, at 8 (“[D]erivatives can be used to lever a portfolio, in essence creating additional economic exposure.”) See also BlackRock Concept Release Comment Letter, at 4 (noting that in circumstances where a derivative is effectively substituting for one or more ‘long’ physical security positions, “the full notional amount of the reference asset is at risk to the same extent as the principal amount of a physical holding, and any difference between the amount invested by the fund and the notional amount of the derivative is equivalent to a ‘borrowing.’”). See also Keen Concept Release Comment Letter, at 8 (noting that, except with respect to hedging transactions, “the notional amount of swaps should be treated as creating investment leverage and subject to any asset coverage requirement the Commission imposes on the issuance of senior securities by investment companies”). See also Morningstar Concept Release Comment Letter, at 2 (noting that, by using futures, a fund may only need \$5 of initial margin to obtain \$100 worth of notional exposure to the S&P 500 and that such position may represent “effectively a 100% equity investment”).

which effectively permits a fund to incur indebtedness of up to 50% of the fund’s net assets.²⁰² For example, a mutual fund with \$100 in assets and with no liabilities or senior securities outstanding could borrow an additional \$50 from a bank. We therefore considered whether it would be appropriate to propose a 50% exposure limitation under the proposed rule, in order to limit a fund’s derivatives exposure to the same extent as section 18 limits a fund’s ability to borrow from a bank (or issue other senior securities representing indebtedness subject to section 18’s 300% asset coverage requirement).²⁰³ We also considered an exposure limitation of 100% of net assets, which would more closely track the level of exposure suggested by Release 10666 for the trading practices described in that release.²⁰⁴

We have not proposed these lower exposure limits of 50% or 100% of net assets primarily due to our consideration of the point made by numerous commenters that funds use derivatives for a range of purposes that may not, or may not be expected to, result in additional leverage for the fund.²⁰⁵ Commenters have noted that many funds use derivatives for hedging or risk-mitigation, or choose to use derivatives for reasons other than specifically to obtain leverage.²⁰⁶ Thus, although a lower exposure limit, like the 100% limitation suggested by Release 10666, may be appropriate for the trading practices described in that release, that exposure limit may not be appropriate when applied to

²⁰² See *supra* note 34.

²⁰³ We note that, at this level of exposure limitation, the corresponding limitation on BDCs could be set at 100% of net assets to reflect the increased borrowing capacity that Congress has permitted BDCs to obtain under section 61 of the Act.

²⁰⁴ One of the commenters to the Concept Release indicated that this level of exposure would be the effective limit under Release 10666 “[a]s originally conceived by the Commission,” explaining that, “[a]s a practical matter, requiring the segregation of assets but not limiting the permitted segregation to cash equivalents effectively permitted funds to incur investment leverage up to a theoretical limit equal to 100% of a fund’s net assets.” See Ropes & Gray Concept Release Comment Letter.

²⁰⁵ See, e.g., *infra* note 248 and accompanying text. See also BlackRock FSOC Comment Letter, at 8 (noting that in certain cases “derivatives are used to hedge (mitigate) risks and thus do not result in the creation of leverage and, in fact may specifically reduce economic leverage.”); BlackRock Concept Release Comment Letter, at 4–5 (noting that “in the context of an overall portfolio, a derivative holding may increase overall leverage, decrease overall leverage or have no effect on overall leverage”) (internal footnotes omitted).

²⁰⁶ In determining an appropriate exposure limit, we have also considered that, as noted below in section III.B.1.d, derivatives transactions that are intended to hedge or mitigate risks may not be effective, particularly in stressed market conditions.

derivatives’ notional exposure. Such a lower exposure limit, as well as the 50% limitation we considered, could limit a fund’s ability to use derivatives transactions for purposes other than leveraging the fund’s portfolio that may be beneficial to the fund and its investors.²⁰⁷

As described in greater detail below in section III.B.1.d, we considered whether to reflect the different ways in which funds might use derivatives by excluding from that calculation any exposure associated with derivatives transactions that may arguably be used to hedge or cover other transactions. This would be similar to the guidelines that apply to UCITS funds, which generally are subject to an exposure limit of 100% of net assets, but are not required to include exposure relating to certain hedging transactions. For the reasons discussed in section III.B.1.d, however, we have determined not to propose to permit a fund to reduce its exposure for purposes of the rule’s portfolio limitations for particular derivatives transactions that may be entered into for hedging (or risk-mitigating) purposes or that may be “cover transactions.” As discussed in more detail in that section of this Release, we believe it would be difficult to develop a suitably objective standard for these transactions, and that confirming compliance with any such standard would be difficult, both for fund compliance personnel and for our staff. In addition, many hedges are imperfect, making it difficult to distinguish purported hedges from leveraged or speculative exposures or to provide criteria for this purpose in the proposed rule that would be appropriate for the diversity of funds subject to the proposed rule and the diversity of strategies and derivatives they use or may use in the future.

In addition to these considerations, we also note that, as discussed in section III.B.1.b.i, while an exposure-based test based on notional amounts could be viewed as a relatively blunt measurement, we believe that, on balance, a notional amount limitation would be more administrable, and thus more effective, as a means of limiting potential leverage from derivatives for purposes of the proposed rule than a limitation which seeks to define, and

²⁰⁷ We also note that the payment obligations and potential payment obligations associated with derivatives transactions differ in certain respects from the payment obligations under borrowings permitted under section 18, including in that the fund’s payment obligations under a derivatives transaction would vary depending on changes in market prices, volatility, and other market events related to the derivatives transaction’s reference asset. See also sections III.E and IV.E.

rely on, more precise measurements of leverage. We note that setting the exposure limitation at 150%, as proposed, would allow the fund to use derivatives transactions to obtain a level of indirect market exposure solely through derivatives transactions that could approximate the level of market exposure that would be possible through securities investments augmented by borrowings as permitted under section 18.²⁰⁸

We also considered whether higher exposure limitations might be appropriate, such as exposure levels ranging from 200% to 250% of net assets. We are concerned, however, that exposure levels in excess of 150% of net assets, if not tempered by the risk mitigating aspects of the VaR test as we have proposed under the risk-based limit, could be used to take on additional speculative investment exposures that go beyond what would be expected to allow for hedging arrangements, and thus could implicate the undue speculation and asset sufficiency concerns expressed in sections 1(b)(7) and 1(b)(8) of the Act.

Second, we considered the extent to which different exposure limits would affect funds' ability to pursue their strategies. In this regard we considered the extent to which different potential exposure limitations would affect funds and their investors, as well as section 18's strict limitations on senior securities transactions and the concerns we discuss above regarding funds' ability to obtain leverage through derivatives and other senior securities transactions. We also considered the extent to which different types of funds, and funds collectively, use senior securities transactions today. Given that, as discussed below, most funds use relatively low notional amounts of derivatives transactions (or do not use any derivatives), we have proposed an exposure limitation at a level that we believe would appropriately constrain funds that use derivatives to obtain highly leveraged exposures.

Third, we recognize and have considered that funds using any derivatives transactions can experience derivatives-related losses, including

²⁰⁸ For example, for a fund that determines to use derivatives as an alternative to investments in securities, this proposed exposure-based limit would permit a fund with \$100 in assets and with no liabilities or senior securities to obtain market exposure through a derivatives transaction with a notional amount of up to 150% of the fund's net assets, with the fund's non-derivatives assets invested in cash and cash equivalents. This would match the degree of market exposure the fund could obtain by borrowing up to \$50 from a bank as permitted under section 18 and investing the fund's \$150 in total assets in securities.

funds with exposures below the limits we are proposing today as well as the other limits that we discuss above. In this regard, we recognize that the information available in the administrative orders described in section II.D.1.d indicates that some of the losses described as resulting from derivatives in those matters occurred at exposure levels below the exposure limits that we are proposing today.²⁰⁹ The proposed rule's exposure limits are not designed to prevent all derivatives-related losses, however. Importantly, the exposure limits would be complemented by the rule's asset segregation requirements, which would apply to all funds that engage in derivatives transactions in reliance on the rule, and the proposed rule's risk management requirements, which would apply to funds that have derivatives exposure exceeding a lower threshold of 50% of net assets or that use complex derivatives transactions.

Based on these considerations, we have determined to propose an exposure-based portfolio limit set at 150% of net assets, rather than a lower limit, including the 50% and 100% limits discussed above. We believe that a 150% exposure limit would account for the variety of purposes for which funds may use derivatives, including to hedge risks in the fund's portfolio and to make investments where derivatives may be a more efficient means to obtain exposure. As discussed in more detail below, we have determined not to permit funds to reduce their exposure for potentially hedging or cover transactions and, instead, have proposed an exposure limit that we believe would be high enough to provide funds sufficient flexibility to engage in these kinds of transactions.

We also believe that a 150% exposure limitation would appropriately balance the proposed rule's effects on funds and their investors, on the one hand, with concerns related to funds' ability to obtain leverage through derivatives and other senior securities transactions, on the other. We understand based on the DERA analysis that, although most funds would be able to comply with an exposure-based portfolio limit of 150% of net assets, the limit would constrain the use of derivatives by the small percentage of funds that use derivatives to a much greater extent than funds generally. The analysis also indicates that funds and their advisers generally would be able to continue to operate and to pursue a variety of investment

²⁰⁹ See *supra* notes 123–124 and 126.

strategies, including alternative strategies.²¹⁰

As discussed in more detail in the DERA White Paper, DERA staff reviewed the portfolio holdings of a random sample of mutual funds (including a separate category of alternative strategy funds, which includes index-based alternative strategy funds²¹¹), closed-end funds, BDCs, and ETFs. DERA staff randomly selected 10% of the funds from each of these categories and reviewed the funds' schedule of investments included in their most recently filed annual reports to identify the fund's derivatives transactions, financial commitment transactions, and other senior securities transactions. DERA staff then calculated the funds' exposures under these transactions, using the notional amounts to calculate the funds' derivatives exposures and the amounts of the funds' obligations and contingent obligations under financial commitment transactions and other senior securities transactions, and compared the funds' aggregate exposures to the funds' reported net assets. Although we recognize that the review by DERA staff evaluated funds' investments as reported in the funds' then-most recent annual reports, DERA staff is not aware of any information that would provide any different data analysis of the current use of senior securities transactions by registered funds and business development companies.²¹²

This analysis showed that, for mutual funds other than alternative strategy funds (which we discuss separately below), more than 70% of the sampled mutual funds did not identify *any* derivatives transactions in their schedules of investments; about 6% of sampled mutual funds had derivatives exposures in excess of 50% of the funds' net assets; and about 99% of sampled mutual funds had aggregate exposures that were less than 150% of the funds' net assets.²¹³ None of the sampled closed-end funds had aggregate exposure in excess of 150% of net assets

²¹⁰ See *infra* note 211.

²¹¹ See *supra* note 87 (describing the funds included as alternative strategy funds as part of the staff's review).

²¹² We understand that, in stable environments, samples including longer periods of time are preferable because their larger sample sizes offer greater precision in estimating a given relation or characteristic. DERA staff analysis shows, however, that funds that make the greatest use of derivatives have received disproportionately large net inflows since the end of 2010. Extending DERA's sample back in time thus would tend to include data in the sample that is no longer consistent with industry practice with respect to derivatives usage as it exists today.

²¹³ DERA White Paper, *supra* note 73, at Figures 9.5 and 11.5.

(and only about 2% of those funds had aggregate exposures exceeding 100% of net assets).²¹⁴ None of the sampled BDCs reported any derivatives transactions, although some of them did report financial commitment transactions (and they also had issued other senior securities).²¹⁵ The sampled ETFs included alternative strategy ETFs and ETFs pursuing other strategies. Of the non-alternative strategy ETFs, only one of the sampled funds had aggregate exposure in excess of 150% of net assets, and the other sampled non-alternative strategy ETFs with relatively higher exposures had exposures of approximately 100% of net assets.²¹⁶ With respect to alternative strategy ETFs, the sampled funds with the highest exposures were leveraged ETFs; several of these funds had aggregate exposure exceeding 150% of net assets, with exposure ranging up to approximately 280% of net assets.²¹⁷ Based on this analysis we believe that, except for alternative strategy funds and certain leveraged ETFs, most funds should be able to comply with a 150% exposure portfolio limitation without modifying their portfolios.

The sampled alternative strategy funds in DERA's analysis tended to be more significant users of derivatives.²¹⁸ Fifty-two percent of the sampled alternative strategy funds had at least 50% notional exposure from derivatives, and approximately 73% of these funds had aggregate exposure that represented less than 150% of net assets.²¹⁹ The approximately 73% of funds with exposure under 150% included at least one fund in every Morningstar alternative mutual fund category.²²⁰ The remaining approximately 27% of the sampled alternative strategy funds with aggregate

exposure of 150% or more pursued a variety of strategies including, among others, absolute return, managed futures, unconstrained bond, and currency strategies. The funds with the highest exposures in the sample generally followed managed futures strategies.

We believe the proposed 150% exposure limitation appropriately balances the proposed rule's effects on funds and their investors, on the one hand, with the concerns we discuss above concerning funds' ability to obtain leverage and incur obligations through derivatives transactions (and other senior securities transactions), on the other. The information provided in the DERA staff analysis indicates, as discussed above, that most funds in the DERA random sample would be able to comply with a 150% exposure limit without modifying their portfolios. The analysis also indicates that alternative strategy funds, the heaviest users of derivatives in the DERA random sample, generally would be able to continue to operate and to pursue a variety of alternative strategies. As noted above, approximately 73% of the sampled alternative strategy funds had less than 150% exposure and included funds in every alternative mutual fund category.²²¹ The majority of the sampled ETFs also had exposures of 150% or less of net assets. Our staff's analysis indicates that it should be possible to pursue, in some form, almost all existing types of investment strategies in compliance with a 150% exposure limitation.²²²

We recognize, however, that particular funds, including particular alternative strategy funds and certain leveraged ETFs, would need to modify their portfolios to reduce their use of derivatives in order to comply with a 150% exposure limitation, and that these funds may view it to be disadvantageous or less efficient to

reduce their use of derivatives and the potential returns that they may seek to obtain from such derivatives.²²³ On balance, however, we believe a 150% limit provides an appropriate amount of flexibility for funds to engage in derivatives transactions in reliance on the exemption the proposed rule would provide, which otherwise would be prohibited for mutual funds by section 18 (and limited for other types of funds).²²⁴

We believe it is appropriate, and consistent with the investor protection concerns underlying section 18, for funds that engage in derivatives securities transactions in reliance on the exemption that would be provided by proposed rule 18f-4 to be subject to an exposure limit, given that exposures resulting from borrowings and other senior securities are also subject to a limit under section 18. Funds with exposure in excess of the proposed 150% limit thus would have to reduce their exposure in order to rely on the rule. We recognize that a very small percentage of funds may find it difficult to modify their portfolios in order to comply with the proposed 150% exposure limit while pursuing their current strategies.

Some managed futures funds and currency funds, for example, pursue their strategies almost exclusively through derivatives transactions, with the funds' assets generally consisting of cash and cash equivalents. For example, four funds in DERA's sample had exposures in excess of 500% of net assets, and three of them were managed futures funds, with exposures ranging up to approximately 950% of net assets. These funds may find it impractical to reduce their exposures below the

²¹⁴ DERA White Paper, *supra* note 73, at Figure 9.7.

²¹⁵ DERA White Paper, *supra* note 73, at Figures 9.11 and 11.11.

²¹⁶ DERA White Paper, *supra* note 73, at Figures 4.6 and 9.9.

²¹⁷ DERA White Paper, *supra* note 73, at Figure 4.5.

²¹⁸ We refer to alternative strategy funds in the same manner as the staff classified "Alt Strategies" funds in the DERA White Paper, *supra* note 73, as including the Morningstar categories of "alternative," "nontraditional bond" and "commodity" funds.

²¹⁹ DERA White Paper, *supra* note 73, at Figures 9.4 and 11.4.

²²⁰ Our staff's experience suggests, however, that funds in one Morningstar alternative strategy category—Managed Futures—may find it difficult to limit their exposures to less than 150%. These funds generally obtain their investment exposures through derivatives transactions, and thus can be expected to have high derivatives exposures relative to net assets. This is consistent with DERA's analysis, in which the funds with the highest exposures were managed futures funds.

²²¹ See *supra* note 220 regarding funds in the Morningstar managed futures category.

²²² In this regard we note that our staff has observed that derivatives transactions may be used by a fund almost entirely to substitute for the purchase of physical securities, with the result that different funds may pursue the same strategy with one fund doing so primarily through derivatives and the other primarily through securities investments. For example, a long/short equity fund that engages in cash transactions could purchase long investment securities and borrow securities in connection with its short sale transactions. Alternatively, the long/short equity fund might invest primarily in Government securities or other short-term investments and pursue its long/short equity strategy solely through a few portfolio total return swaps, under which the fund designates long and short positions and receives the net performance on these reference securities in substantially the same manner as if the fund had invested directly in the reference securities.

²²³ We also discuss these and other implications of the proposed rule's 150% exposure limitation below in section IV of this Release. A fund with exposure in excess of 150% of net assets might be able to comply with the risk-based portfolio limit, discussed below, which includes an exposure limit of 300% of net assets. We note, however, that a fund that holds only cash and cash equivalents and derivatives—like certain alternative strategy funds and leveraged ETFs—would not be able to satisfy the VaR test because, in this case, the fund's derivatives, in aggregate, generally would add, rather than reduce, the fund's exposure to market risk and thus generally would not result in a full portfolio VaR that is lower than the fund's securities VaR, as required under the VaR test. See *infra* note 314 and accompanying text.

²²⁴ In this regard we also note that, as discussed above, the DERA staff analysis shows that approximately 73% of the sampled alternative strategy funds, which are as a group more substantial users of derivatives, had less than 150% exposure. Only those funds that used derivatives to a much greater extent than funds generally, including a limited percentage of alternative strategy funds, had exposures in excess of 150% of net assets.

proposed limit of 150%.²²⁵ As we discussed above in section II.D.1 of this Release, however, funds with derivatives notional exposures of almost ten times net assets and having the potential for additional exposures do not appear to be subject to a practical limit on leverage as we contemplated in Release 10666.

Certain ETFs and mutual funds expressly use derivatives to achieve performance results, over a specified period of time, that are a multiple of or inverse multiple of the performance of an index or benchmark. Certain of these funds have derivatives exposures exceeding 150% of net assets (e.g., a fund that seeks to deliver two or three times the inverse of a benchmark and achieves this exposure through derivatives transactions), as reflected in the DERA sample and noted above. These funds are sometimes referred to as trading tools because they seek to provide a specific level of leveraged exposure to a market index over a fixed period of time (e.g., a single trading day).

Initially only certain mutual funds pursued these strategies. Today, most of these funds are ETFs operating pursuant to exemptive orders granted by the Commission that provide relief from certain provisions of the Act other than section 18.²²⁶ The first exemptive order that contemplated leveraged ETFs, which was issued by the Commission in 2006,²²⁷ stated that the applicants intended to operate ETFs that would seek investment results of 125%, 150%, or 200% of the return of the underlying securities index on a daily basis (or an inverse return of 100%, 125%, 150%, or 200% of such index on a daily basis).²²⁸ Subsequent orders were issued for two other ETF sponsors seeking to launch and operate leveraged ETFs, some of which involved higher amounts of

²²⁵ We note that managed futures funds account for approximately 3% of alternative mutual fund assets under management, and 0.09% of mutual fund assets under management. We thus expect that, although the proposed rule would have a greater effect on managed futures funds than most other types of funds, the effect would be small relative to alternative fund assets under management, and especially small relative to overall mutual fund assets under management.

²²⁶ The applicants did not seek, and their orders do not provide, any exemption from the requirements of section 18. The proposed rule, if adopted, would prohibit funds, including leveraged ETFs, from obtaining exposure in excess of the proposed rule's exposure limits.

²²⁷ ProShares Trust, et al., Investment Company Release Nos. 27323 (May 18, 2006) (notice) and 27394 (June 13, 2006) (order).

²²⁸ In this Release we generally refer to ETFs that seek to achieve performance results, over a specified period of time, that are a multiple of or inverse multiple of the performance of an index or benchmark collectively as "leveraged ETFs."

leverage.²²⁹ No exemptive orders for leveraged ETFs have been issued since 2009.

The Commission and the staff have continued to consider funds' use of derivatives, including the use of derivatives by ETFs and leveraged ETFs. In August 2009, the staff of our Office of Investor Education and Advocacy and FINRA jointly issued an Investor Alert regarding leveraged ETFs, expressing certain concerns regarding such ETFs.²³⁰ In March 2010, we issued a press release announcing that the staff was conducting a review to evaluate the use of derivatives by registered investment companies, including ETFs, and we indicated that, pending completion of this review, the staff would defer consideration of exemptive requests under the Act relating to ETFs that would make significant investments in derivatives.²³¹ Although the staff is

²²⁹ Rydex ETF Trust, et al., Investment Company Release Nos. 27703 (Feb. 20, 2007) (notice) and 27754 (Mar. 20, 2007) (order); Rafferty Asset Management, LLC, et al., Investment Company Release Nos. 28379 (Sept. 12, 2008) (notice) and 28434 (Oct. 6, 2008) (order). See also ProShares Trust, et al., Investment Company Release Nos. Investment Company Release Nos. 28696 (Apr. 14, 2009) (notice) and 28724 (May 12, 2009) (order) (amending the applicant's prior order); Rafferty Asset Management, LLC, et al., Investment Company Release Nos. 28889 (Aug. 27, 2009) (notice) and 28905 (Sept. 22, 2009) (order) (amending the applicant's prior order). These orders (as amended) relate to leveraged ETFs that seek investment results of up to 300% of the return (or inverse of the return) of the underlying index.

²³⁰ Investor Alert and Bulletins, *Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors* (Aug. 18, 2009), available at <http://www.sec.gov/investor/pubs/leveragedetfs-alert.htm>. FINRA also has sanctioned a number of brokerage firms for making unsuitable sales of leveraged and inverse ETFs. See, e.g., FINRA News Release, *FINRA Orders Stifel, Nicolaus and Century Securities to Pay Fines and Restitution Totaling More Than \$1 Million for Unsuitable Sales of Leveraged and Inverse ETFs, and Related Supervisory Deficiencies* (Jan. 9, 2014), available at <https://www.finra.org/newsroom/2014/finra-orders-stifel-nicolaus-and-century-securities-pay-fines-and-restitution-totaling>; see also FINRA News Release, *FINRA Sanctions Four Firms \$9.1 Million for Sales of Leveraged and Inverse Exchange-Traded Funds* (May 1, 2012), available at <https://www.finra.org/newsroom/2012/finra-sanctions-four-firms-91-million-sales-leveraged-and-inverse-exchange-traded>. Following losses incurred by certain ETF investors during 2008–2009, a lawsuit was brought against one of the sponsors of leveraged ETFs alleging that the funds' registration statements contained material misstatements or omissions. The Circuit Court of Appeals for the Second Circuit affirmed the district court's dismissal of the plaintiffs' claims. In affirming, the court noted, among other things, that, as a disclosure matter, "[a]ll the ProShares I prospectuses make clear that ETFs used aggressive financial instruments and investment techniques that exposed the ETFs to potentially 'dramatic' losses 'in the value of its portfolio holdings and imperfect correlation to the index underlying.'" In re ProShares Trust Securities Litigation, 728 F.3d 96 (2d Cir. 2013) (internal citations omitted).

²³¹ See SEC Press Release 2010–45, *SEC Staff Evaluating the Use of Derivatives by Funds* (Mar.

no longer deferring consideration of exemptive requests under the Act relating to all actively-managed ETFs that make use of derivatives,²³² the staff continues not to support new exemptive relief for leveraged ETFs.

Funds that do not wish to rely on the proposed rule may wish to consider deregistering under the Investment Company Act, with the fund's sponsor offering the fund's strategy as a private fund or as a public (or private) commodity pool, which do not have statutory limitations on the use of leverage.²³³ These alternative fund structures would be marketed to a more targeted investor base (i.e., those with higher incomes or net worth, in the case of private funds, and those familiar with commodity pool investment partnerships, in the case of public commodity pools) and would not be expected by their investors to have the protections provided by the Investment Company Act. We also note that our staff has observed that certain of these highly leveraged funds (e.g., managed futures funds) often do not make significant investments in securities and the securities investments they do make generally do not meaningfully contribute to their returns.

We request comment on all aspects of the proposed exposure-based portfolio limit of 150% of a fund's net assets.

- Is 150% an appropriate exposure limit? If not, should it be higher or lower, for example 200% or 100%? Does the 150% exposure limit, together with the rule's other limitations, achieve an appropriate balance between providing flexibility and limiting the amount of leverage a fund could obtain (and thus the potential risks associated with leverage)? Does the 150% exposure limit effectively address the varying ways in which funds use derivatives, including for hedging purposes?

- Are certain types of funds likely to use the 150% exposure limit exclusively for leveraging purposes? If so, do commenters believe that such a level of exposure would be inappropriate? Should any concerns about a fund using

25, 2010), available at <http://www.sec.gov/news/press/2010/2010-45.htm>.

²³² See *Derivatives Use by Actively-Managed ETFs* (Dec. 6, 2012), available at <http://www.sec.gov/divisions/investment/noaction/2012/moratorium-lift-120612-etf.pdf> (announcing that the staff will no longer defer consideration of exemptive requests under the Act relating to actively-managed ETFs that make use of derivatives provided that they include representations to address some of the concerns expressed in the March 2010 press release).

²³³ See section IV below for a discussion of possible effects associated with funds' decision to deregister under the Investment Company Act and for their sponsors to offer the fund's strategy as private funds or commodity pools.

derivatives transactions exclusively for leveraging purposes be addressed through a reduced exposure limitation? Conversely, would the other conditions and requirements of the rule, including the requirement to have a derivatives risk management program meeting specified requirements (discussed in section III.D below), address concerns regarding the leverage that the fund might be able to obtain under the 150% exposure limit, in light of the policy concerns underlying section 18 of the Act?

- Do commenters agree that the proposed 150% exposure limitation appropriately balances concerns regarding, on the one hand, the extent to which the exposure limit would affect funds' investment strategies and, on the other hand, section 18's limitations on the issuance of senior securities and the concerns we discuss above concerning funds' ability to obtain leverage through derivatives transactions and other senior securities transactions?

- As discussed above, our staff's analysis indicates that certain funds, including certain alternative funds, today have exposures exceeding 150% of their net assets. What types of modifications would these funds be required to make and how would the modifications affect their investors? Would they be able to make such modifications? Are there other types of funds that also would expect to have exposure exceeding 150%? If so, what kinds of funds and what types of modifications would they be required to make and how would the modifications affect their investors? What types of costs would funds that need to modify their investment strategies in order to comply with the 150% limit be likely to incur? Would funds that would be required to make modifications to comply with a 150% exposure limit generally be able to follow the same investment strategy as they do today after making any modifications? How would such modifications likely affect such funds?

- What types of funds would be unable to modify their investment program in order to comply with the 150% exposure limit? Would these funds be likely to continue their investment programs as private funds or public (or private) commodity pools? What would be the effects, positive and negative, on the funds' investors in these cases?

- The 150% exposure limit (and the 300% exposure limit in the risk-based portfolio limit) would apply to all funds without regard to the type of fund or the fund's strategy. Are there certain types

of funds for which a higher or lower exposure limit would be appropriate?

- Should we consider a higher limit for ETFs (or other funds) that seek to replicate the leveraged or inverse performance of an index? Would a higher exposure limit be appropriate for these funds because they may operate as trading tools that seek to provide a specific level of leveraged exposure to a market index over a fixed period of time, and because the amount of leverage is an integral part of their strategy? Conversely, do those same considerations suggest that these funds—which are not restricted to sophisticated investors—should be subject to the same exposure limitations as other types of funds? Some of these funds are ETFs that operate pursuant to exemptive orders granted by the Commission. Would it be more appropriate to consider these funds' use of derivatives transactions in the exemptive application context, based on the funds' particular facts and circumstances, rather than in rule 18f-4, which would apply to funds generally? Would the exemptive application process be a more appropriate way to evaluate these funds in order to consider their use of leverage together with other features of these products (such as their objective of seeking daily returns) that are not shared by funds generally?

- As discussed in more detail above, some managed futures funds and currency funds pursue their strategies almost exclusively through derivatives transactions, with the funds' other assets generally consisting of cash and cash equivalents. Managed futures and currency funds with derivatives exposures substantially in excess of the funds' net assets may find it impractical to reduce their exposures below the proposed limit of 150%. Do commenters agree that it may be feasible, for the reasons discussed above, for funds that do not wish to rely on the proposed rule to deregister under the Investment Company Act and for the fund's sponsor to offer the fund's strategy as a private fund (which can be offered solely to a limited range of investors) or as a public or private commodity pool? Are these alternatives, which do not have statutory limitations on the use of leverage, feasible vehicles for these types of strategies? Conversely, should we permit managed futures or currency funds (or other specified fund categories) to obtain exposure in excess of 150% of the funds' net assets under the exposure-based portfolio limit? If so, what limit and what other restrictions or limitations on their use of derivatives would be appropriate? Are there ways

that we could permit such funds to obtain additional exposure while still addressing the undue speculation concern expressed in section 1(b)(7) and the asset sufficiency concern expressed in section 1(b)(8)? How could we permit such funds to obtain additional exposure while also imposing an effective limit on leverage and on the speculative nature of such funds?

- Section 61 permits a BDC to issue senior securities to a greater extent than other types of funds in that BDCs are subject to a lower asset coverage requirement of 200% (as opposed to the 300% asset coverage requirement that applies to other types of funds).²³⁴ The proposed rule would not restrict the ability of a BDC to continue to issue senior securities pursuant to section 61 subject to a 200% asset coverage requirement. The proposed rule would, however, require a BDC that engages in derivatives transactions in reliance on the proposed rule to comply with the rule's aggregate exposure limitations, which would include exposure associated with senior securities issued by a BDC pursuant to section 61 (as well as exposure from financial commitment transactions entered into by a BDC pursuant to the proposed rule). Should the proposed rule provide BDCs greater exposure limits under the rule in recognition of the greater latitude that BDCs have to issue senior securities provided by section 61? Would any increase be needed given that our staff's review suggests BDCs do not use derivatives to any material extent?

- Are there other types of funds for which, or circumstances under which, we should provide higher or lower exposure limits? What kinds of funds or circumstances and why? Should we provide for differing exposure limits based on characteristics of the fund's derivatives? Which characteristics and how should they affect the level of exposure the fund should be permitted to obtain?

- Should we grandfather funds that are operating in excess of the proposed rule's portfolio limits as of a specified date? If we were to grandfather funds, which funds should we grandfather and why? Should we apply any grandfathering to funds that are operating on the date of this proposal, for example? Alternatively, should we, for example, grandfather leveraged ETFs on the basis that they operate pursuant to the terms and conditions of exemptive orders granted by the Commission? If we were to grandfather funds, should the grandfathering be subject to conditions? Should any

²³⁴ See *supra* notes 34–36 and accompanying text.

grandfathered funds be required to comply with some, but not all, aspects of the proposed rule? For example, should they be required to comply with the proposed rule's asset segregation requirements and the requirement to have a formalized derivatives risk management program? Should they be required to comply with any other conditions?

d. Treatment of Hedging and Cover Transactions

We believe that the 150% exposure-based portfolio limit would permit funds to engage in derivatives transactions to an extent that we believe is appropriate when done in compliance with the proposed rule's other conditions, and would permit a fund relying on the rule to use derivatives for a variety of purposes under the proposed rule, including to seek to hedge or mitigate risks. We have not separately included any provision in the proposed rule to permit a fund to reduce its exposure for purposes of the rule's portfolio limitations for particular derivatives transactions that may be entered into for hedging (or risk-mitigating) purposes or that may be "cover transactions" as described below.²³⁵ We believe that the DERA staff analysis, discussed in section III.B.1.c, suggests that such a reduction is not necessary in order to permit the use of derivatives for hedging or risk-mitigating purposes because most of the funds in DERA's sample did not have aggregate exposure in excess of 150% of net assets. In addition, while we expect that the proposed rule's exposure limitation would be applied relatively consistently across funds, we believe that providing for a hedging reduction may hinder our efforts toward establishing a consistent and effective approach toward the regulation of funds' use of derivatives, and that the exposure limits under the proposed rule are more easily administrable than some other potential alternatives that could entail a more tailored approach.

One substantial concern regarding any hedging or cover transaction exception is that we believe it would be difficult to develop a suitably objective standard for these transactions, and that confirming compliance with any such standard would be difficult, both for fund compliance personnel and for our

²³⁵ See *infra* note 244. The proposed rule would, however, permit a fund to net certain transactions when determining its exposure, as noted above, where the transactions to be netted are directly offsetting derivatives that are the same type of instrument and have the same underlying reference asset, maturity and other material terms. See proposed rule 18f-4(c)(3)(i).

staff.²³⁶ Our staff has noted that funds may enter into a variety of derivatives transactions based on their portfolio managers' views of the expected performance correlations between such transactions and other investments (including other derivatives instruments) made by the funds, and these relationships may be difficult to describe effectively and comprehensively in an exemptive rule of general applicability such as the proposed rule.²³⁷ In addition, many hedges are imperfect,²³⁸ which makes it difficult to distinguish purported hedges from leveraged or speculative exposures. For example, while a fund might use interest rate or currency derivatives primarily for hedging particular investments, the same instruments could be used by the fund to obtain, or could inadvertently result

²³⁶ As discussed in section IV.E, the CESR commitment approach for UCITS funds permits funds to reduce their calculated derivatives exposure for certain netting and hedging transactions, while providing for a lower exposure limit (100% of net assets) than the proposed rule. We note, however, that the challenges of distinguishing between hedging and speculative activity have been considered in numerous regulatory and financial contexts. One recent regulatory example is the exemption for certain risk-mitigating hedging activities from the prohibition on proprietary trading by banking entities in the final rules implementing section 13 of the Bank Holding Company Act (commonly known as the "Volcker Rule"). See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, Release No. BHCA-1 (Dec. 10, 2013) [79 FR 5536 (Jan. 31, 2014)] ("Volcker Rule Adopting Release"), at 5629, 5627. The complexity of distinguishing hedging from speculation in this context is notable because the exemption is designed for entities that would not otherwise be engaged in speculative activity. We believe it would be even more difficult to make such a distinction in the context of funds that in the ordinary course are permitted, and often likely, to use derivatives for both speculative and hedging purposes.

²³⁷ See, e.g., MFDF Concept Release Comment Letter, at 4 (noting that "in recent years, funds have adopted more complex and more nuanced investment strategies, and thus are using derivatives—and sometimes the same type of derivative—in many different ways, including as a way of hedging and mitigating other risks present in fund portfolios. Therefore, any detailed and purportedly all-inclusive approach to regulations governing funds' use of derivatives is almost necessarily destined to be out-of-date the moment it is issued.").

²³⁸ See, e.g., Federal Reserve Bank of Chicago, *Understanding Derivatives: Markets and Infrastructure* (Aug. 2013), available at <https://www.chicagofed.org/publications/understanding-derivatives/index>, at 27–28 (noting that exchange-traded contracts often give rise to basis risk, *i.e.*, the risk that arises when "the exposure to the underlying asset, liability or commodity that is being hedged and the hedge contract (the derivatives contract) are imperfect substitutes" and that mitigating basis risk may necessitate OTC derivatives that can be tailored to meet specific requirements).

in, leveraged or speculative exposures in a fund's portfolio.²³⁹

The Concept Release sought comment on the "cover transaction" alternative to liquid asset segregation first addressed by our staff in the Dreyfus Letter as a means of limiting a fund's leverage and risk of loss from derivatives.²⁴⁰ In the Dreyfus Letter, our staff stated that it would not object to a fund covering its obligations by entering into certain other transactions that were intended to position the fund to meet its obligations under the derivatives transaction to be covered or by holding the asset (or the right to acquire the asset) that the fund would be required to deliver under certain derivatives, rather than following the segregated account approach set forth in Release 10666. While commenters to the Concept Release generally argued for retaining the flexibility offered by the cover transaction approach, they also raised numerous issues that demonstrate the difficulties in identifying transactions that should be viewed as providing adequate coverage.²⁴¹

One commenter noted that, although entering into cover transactions "can mitigate the potential for loss and thus the effect of indebtedness leverage," the determination of which transactions actually offset others can be "very complicated."²⁴² Other issues raised by commenters and in the 2010 ABA Derivatives Report included: Whether transactions involving two different counterparties could provide adequate cover for each other; whether positions that are "substantially correlated" could offset each other; whether transactions

²³⁹ One commenter to the Concept Release offered the following hypothetical: A fund holds euro-denominated shares with a market value of €2 million and hedges against exchange rate fluctuations by entering into a 3-month forward contract to sell €2 million for \$2.75 million. If the euro value of the shares falls below the notional amount of the currency contract, then it could be viewed as a form of investment leverage, but the alternative—requiring the fund to continuously adjust its hedge to match the value of its security position—could be prohibitively expensive and contrary to the best interest of the fund's shareholders. See Keen Concept Release Comment Letter, at 11.

²⁴⁰ See Dreyfus No-Action Letter, *supra* note 55. See also Concept Release, *supra* note 3, at nn.70–71 and accompanying text (discussing circumstances under which the staff has provided guidance with respect to whether certain "obligations may be covered by funds transacting in futures, forwards, written options, and short sales").

²⁴¹ In contrast to the types of hedging (or risk-mitigating) or cover transactions that we discuss in this section, we believe that the proposed rule's netting provision is sufficiently limited in scope and purpose such that allowing netting would be unlikely to raise the concerns discussed in this section. See *supra* section III.B.1.b.i.2.

²⁴² See ICI Concept Release Comment Letter, at 14.

that are “demonstrably fully or partially offsetting” could cover each other; and whether the cover transaction approach extended to, or should be extended to, other transactions not addressed in the Dreyfus Letter, such as whether a currency forward could be covered with a currency swap, or whether a written CDS could be covered by holding the underlying reference bond.²⁴³

Some commenters endorsed a “principles-based approach” to these questions, broadly advocating that we allow funds to determine which transactions should be deemed to cover the exposure of another derivatives transaction.²⁴⁴ Our staff has found through examinations that funds have expanded their reliance on a cover transaction approach for a variety of different strategies involving written and purchased options and long and short futures, which in the staff’s view raises concerns regarding whether the risks under such complex combinations of derivatives are in fact covered. We note in this regard that an incorrect determination that two or more transactions are actually covered could leave a fund unprotected against the risks relating to these transactions and could result in undue speculative activity. A principles-based approach to these issues could also implicate a concern raised by one commenter that “different funds could end up with different determinations, perhaps some taking more aggressive positions to allow for greater use of derivatives to drive performance.”²⁴⁵ We therefore do not believe it would be appropriate to permit funds broad discretion under the proposed rule to determine, based on their own interpretations, the types of derivatives transactions that should be exempt from the restrictions underlying section 18 based on their different characteristics purportedly covering the risks associated with other derivatives transactions.

For all of these reasons, we believe it would be more effective to provide for a 150% exposure-based portfolio limit that we believe would provide funds sufficient flexibility to use derivatives for a variety of purposes, including to

hedge or mitigate risks as discussed above, rather than proposing a lower exposure limit that includes exceptions for potentially hedging or cover transactions.

We request comment on our determination not to provide for exclusions for hedging and offsetting transactions in the proposed rule.

- As discussed above, the proposed rule generally would not permit a fund to reduce its exposure for purposes of the rule’s portfolio limitations for particular types of potentially hedging, risk-mitigating or cover transactions, and instead would seek to provide funds sufficient flexibility to engage in these transactions by permitting a fund to have exposure of up to 150% of net assets (or 300% under the risk-based limit discussed below). Do commenters agree that this is an appropriate approach?

- Should we, instead, reduce the amount of aggregate exposure a fund would be permitted to obtain but permit funds to reduce their exposure for particular derivatives transactions that are entered into for hedging or risk-mitigating purposes or that are cover transactions? If we were to take this approach, what would be an appropriate exposure limit? Should we, for example, limit a fund’s exposure under this approach to 100% of the fund’s net assets? Would it be possible to provide comprehensive guidance or prescribe in a rule the types of transactions that appropriately should be permitted to reduce a fund’s exposure without requiring the kinds of instrument-by-instrument determinations required under the current approach? If so, how?

2. Risk-Based Portfolio Limit

As an alternative to the exposure-based portfolio limit, the proposed rule includes a risk-based portfolio limit that would permit a fund to enter into derivatives transactions, and obtain exposure in excess of that permitted under the exposure-based portfolio limit, if the fund complies with the VaR-based test described below (the “VaR test”). The risk-based portfolio limit, including the VaR test, is designed to provide an indication of whether a fund’s derivatives transactions, in aggregate, have the effect of reducing the fund’s exposure to market risk, as measured by the VaR test. A fund that elects the risk-based portfolio limitation under the proposed rule would also be subject to an exposure limit, but would be permitted to obtain exposure under its derivatives transactions and other

senior securities transactions of up to 300% of the fund’s net assets.²⁴⁶

As discussed in section II.B above, the concerns underlying section 18 include the undue speculation concern expressed in section 1(b)(7) of the Act that “excessive borrowing and the issuance of excessive amounts of senior securities” may “increase unduly the speculative character” of a fund’s common stock.²⁴⁷ As we noted in Release 10666, leveraging a fund’s portfolio through the issuance of senior securities “magnifies the potential for gain or loss on monies invested” and therefore “results in an increase in the speculative character” of the fund’s outstanding securities. Section 18 seeks to address this concern by limiting the obligations a fund could incur through senior securities transactions. However, although derivatives transactions involve the issuance of senior securities, funds can use derivatives in ways that may not necessarily magnify a fund’s potential for gain or loss, or result in an increase in the speculative character of the fund. For example, commenters have indicated that some fixed-income funds use a range of derivatives, including CDS, interest rate swaps, swaptions and futures, and currency forwards, and that these derivatives are being used, in part, to seek to mitigate the risks associated with a fund’s bond investments, or to achieve particular risk targets, such as a specified duration.²⁴⁸ Such strategies, or other strategies that funds currently use or may develop in the future, may involve the use of derivatives that, in the aggregate, have relatively high notional amounts, but which are used in a manner that could be expected to reduce a fund’s potential for gain or loss due to market movements and thereby result in a fund being less speculative than if the fund did not use derivatives. We believe that it may be appropriate for a fund to be able to obtain exposure in excess of that permitted under a portfolio limitation focused solely on the level of a fund’s exposure where the fund’s use of derivatives, in aggregate,

²⁴⁶ Proposed rule 18f-4(a)(1)(ii).

²⁴⁷ See section 1(b)(7) of the Investment Company Act; see also *supra* section II.B.

²⁴⁸ See, e.g., BlackRock Concept Release Comment Letter, at 25 (noting “the use of a derivative to mitigate some or all of the risk inherent in physical positions held in a fund portfolio, such as purchase of a put option on a stock ‘to provide downside price protection, use of an interest rate swap to shorten the duration of a bond portfolio or the sale of a currency forward to reduce the currency exposure of a bond denominated in a currency other than US dollars’”); ICI Concept Release Comment Letter, at 25 (“[f]ixed income funds frequently use derivatives to structure and control duration, yield curve, sector, and/or credit exposures”).

²⁴³ See, e.g., ICI Concept Release Comment Letter, at 14; 2010 ABA Derivatives Report, at 19; Oppenheimer Concept Release Comment Letter, at 5; SIFMA Concept Release Letter, at 8.

²⁴⁴ See, e.g., T. Rowe Price Concept Release Comment Letter, at 3 (“Under a principles-based approach, the SEC should also acknowledge that it is possible for a fund to conclude that in certain cases, transactions that are not identical can be offset for coverage purposes (factors that may impact this conclusion are the credit quality of the counterparties, expected correlation between the two transactions, etc.)”).

²⁴⁵ AQR Concept Release Comment Letter, at 4.

has the effect of reducing the fund's exposure to market risk.²⁴⁹

The risk-based alternative under the proposed rule therefore is designed to provide an alternative portfolio limitation that focuses primarily on a risk assessment of a fund's use of derivatives, in contrast to the exposure-based portfolio limit, which focuses solely on the level of a fund's exposure.²⁵⁰ The risk-based portfolio limit reflects our belief that if a fund's use of derivatives, in the aggregate, can reasonably be expected to result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives—if the fund's derivatives use reduces rather than magnifies the potential for loss from market movements—then the fund's derivatives use is also less likely to implicate the undue speculation concern expressed in section 1(b)(7). As discussed further below, we believe that the VaR test would be an appropriate way to evaluate if a fund's derivatives use, in the aggregate, decreases the fund's overall exposure to market risk, and that it therefore may be appropriate

²⁴⁹ As used in this Release, "market risk" refers to the risk of financial loss resulting from movements in market prices, and includes both *general* market risk, which refers to the risk associated with movements in the markets as a whole, and *specific* market risk, which refers to the risk associated with movements in the price of a particular asset. See, e.g., Edward Platen & Gerhard Stahl, *A Structure for General and Specific Market Risk*, 18 Computational Statistics 355 (Sept. 2003), available at http://www.fe-tokyo.kier.kyoto-u.ac.jp/symposium/platen/sympo_platen_02.pdf; see also Gregory Brown & Nishad Kapadia, *Firm-Specific Risk and Equity Market Development*, 84 J. of Fin. Econ. 358 (May 2007), available at <http://www.sciencedirect.com/science/article/pii/S0304405X06002145>.

²⁵⁰ We believe that the inclusion of the risk-based alternative in the proposed rule, and in particular its use of the VaR test, is consistent with the views expressed by some commenters to the Concept Release and the FSOE Notice suggesting that concerns about leverage be addressed by using risk-based measures, such as VaR, as an alternative or supplement to traditional leverage metrics. See, e.g., Comment Letter of Nuveen Investments to the FSOE Request for Comment (Mar. 25, 2015) ("Nuveen FSOE Comment Letter"), available at <http://www.regulations.gov/#/documentDetail;D=FSOC-2014-0001-0051>, at 6–7 (noting the firm's use of "different tools to measure the effects of leverage and its accompanying risks," and noting, when using VaR, that "[i]t is helpful, for example, to "determine the VaR of a fund's portfolio both before and after the addition of leverage, to compare both the unleveraged and leveraged metrics to those of the benchmark"); Oppenheimer Concept Release Comment Letter, at 3 (advocating for "the use of VaR for measuring and mitigating the potential exposure and risks of derivatives in an investment company's portfolio for funds making sophisticated and extensive use of derivatives"). Some commenters also suggested the use of VaR as a means of determining asset segregation requirements for funds. See, e.g., SIFMA Concept Release Comment Letter, at 7; BlackRock Concept Release Comment Letter, at 5; ICI Concept Release Comment Letter, at 12.

for the proposed rule to allow a fund that satisfies the VaR test to have greater exposure under its derivatives transactions than would be permitted for a fund operating under the exposure-based portfolio limit.

a. VaR Test Under the Risk-Based Portfolio Limit

To satisfy the VaR test under the risk-based portfolio limit, a fund's full portfolio VaR would have to be less than the fund's securities VaR immediately after the fund enters into any senior securities transaction.²⁵¹ A fund's "full portfolio VaR" would be defined as the VaR of the fund's entire portfolio, including securities, derivatives transactions and other investments.²⁵² A fund's "securities VaR" would be defined as the VaR of the fund's portfolio of securities and other investments, but excluding any derivatives transactions.²⁵³ As explained below, we believe that the determination by a fund that its full portfolio VaR is less than its securities VaR would be an appropriate indication that the fund's derivatives use, in the aggregate, decreases the fund's overall exposure to market risk.

The proposed rule defines VaR as "an estimate of potential losses on an instrument or portfolio, expressed as a positive amount in U.S. dollars, over a specified time horizon and at a given confidence level," which we believe is generally consistent with definitions of VaR that are used in other regulatory regimes as well as in academic literature.²⁵⁴ While VaR can be

²⁵¹ Proposed rule 18f-4(a)(1)(ii).

²⁵² Proposed rule 18f-4(c)(11)(i)(B).

²⁵³ Proposed rule 18f-4(c)(11)(i)(A). Although the proposed rule uses the term "securities VaR," some instruments that a fund could hold, and that would need to be included in the fund's securities VaR, may not be "securities" for all purposes under the federal securities laws. For example, a fund's securities VaR would include any direct holdings of non-U.S. currencies. A fund's securities VaR would also include derivative instruments that do not entail a future payment obligation for a fund (and thus are not "derivatives transactions" as defined in the rule), such as most purchased options.

²⁵⁴ Proposed rule 18f-4(c)(11). See, e.g., Form PF (defining VaR as "[f]or a given portfolio, the loss over a target horizon that will not be exceeded at some specified confidence level"). See also Volcker Rule Adopting Release, *supra* note 236, at Appendix A (defining Value-at-Risk as "the commonly used percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on current market conditions." See also Darrell Duffie & Jun Pan, *An Overview of Value at Risk*, 4 The J. of Derivatives 7 (Spring 1997) ("For a given time horizon t and confidence level p , the value at risk is the loss in market value over the time horizon t that is exceeded with probability $1-p$ "). See also Michael Minnich, Perspectives on Interest Rate Risk Management for Money Managers and Traders (Frank Fabozzi, ed.) ("Minnich"), at 39

calculated using several different approaches and a wide range of parameters (as discussed further below), VaR has certain characteristics that we believe make it an appropriate metric, when used as part of the VaR test, for assessing the effect of derivatives use on a fund's exposure to market risk.

First, VaR generally enables risk to be measured in a comparable and consistent manner across diverse types of instruments that may be included in a fund's portfolio, and provides a means of integrating the market risk associated with different instruments into a single number that provides an overall indication of market risk.²⁵⁵ By contrast, many other risk metrics used by funds are suited to particular categories of instruments and, given the diverse investment portfolios of many funds, may be less suitable as a means of assessing risk for purposes of the risk-based alternative under the proposed rule.²⁵⁶ For example, risk measures for government bonds can include duration, convexity and term-structure models; for corporate bonds, ratings and default models; for stocks, volatility, correlations and beta; for options, delta, gamma and vega; and for foreign exchange, target zones and spreads.²⁵⁷ Because proposed rule 18f-4 is intended to apply generally to all funds that use derivatives, however, and because VaR can be applied across diverse types of instruments that may be included in the portfolios of funds that pursue different strategies, we believe that VaR is a more appropriate metric for purposes of the proposed rule.²⁵⁸

("VaR can be defined as the maximum loss a portfolio is expected to incur over a specified time period, with a specified probability").

²⁵⁵ See Kevin Dowd, An Introduction to Market Risk Measurement (Oct. 2002) ("Dowd"), at 10 (VaR "provides a common consistent measure of risk across different positions and risk factors. It enables us to measure the risk associated with a fixed-income position, say, in a way that is comparable to and consistent with a measure of the risk associated with equity positions"). See also Zvi Weiner, *Introduction to VaR (Value-at-Risk)* ("Weiner") (May 1997), available at <http://pluto.mssc.huji.ac.il/~mswiener/research/Intro2VaR3.pdf> (noting that VaR provides "an integrated way to deal with different markets and different risks and to combine all of the factors into a single number" that indicates the overall risk level).

²⁵⁶ See Weiner, *supra* note 255.

²⁵⁷ See *id.* We have proposed to require certain funds to report some of these metrics on proposed Form N-PORT, such as portfolio-level duration (DV01 and SDV01) and position-level delta, because we believe that such information would be useful to the Commission and to investors. See Investment Company Reporting Modernization Release, *supra* note 138.

²⁵⁸ See, e.g., Katerina Simons, *The Use of Value at Risk by Institutional Investors* ("Simons"), New Eng. Econ. Rev. 21 (Nov./Dec. 2000), available at <http://www.bostonfed.org/economic/neer/neer2000/neer600b.pdf> (noting that VaR is "particularly

Second, VaR can be used to assess the effect of the addition of a position, or group of positions, on the overall market risk of a portfolio. If the addition of a position to a portfolio increases VaR, the position can generally be viewed as adding to a fund's exposure to market risk, while if the addition of a position decreases VaR, it can be viewed as reducing the fund's exposure to market risk.²⁵⁹

We believe that these characteristics allow the VaR test to be used as a means of evaluating whether a fund uses derivatives in a manner that would be less likely to implicate the concerns underlying section 18. Section 18 does not restrict a fund's ability to invest in securities and other investments that would be included in a fund's securities VaR, but rather, restricts the ability of a fund to leverage its exposure to such investments by borrowing, or issuing debt or preferred equity, through senior securities. This reflects the concern that the addition of leverage generally will cause a fund to become more speculative and expose investors to potentially greater risk of loss due to market movements than if the fund were unlevered. As discussed above, a fund's use of derivatives transactions may cause a fund to become more speculative or expose investors to greater risk of loss, but may also be used to mitigate risks in the fund's portfolio.

Whether a fund's use of derivatives exposes the fund to greater risk or less risk than if the fund did not use derivatives requires consideration of the risk characteristics of a fund's non-derivatives investments and its derivatives transactions, and the interaction of the risk characteristics of these investments and transactions with each other. The VaR test provides a means for making such an assessment, by providing an indication of whether the market risk associated with a fund's portfolio of securities and other investments exclusive of derivatives (as

useful" for an investor that "has a multi-asset-class portfolio and needs to measure its exposure to a variety of risk factors. VaR can measure the risk of stocks and bonds, commodities, foreign exchange, and structured products such as asset-backed securities and collateralized mortgage obligations (CMOs), as well as off-balance sheet derivatives such as futures, forwards, swaps, and options." See also *infra* section III.B.2.b.

²⁵⁹ See Dowd, *supra* note 255, at 117–118 (defining incremental VaR (or "IVaR") as the change in VaR associated with the addition of a new position to a portfolio, and noting that "IVaR gives us an indication of how [portfolio] risks change when we change the portfolio itself. In practice, we are often concerned with how the portfolio risk changes when we take on a new position, in which case the IVaR is the change in portfolio VaR associated with adding the new position to our portfolio.").

measured by the fund's securities VaR), is greater than or less than the market risk associated with the fund's portfolio as a whole (as measured by the fund's full portfolio VaR), inclusive of derivatives transactions and taking into account the offsetting risk characteristics of different instruments in a fund's portfolio. If a fund's full portfolio VaR is less than its securities VaR—*i.e.*, if the fund can satisfy the VaR test—we believe that the fund's derivatives use, in the aggregate, can be viewed as decreasing the fund's overall exposure to market risk.²⁶⁰ In this way, we believe that a fund's compliance with the VaR test would indicate that the fund's derivatives transactions do not, in the aggregate, result in an increase in the speculative character of the fund, and that the fund's use of derivatives transactions thus would be less likely to implicate the undue speculation concern expressed in section 1(b)(7).²⁶¹

We also believe permitting a fund to use derivatives transactions in these circumstances, and subject to the other requirements in the proposed rule, is broadly consistent with the policies and provisions of the Investment Company Act, which seeks to prevent funds from becoming unduly speculative by means of leveraging their assets through the issuance of senior securities, but generally does not impose limitations on a fund's ability to invest in risky or volatile securities instruments.²⁶² Similarly, the VaR test is designed to limit a fund's ability to use derivatives transactions in order to address undue speculation concern expressed in section 1(b)(7) of the Act, but does not

²⁶⁰ See also, *e.g.*, Nuveen FSOC Comment Letter, at 6 (noting the firm's use of different "tools to measure the effects of leverage and its accompanying risks," and noting, when using VaR, that "[i]t is helpful, for example, to determine the VaR of a fund's portfolio both before and after the addition of leverage, to compare both the unleveraged and leveraged metrics to those of the benchmark").

²⁶¹ By contrast, if a fund used derivatives transactions solely for the purpose of leveraging its physical portfolio—for example, by holding a long-only portfolio of large cap equity and obtaining further exposure to those securities through a basket total return swap—the additional market risk incurred by the fund would cause the fund's full portfolio VaR to be greater than its securities VaR. See, *e.g.*, Jacques N. Gordon & Elysia Wai Kuen Tse, *VaR: A Tool to Measure Leverage Risk*, 29 *The J. of Portfolio Management* 62 (Summer 2003) (demonstrating how VaR increases as the degree of leverage added to a portfolio increases and noting that "[b]y comparing the value at risk of different leverage levels to the unleveraged result, we can calculate the incremental risk due to leverage").

²⁶² See, *e.g.*, 1994 Report, *supra* note 32, at 27 (noting that the Act "imposes few substantive limits on mutual fund investments" and that funds "generally are permitted to make investments without regard to their volatility").

seek to limit the risk or volatility of the fund's investments more generally.

An additional benefit of using VaR in the risk-based portfolio limit is that, based on outreach conducted by our staff, we understand that VaR calculation tools are widely available and that many advisers already use risk management or portfolio management platforms that include VaR capability.²⁶³ We expect that the funds that would rely on the risk-based portfolio limit are funds with exposure approaching, or in excess of, the 150% exposure limit included in the exposure-based portfolio limit, and advisers to the funds that use derivatives more extensively may be particularly likely to already use risk management or portfolio management platforms that include VaR capability. Further, as discussed in section III.B.2.b below, VaR models also can be tailored in numerous ways in order to incorporate and reflect the risk characteristics of a fund's particular strategy and investments.²⁶⁴

The following example demonstrates how the VaR test would be used under the proposed rule to assess whether a fund's derivatives, in aggregate, result in an investment portfolio that is subject to more or less market risk than if the fund did not use such derivatives. Suppose that a fund has a net asset value of \$100 million and holds a portfolio of non-U.S. debt securities, and that the fund calculates the VaR of such securities, using a VaR model that meets the requirements of the proposed rule, to be \$3 million. Suppose further that the fund wishes to hedge some of its credit risk by purchasing CDS, adjust its duration by entering into interest rate swaps, and enter into currency forwards both to obtain exposure to certain foreign currencies and to hedge some of

²⁶³ See, *e.g.*, BNY Mellon, *Risk Roadmap: Hedge Funds and Investors' Evolving Approach to Risk* (Aug. 2012), available at <http://www.thehedgefundjournal.com/sites/default/files/riskroadmap.pdf> (noting that third-party administrators to hedge funds "provide advanced risk functions" to investors such as "[d]aily VaR analysis using multiple models". See also Christopher L. Culp, Merton H. Miller & Andres M. P. Neves, *Value at Risk: Uses and Abuses*, 10 *J. of Applied Corp. Fin.* 26 (Jan. 1998) (VaR is "used regularly by nonfinancial corporations, pension plans and mutual funds, clearing organizations, brokers and futures commission merchants, and insurers").

²⁶⁴ See *infra* section III.B.2.b. For example, fund advisers that manage UCITS funds may already be using VaR to comply with the requirements of the "relative VaR" and "absolute VaR" approaches under the UCITS regulatory scheme (discussed below in this section and in section IV.E.). See, *e.g.*, AQR Concept Release Comment Letter (noting that the firm is "familiar with the 'value at risk' or VaR methodologies, both through [its] management of UCITS funds and as an effective tool for day-to-day overall firm risk management").

its exposure to euro and yen currency risk. If the VaR of its full portfolio (*i.e.*, its securities investments plus its derivatives transactions) immediately after entering into these derivatives transactions is less than \$3 million, the fund would comply with the risk-based portfolio limit's VaR test.

The VaR test under the risk-based portfolio limit is similar in certain ways to the "relative VaR" approach used by some UCITS funds. Under the relative VaR approach, the VaR of the UCITS fund's portfolio cannot be greater than twice the VaR of an unleveraged benchmark securities index (referred to as a "reference portfolio").²⁶⁵ In contrast to the relative VaR approach for UCITS funds, the VaR test under the proposed risk-based portfolio limit would use a fund's own portfolio of securities and other investments (exclusive of derivatives) as the baseline against which the fund's full portfolio VaR (inclusive of derivatives) would be compared. For the reasons discussed below, we believe the proposed rule's VaR test offers advantages over a relative VaR approach based on a hypothetical reference portfolio.²⁶⁶

First, we believe that the VaR test under the proposed rule is more consistent with the policies and provisions of the Investment Company Act, which restricts in section 18 a fund's ability to issue senior securities but otherwise generally does not impose limitations on a fund's ability to invest in risky or volatile securities investments, provided that such investments are consistent with the investment strategy described to investors. Using the fund's own portfolio as the baseline for the VaR test under the proposed rule—and thus providing a risk assessment of the fund's use of derivatives in the context of the fund's investment strategy disclosed to investors, which may include risky or volatile securities—would be more consistent with the Act. A relative VaR test, by contrast, could be viewed as a limitation on risk or volatility generally—as opposed to a limitation on the issuance of senior securities—because it would measure

the VaR of a fund's portfolio, including non-senior securities investments, against a hypothetical reference portfolio, and such non-senior securities investments could cause the fund to fail a relative VaR test.²⁶⁷ Second, we are also concerned that under a relative VaR approach it would be difficult, in light of the wide range of fund strategies and potential benchmarks, to require funds to select benchmarks that are appropriate (particularly in connection with alternative strategies),²⁶⁸ are unleveraged,²⁶⁹ and would otherwise serve as an appropriate baseline against which the relative VaR should be measured.²⁷⁰

While we believe that there are significant benefits to using VaR in the risk-based portfolio limit, we also recognize that significant attention has been given (especially since the 2007–2009 financial crisis) to the limitations of VaR and the risks of overreliance on

²⁶⁷ For example, a sector-focused equity fund (*e.g.*, focusing on financial or commodity-focused stocks) that used a broad-based large cap equity index as its benchmark under a relative VaR test could potentially fail to comply with the test if the sector experienced a period of unexpected volatility, even if the fund did not use a significant amount of derivatives. In this case the volatility associated with the fund's equity investments, rather than its derivatives transactions, could cause the fund to fail the relative VaR test.

²⁶⁸ The difficulty of identifying appropriate benchmarks for purposes of assessing the performance of alternative funds illustrates some of the potential challenges that identifying an appropriate benchmark for purposes of a relative VaR test could entail. For example, our staff has noted that many alternative funds use LIBOR or a Treasury bill rate of interest plus a spread (*e.g.*, 4 percentage points) for their performance benchmark. It has been observed, however, that although such benchmarks reflect return, they may understate risk, which raises concerns that they may not be effective for purposes of a test that would compare a fund's VaR to a benchmark VaR. See Richard J. Harper, *Absolute Tracking: Moving Past Absolute Return for Hedge Fund Benchmarking* (May 2013), available at http://www.nepc.com/writable/research_articles/file/2013_03_nepc_absolute_tracking_update.pdf (noting that the "fundamental problem with absolute return benchmarks" is that they "reflect only return" and "understate risk").

²⁶⁹ Our staff has observed that some alternative funds use hedge fund indices for performance benchmarking, but such indices would not be appropriate for comparing a fund's VaR to the benchmark VaR because the hedge funds included in the benchmark generally can be expected to use leverage. See *id.* (hedge fund benchmarks "vary widely with regard to long/short exposure, leverage, capitalization, sector focus, international diversification, and optionality").

²⁷⁰ See Daisy Maxey, *Benchmarking Alternative Funds an Inexact Science*, Wall Street Journal (Apr. 10, 2014), available at <http://www.wsj.com/articles/SB10001424052702304058204579493590377289408> (citing statement from Morningstar's director of alternative funds research that "more often than not, there is no single good measure" for benchmarking alternative funds and therefore "multiple benchmarks must be used").

VaR as a risk management tool.²⁷¹ One widely expressed concern with VaR is that it does not adequately reflect "tail risks" (*i.e.*, the size of losses that may occur on the trading days during which the greatest losses occur).²⁷² Another concern is that VaR calculations may underestimate the risk of loss under stressed market conditions.²⁷³

Under the proposed rule, however, VaR would be used to focus primarily on the relationship between a fund's securities VaR and its full portfolio VaR, rather than on the absolute magnitude of the potential loss of any particular investment or the fund's portfolio as a whole. We believe that this use of VaR—to assess whether a fund's derivatives as a whole directionally increase or mitigate risk, rather than to precisely estimate potential losses—mitigates some of the concerns that have been

²⁷¹ See, *e.g.*, James O'Brien & Pawel J. Szerszen, *An Evaluation of Bank VaR Measures for Market Risk During and Before the Financial Crisis*, Federal Reserve Board Staff Working Paper (Mar. 7, 2014) ("[c]riticism of banks' VaR measures became vociferous during the financial crisis as the banks' risk measures appeared to give little forewarning of the loss potential and the high frequency and level of realized losses during the crisis period"). See also Pablo Triana, *VaR: The Number That Killed Us*, Futures Magazine (Dec. 1, 2010), available at <http://www.futuresmag.com/2010/11/30/var-number-killed-us> (noting that "in mid-2007, the VaR of the big Wall Street firms was relatively quite low, reflecting the fact that the immediate past had been dominated by uninterrupted good times and negligible volatility").

²⁷² In the regulatory context, VaR gained widespread usage by banks and other financial institutions following the 1996 Market Risk Amendment to the Basel II Capital Accords (the "Market Risk Amendment"), which set forth a framework of qualitative and quantitative standards for allowing banks to determine capital charges for market risks they incurred, by using proprietary internal models. The Basel Committee on Bank Supervision (BCBS) modified this framework in 2009, by introducing an additional capital charge based on a "stressed VaR" calculation—that is, VaR calibrated to a period of significant financial stress.

More recently, the BCBS has proposed the use of "stressed expected shortfall". Expected shortfall is similar to VaR but differs from VaR in that it accounts for tail risk by taking the average or expected losses beyond the specified confidence level; "stressed" expected shortfall refers to expected shortfall calculated using a model that is calibrated to a period of significant financial stress. The BCBS has recognized that, while it believes that a shift to stressed expected shortfall would "account[] for the tail risk in a more comprehensive manner, considering both the size and likelihood of losses above a certain threshold", it also presents challenges, including the difficulty of identifying a stress period using a full set of risk factors for which historical data is available and potentially greater sensitivity of expected shortfall to extreme outlier losses. See Bank for International Settlements, Basel Committee on Banking Supervision, *Fundamental review of the trading book: A revised market risk framework* (Oct. 2013) ("BCBS Trading Book Review—Oct. 2013).

²⁷³ See, *e.g.*, Amit Mehta, Max Neukirchen, Sonja Pfetsch & Thomas Poppensieker, *Managing Market Risk: Today and Tomorrow*, McKinsey Working Papers on Risk, No. 32 (May 2012).

²⁶⁵ See *infra* section IV.E.

²⁶⁶ We understand that some UCITS funds also may use an absolute VaR approach, which limits the maximum VaR that a UCITS fund can have relative to its net assets, generally at 20 percent of the UCITS fund's net assets. See section IV.E. As discussed in more detail below, we believe that our proposed rule's use of VaR—to assess whether a fund's derivatives as a whole directionally increase or mitigate risk, rather than to precisely estimate potential losses—may be a more effective way to use VaR to provide a risk assessment of a fund's use of derivatives for purposes of section 18 of the Investment Company Act.

expressed about the use of VaR.²⁷⁴ In addition, the VaR test under the risk-based portfolio limit would be coupled with an outside limit on exposure, which, as discussed in section III.B.2.c below, would provide an independent limit on a fund's use of senior securities transactions under the proposed rule that would not be based on VaR.

We also recognize that funds may use measures other than VaR in order to assess the risks posed by a fund's derivatives and other investments.²⁷⁵ The VaR test is designed to serve as a means of limiting a fund's ability to leverage its assets in a manner that would implicate the undue speculation concern in section 1(b)(7) of the Act, but it is not intended as a substitute for other measures that a fund may consider in connection with its derivatives risk management. For example, those funds that are subject to the requirement to have formalized derivatives risk management programs should consider other appropriate measures to assess risk, including stress tests that are tailored to a fund's particular characteristics, as part of their derivatives risk management programs, as discussed in section III.D below.²⁷⁶

²⁷⁴ See *infra* section III.B.2.b (discussing the proposed rule's requirements concerning the VaR models that a fund would be permitted to use for purposes of the VaR test and the requirement that, regardless of which VaR model the fund chooses, the fund must use the same VaR model, and apply it consistently, in the calculation of the fund's securities VaR and full portfolio VaR).

²⁷⁵ See, e.g., Frank J. Ambrosio, *An Evaluation of Risk Metrics*, Vanguard Investment Counseling & Research (2007), available at <https://personal.vanguard.com/pdf/flgerm.pdf> (discussing various risk metrics used by fund managers, including absolute risk measures such as standard deviation (the degree of fluctuation in a portfolio's return), risk of loss (the percentage of outcomes below a certain total return level) and shortfall risk (the probability that an investment's value will be less than is needed to meet portfolio objectives), and relative risk measures such as excess return (a security's return above or below that of a benchmark or risk-free asset), tracking error (the standard deviation of excess return), Sharpe ratio (a measurement of how much return is being obtained for each theoretical unit of risk), information ratio (the risk-adjusted return of a portfolio versus a benchmark), beta (the magnitude of an investment's price fluctuations relative to the ups and downs of the overall market) and Treynor ratio (the risk-adjusted return of a portfolio or security versus the market).

²⁷⁶ As discussed below in section III.D, the proposed rule would require a fund that relies on proposed rule 18f-4 to enter into derivatives transactions to have a formalized risk management program unless the fund limits its exposure from derivatives transactions to 50% or less of the fund's net assets (and does not use complex derivatives transactions). We expect that all funds that would operate under the risk-based limit would have derivatives exposure in excess of 50% of net assets, and thus would be required to have risk management programs, because funds with derivatives exposure of 50% or less would be able to comply with the 150% exposure limit and have

We also recognize that the use of derivatives poses other risks, such as counterparty risk and liquidity risk, that may not be addressed by the VaR test under the proposed rule; however, we believe, as discussed in section III.D below, that funds making significant use of derivatives generally should address these risks as part of their risk management programs.²⁷⁷ We have proposed that the risk-based portfolio limit include a VaR-based test because of the characteristics of VaR we discussed above, which we believe allow VaR to be used as part of the VaR test to provide an indication of whether a fund's derivatives as a whole directionally increase or mitigate risk.

We request comment immediately below on the proposed rule's inclusion of a risk-based portfolio limitation based on VaR and, in section III.B.2.b below, we request comment on the proposed rule's requirements regarding funds' use of particular VaR models in connection with the VaR test and the proposed rule's requirements for any VaR model chosen by the fund.

- Do commenters agree that the proposed rule should include, in addition to the exposure-based portfolio limit, an alternative portfolio limitation that focuses primarily on a risk assessment of a fund's use of derivatives? Do commenters agree that, where a fund's derivatives transactions, in the aggregate, result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives, it would be appropriate to permit the fund to engage in derivatives transactions to a greater extent than would be permitted under any exposure-based portfolio limit?

- As noted above, we are proposing to include the risk-based portfolio limit in the proposed rule because we recognize that, because derivatives transactions may be used for a variety of purposes, some funds may make use of derivatives that in the aggregate result in relatively high notional amounts, but which are not used to leverage the fund's assets in a manner that increases the fund's exposure to market risk. What types of funds have or could have exposure in excess of the limit provided in the exposure-based portfolio limit (150% of net assets) but use derivatives

no need to avail themselves of the higher 300% exposure limit for funds that comply with the risk-based portfolio limit.

²⁷⁷ Proposed rule 22e-4 also would require a fund subject to that rule to assess and periodically review the fund's liquidity risk, considering various factors specified in the rule, including the fund's use of borrowings and derivatives for investment purposes. See *supra* note 81 and accompanying text.

transactions that, in the aggregate, result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives? Are there funds that today use derivatives in amounts greater than the exposure-based portfolio limit but could comply with the risk-based portfolio limit? If so, what kinds of funds? If funds would have to restructure their portfolios to comply with the risk-based portfolio limit, how would they do so? Would they be able to pursue strategies or obtain investment exposures similar to their current strategies and exposures? If not, what types of strategies or investment exposures would not be possible?

- The proposed rule would use the VaR test to determine if a fund's derivatives transactions, in aggregate, result in an overall portfolio that is subject to less market risk than if the fund did not use such derivatives. Do commenters agree that VaR, as used in the VaR test, is an effective approach for this purpose? Are there other measures we should permit a fund to use, either in lieu of or in addition to VaR, to assess whether the fund's derivatives transactions, in the aggregate, have the effect of mitigating the fund's exposure to market risk? For example, would absolute risk measures (such as standard deviation, risk of loss or shortfall risk), relative risk measures (such as excess return, tracking error, Sharpe ratio, information ratio, beta or Treynor ratio), or stress testing/scenario generation, better address the purposes that the VaR test is intended to fulfill?²⁷⁸ If so, how would such risk measures be incorporated into a test for purposes of the risk-based portfolio limit?

- As discussed above, we believe that the manner in which VaR would be used under the proposed rule, which focuses on the relationship between a fund's securities VaR and its full portfolio VaR, would mitigate some of the concerns that have been expressed regarding the risks and limitations of relying on VaR as a risk measure. Do commenters agree? If not, what alternative measures could be implemented to address these concerns? For example, would these concerns be addressed by requiring funds to comply with a test that is similar to the VaR test, but that uses expected shortfall instead of VaR (*i.e.*, that would require a fund to compare the expected shortfall of its

²⁷⁸ See *supra* note 275 (discussing different types of absolute and relative risk measures).

securities portfolio with the expected shortfall of its full portfolio)?²⁷⁹

- The risk-based portfolio limit would require a fund's full portfolio VaR to be less than its securities VaR. Should the test be more restrictive or less restrictive? For example, should we permit a fund's full portfolio VaR to exceed its securities VaR up to a specified limit (e.g., allow the fund's full portfolio VaR to exceed its securities VaR by not more than a specified percentage)? For example, would it be appropriate for the fund's full portfolio VaR to exceed its securities VaR by 10% or 20%? Conversely, should we make the test more restrictive and require that the fund's full portfolio be less than the fund's securities VaR by an amount specified in the rule? Should we, for example, require that the full portfolio VaR be 10% or 20% less than the fund's securities VaR?

- For purposes of the risk-based portfolio limit, should the proposed rule use an approach such as (or similar to) the relative VaR or absolute VaR approach for UCITS funds, instead of or as an alternative to the proposed VaR test? Why or why not? Would it be more efficient to allow funds to use such an approach—e.g., because some advisers already use this approach for UCITS funds? Under a relative VaR approach, what sort of benchmarks would or would not be appropriate, and how should the benchmarks be chosen? Under an absolute VaR approach, what would be an appropriate VaR limit (e.g., 20%, as for UCITS funds, or a higher or lower limit)? Would a relative VaR or absolute VaR approach appropriately address the undue speculation concern underlying section 18? Why or why not?

- A fund's securities VaR would be the VaR of the fund's investments other than derivatives transactions which, as defined in the proposed rule, would include derivatives transactions that involve the issuance of a senior security. The VaR associated with derivatives that do not involve the issuance of a senior security, such as a typical purchased option, would be included in the fund's securities VaR. Although section 18 does not limit a fund's ability to acquire such derivatives, they could be volatile and thus could generate a securities VaR that would provide the fund additional latitude to engage in derivatives transactions under the risk-based portfolio limit. Should we, therefore, require the fund to exclude the VaR associated with *all* of the fund's derivatives from the securities VaR,

whether or not they involve the issuance of a senior security, and, if so, how should we define "derivatives" for this purpose? If so, what would be the effects on funds' strategies?

- Should we place other limitations on a fund's ability to use borrowings or other financial commitment transactions to obtain leveraged exposures if the fund elects to use derivatives at the higher level permitted under the risk-based portfolio limit? Should we, for example, further restrict a fund's ability to use financial commitment transactions or other borrowings, the proceeds of which could be used by the fund to purchase securities investments that would increase the fund's securities VaR?

- Are there certain types of securities, derivatives or other instruments that would be difficult to model using VaR (taking into account the requirements for a fund's VaR model, discussed in section III.B.2.b below)? For example, would it be difficult for a fund to model an investment in a private fund, or in other types of illiquid investments that lack frequent valuations or transparency? Are there ways that we should modify the VaR test to allow a fund that invests in instruments that are difficult to model using VaR to demonstrate in some other way that its derivatives, in aggregate, are risk mitigating?

b. Choice of Model and Parameters for VaR Test

The proposed rule defines VaR as "an estimate of potential losses on an instrument or portfolio, expressed as a positive amount in U.S. dollars, over a specified time horizon and at a given confidence interval."²⁸⁰ We believe that this is generally consistent with the commonly understood definition of VaR as a risk measure.²⁸¹ We also believe that, while VaR can be calculated using a number of different approaches and a wide range of parameters, this definition is broad enough to encompass most methods of calculating VaR. However, while we believe it is appropriate for funds to have flexibility in the selection of a VaR model and its parameters for purposes of the risk-based portfolio limit, we also believe that a fund's VaR model should meet certain minimum requirements. As discussed further below, the proposed rule therefore would require a fund's VaR model to take into account and incorporate all significant, identifiable market risk factors associated with a fund's

investments.²⁸² In addition, the proposed rule would require a fund to use a minimum 99% confidence interval,²⁸³ a time horizon of not less than 10 and not more than 20 trading days,²⁸⁴ and a minimum of three years of historical data to estimate historical VaR.²⁸⁵ A fund would also be required to apply its VaR model consistently when calculating its securities VaR and full portfolio VaR.²⁸⁶ We discuss these aspects of the proposed rule below.

First, the proposed rule would require a fund's VaR model to take into account and incorporate all significant, identifiable market risk factors associated with a fund's investments.²⁸⁷ Absent this requirement, the fund's VaR calculations, when used in the VaR test, may not provide a reliable indication of whether the fund's derivatives, in aggregate, are increasing or decreasing the fund's overall portfolio's exposure to market risk. The proposed rule provides a non-exclusive list of risk factors that may be relevant in light of a fund's strategy and investments, including equity price risk, interest rate risk, credit spread risk, foreign currency risk and commodity price risk,²⁸⁸ material risks arising from the nonlinear price characteristics of options and positions with embedded optionality,²⁸⁹ and the sensitivity of the market value of the fund's derivatives to changes in volatility or other material market risk factors.²⁹⁰

We understand that VaR models are often categorized into three methods—historical simulation,²⁹¹ Monte Carlo

²⁸² Proposed rule 18f-4(c)(11)(ii)(A).

²⁸³ Proposed rule 18f-4(c)(11)(ii)(B).

²⁸⁴ Proposed rule 18f-4(c)(11)(ii)(B).

²⁸⁵ Proposed rule 18f-4(c)(11)(ii)(C).

²⁸⁶ Proposed rule 18f-4(c)(11)(i)(C).

²⁸⁷ Proposed rule 18f-4(c)(11)(ii)(A). "Market risk" for this purpose includes both general market risk and specific market risk. See *supra* note 249.

²⁸⁸ Proposed rule 18f-4(c)(11)(ii)(A)(1).

²⁸⁹ Proposed rule 18f-4(c)(11)(ii)(A)(2).

²⁹⁰ Proposed rule 18f-4(c)(11)(ii)(A)(3).

²⁹¹ Historical simulation models rely on past observed historical returns to estimate VaR. Historical VaR involves taking a fund's current portfolio, subjecting it to changes in the relevant market risk factors observed over a prior historical period, and constructing a distribution of hypothetical profits and losses. The resulting VaR is then determined by looking at the largest (100 minus the confidence level) percent of losses in the resulting distribution. See, e.g., Dowd, *supra* note 255, at 56–68. See also Thomas J. Linsmeier & Neil D. Pearson, *Value at Risk*, Fin. Analysts J. (Mar.–Apr. 2000) ("Linsmeier & Pearson"), at 50–53.

²⁷⁹ See *supra* note 272 (discussing the use of expected shortfall under BCBS proposal).

²⁸⁰ Proposed rule 18f-4(c)(11).

²⁸¹ See *supra* note 280.

simulation,²⁹² or parametric models.²⁹³ We also understand that each method has certain benefits and drawbacks, which may make a particular method more or less suitable, depending on a fund's strategy, investments and other factors. In particular, some VaR methodologies may not adequately incorporate all of the material risks inherent in particular investments, or all material risks arising from the nonlinear price characteristics of certain derivatives.²⁹⁴ While the proposed rule does not specify that a fund must use any particular type of VaR model, the proposed rule would require that any VaR model used by the fund take into account and incorporate all significant, identifiable market risk factors associated with the fund's investments, as discussed above, and to meet the rule's other requirements for a VaR model.

As discussed below in section III.D, the proposed rule would require funds that are subject to the requirement to have a formalized derivatives risk management program under the proposed rule to periodically review and update any VaR calculation models used by the fund, in order to evaluate their effectiveness and reflect changes in risks over time.²⁹⁵ As part of its derivatives risk management program, a fund that relies on the risk-based

portfolio limit may wish to consider periodic backtesting or other procedures to assess the effectiveness of its VaR model, and in particular, may wish to use such testing to periodically assess whether its VaR model takes into account and incorporates all significant, identifiable market risk factors associated with the fund's investments.²⁹⁶

The proposed rule would require a fund using historical VaR to have at least three years of historical market data.²⁹⁷ We understand that the availability of data is a key consideration when using historical simulation to estimate VaR, and that the length of the data observation period may significantly influence the results of a VaR calculation. For example, a shorter observation period means that each observation will have a greater influence on the result of the VaR calculation (as compared to a longer observation period), such that periods of unusually high or low volatility could result in unusually high or low VaR estimates.²⁹⁸ Longer observation periods, however, can lead to data collection problems, if sufficient historical data is not available.²⁹⁹ By requiring a fund using historical VaR to have at least three years of historical market data, the proposed rule is designed to require a fund to base its VaR estimates on a sufficient number of observations, while also recognizing the concern that requiring a longer historical period could make it difficult for a fund to obtain sufficient historical data to estimate VaR for the instruments in its portfolio.³⁰⁰

²⁹⁶ Backtesting refers to "the application of quantitative, typically statistical, methods to determine whether a model's risk estimates are consistent with the assumptions on which a model is based." Dowd, *supra* note 255, at 141. If backtesting indicates that a model consistently overestimates or underestimates VaR, it may be because a fund's VaR model is not taking into account and incorporating the appropriate market risk factors associated with the fund's investments.

²⁹⁷ Proposed rule 18f-4(c)(11)(ii)(C).

²⁹⁸ See Linsmeier & Pearson, *supra* note 291, at 59 (noting that, because historical simulation relies directly on historical data, "[a] danger is that the price and rate changes in the last 100 (or 500 or 1,000) days might not be typical. For example, if by chance the last 100 days were a period of low volatility in market rates and prices, the VAR computed through historical simulation will understate the risk in the portfolio.").

²⁹⁹ See Dowd, *supra* note 255, at 68 (noting that "[a] long sample period can lead to data collection problems. This is a particular concern with new or emerging market instruments, where long runs of historical data don't exist and are not necessarily easy to proxy.").

³⁰⁰ See also Minnich, *supra* note 254, at 43 (noting that for historical simulation, "[l]onger periods of data have a richer return distribution while shorter periods allow the VAR to react more quickly to changing market events" and that

The proposed rule would also require a fund to use a 99% confidence level for its VaR test.³⁰¹ Many regulatory schemes that use VaR require a 99% confidence level, which can be expected to result in higher estimates of absolute losses than a lower confidence interval.³⁰² As discussed above, the VaR test under the proposed rule's risk-based portfolio limit is designed to focus on the relationship between a fund's securities VaR and its full portfolio VaR, rather than to serve as an absolute measure of potential losses. Although the VaR test is not designed to provide an estimate of a fund's potential absolute losses, we believe that a 99% confidence interval would be more appropriate, as compared to a lower confidence interval, because a higher confidence level would provide a stronger indication that a fund's derivatives use, in aggregate, can be expected to have a risk-mitigating effect on the fund's exposure to market risk on the days on which the fund's securities portfolio would be expected to incur the greatest losses.

The proposed rule also would require a fund to calculate VaR using a time horizon of at least 10 trading days but not more than 20 trading days.³⁰³ We understand that when VaR is used for risk management purposes, the time horizon that is selected by the user typically reflects the expected holding period for an instrument (or portfolio of instruments).³⁰⁴ The holding period, in turn, may depend on factors such as the liquidity of an instrument and the purpose for which it is held, which may vary across different types of instruments in a portfolio.³⁰⁵ When VaR

"[t]hree to five years of historical data are typical." See also Darryll Hendricks, *Evaluation of Value-at-Risk Models Using Historical Data*, FRBNY Econ. Policy Rev. (Apr. 1996), at 44 (finding that, when using historical VaR, "[e]xtreme [confidence interval] percentiles such as the 95th and particularly the 99th are very difficult to estimate accurately with small samples" and that the complete dependence of historical VaR models on historical observation data "to estimate these percentiles directly is one rationale for using long observation periods.").

³⁰¹ Proposed rule 18f-4(c)(11)(ii)(B).

³⁰² For example, UCITS funds that use the relative VaR or absolute VaR approach are required to calculate the fund's VaR using a 99% confidence interval. See CESR Global Guidelines, *supra* note 162, at 26 (requiring funds that use the relative VaR or absolute VaR approach to calculate VaR using a "one-tailed confidence interval of 99%"). As noted in section III.B.2.a above and in section IV.E below, the VaR test under the risk-based portfolio limit is similar in certain respect to the relative VaR approach for UCITS funds.

³⁰³ Proposed rule 18f-4(c)(11)(ii)(B).

³⁰⁴ See, e.g., *infra* at discussion accompanying notes 295–296.

³⁰⁵ See, e.g., Bank for International Settlements, Basel Committee on Banking Supervision, *Messages*
Continued

²⁹² Monte Carlo simulation uses a random number generator to produce a large number (often tens of thousands) of hypothetical changes in market values that simulate changes in market factors. These outputs are then used to construct a distribution of hypothetical profits and losses on the fund's current portfolio, from which the resulting VaR is ascertained by looking at the largest (100 minus the confidence level) percent of losses in the resulting distribution. See, e.g., Dowd, *supra* note 255, at 221; Linsmeier & Pearson, *supra* note 291, at 53–56 (discussing the "delta-normal approach," a form of parametric method).

²⁹³ Parametric methods to calculating VaR rely on estimates of key parameters (such as the mean returns, standard deviations of returns, and correlations among the returns of the instruments in a fund's portfolio) to create a hypothetical statistical distribution of returns for a fund, and use statistical methods to calculate VaR at a given confidence level. See, e.g., Dowd, *supra* note 255, at 37; Linsmeier & Pearson, *supra* note 291, at 56–57.

²⁹⁴ For example, some parametric methodologies may be more likely to yield misleading VaR estimates for assets or portfolios that exhibit non-linear returns, due, for example, to the presence of options or instruments that have embedded optionality (such as callable or convertible bonds). See, e.g., Linsmeier & Pearson, *supra* note 291, at 57 (noting that historical and Monte Carlo simulation "work well regardless of the presence of options and option-like instruments in the portfolio. In contrast, the standard [parametric] delta-normal method works well for instruments and portfolios with little option content but not as well as the two simulation methods when options and option-like instruments are significant in the portfolio.").

²⁹⁵ Proposed rule 18f-4(a)(3)(i)(D).

is used for regulatory purposes, however, the applicable regulation typically specifies a time horizon or range of permissible time horizons (even in cases where the regulated entity may hold instruments or a portfolio having a longer or shorter expected holding period), in order to promote consistency across regulated entities and use a time horizon for the VaR calculation is appropriate in light of the underlying regulatory purpose.³⁰⁶ In light of this, we considered the factors discussed below in determining to propose a 10- to 20-day time horizon for a fund's VaR model under the proposed rule.

First, we understand that very short time horizons (e.g., one day) can be less effective at capturing the effects of fluctuations in risk factors on VaR, particularly with respect to out-of-the-money options (or implicit options, for securities and other investments that contain option-like features). At the same time, we understand that, while VaR estimates of potential losses typically increase as the time horizon increases over short- to medium-term periods, over longer periods VaR estimates of potential losses may eventually decrease.³⁰⁷ Thus, we considered that if the proposed rule did not specify a time horizon or range of acceptable time horizons, some funds that rely on the risk-based portfolio limit could select a time horizon for their VaR model that is either too short or too long and thereby underestimate potential losses, as reflected in the VaR test. In light of these concerns, we believe it would be appropriate for the proposed rule to place some limitations on a fund's ability to use shorter or longer time horizons that could produce less reliable VaR estimates, while also providing some flexibility for a fund to select a time horizon that is appropriate

from the *Academic Literature on Risk Measurement for the Trading Book*, Working Paper No. 19 (Jan. 31, 2011) ("Basel Risk Measurement Working Paper") (noting, based on a survey of academic literature on VaR-based approaches to risk management, that "[t]here seems to be consensus among academics and the industry that the appropriate horizon for VaR should depend on the characteristics of the position").

³⁰⁶ The underlying regulatory purpose could include, for example, limiting the amount of market risk that could be incurred by an investment vehicle and thus mitigating the risk of potential losses that investors would bear, or establishing capital requirements. See *infra* at notes 310–311 and accompanying text.

³⁰⁷ See, e.g., Dowd, *supra* note 255, at 73–74 (showing how parametric VaR can initially result in increasing estimates of loss as the time horizon increases, but that estimates of loss can decrease over longer time horizons). Estimated VaR losses over longer time horizons can also be affected by the tendency of volatility to be mean-reverting over time. See generally Stephen Figlewski, Estimation Error in the Assessment of Financial Risk Exposure (2003).

based on the fund's particular characteristics.³⁰⁸

Second, we considered that the VaR test is designed to provide an indication, through a fund's comparison of its securities VaR to its full portfolio VaR, that the fund's derivatives transactions, in aggregate, have the effect of reducing the fund's exposure to market risk. This means that the VaR test requires a portfolio-level calculation, and for such purposes the fund would need to select a single time horizon, even if the fund expected to hold different instruments in its portfolio for different lengths of time.³⁰⁹ A consequence of this is that even if a fund uses VaR for internal risk-management purposes and applies different time horizons to different types of instruments for such purposes, the fund nevertheless would need to select a single holding period for purposes of the VaR test.

Third, we considered the time horizons in other regulatory regimes that use VaR. In this regard, we noted that the most commonly used time horizons appear to be either 10 days or 20 days. For example, the 1996 Market Risk Amendment to the Basel II Capital Accord, which contemplated banks' use of internal models for measuring market risk, incorporated a 10-day time horizon.³¹⁰ For UCITS funds that rely on the relative VaR or absolute VaR approach, the CESR Global Exposure Guidelines specify a 20-day time horizon.³¹¹ A consequence of the use of 10- and 20-day time horizons under these regimes is that we believe that these time horizons are widely used by

³⁰⁸ Thus, for example, a fund that invests a greater proportion of its assets in liquid instruments and trades frequently might choose a 10-day holding period, while a fund that invests in less liquid instruments or trades less frequently might choose a longer holding period (but not longer than 20 days).

³⁰⁹ While a fund could in theory model different instruments using different VaR time horizons, it is not clear that a fund would be able to incorporate different time horizons into a portfolio-wide VaR test. See, e.g., Basel Risk Measurement Working Paper, *supra* note 305 (noting, based on a survey of academic literature on VaR-based approaches to risk management, that "[a]t present, there is no widely accepted approach for aggregating VaR measures based on different horizons").

³¹⁰ See BCBS Trading Book Review—Oct. 2013, *supra* note 272. The BCBS has implemented and continues to develop new standards which, among other things, would call for five different "liquidity horizon categories" for broad categories of risk factors, ranging from 10 days to one year. As noted above, however, the VaR test under the proposed rule effectively requires a fund to select a single time horizon. See *supra* note 272 and accompanying text.

³¹¹ See CESR Global Guidelines, *supra* note 162, at 26 (requiring funds that use the relative VaR or absolute VaR approach to calculate VaR using a "holding period equivalent to 1 month (20 business days)"). See also *infra* section IV.E.

funds and other financial market participants.

In light of these considerations, including balancing concerns about a time horizon potentially being too long or too short with the benefit of providing some level of flexibility for funds to select a time horizon in light of their particular characteristics, we believe the proposed rule's requirement that the time horizon for the VaR model used by a fund that complies with the risk-based portfolio limit is appropriate.

Finally, regardless of which VaR model the fund chooses, the fund must apply its VaR model consistently when calculating the fund's securities VaR and the fund's full portfolio VaR. This requirement is designed to prevent a fund from using different models to manipulate the results of the VaR test—for example, by overestimating the fund's securities VaR using one VaR model and underestimating its full portfolio VaR using a different model in order to take on riskier derivatives positions. In addition, because the VaR test would be used to focus on the relationship between the fund's securities VaR and its full portfolio VaR as discussed above, requiring the fund to use the same VaR model for purposes of the VaR test would help to ensure that the test generates comparable estimates of the fund's securities VaR and full portfolio VaR.

We request comment on the proposed rule's minimum requirements concerning the VaR model used by the fund.

- Do funds today use VaR models for risk management purposes or otherwise that would meet the proposed rule's minimum requirements? If funds use VaR models that would not meet these requirements, how do they differ?

- Should the proposed rule specify a particular VaR model(s) that funds must use (i.e., a historical simulation, Monte Carlo simulation, or parametric methodology)? If so, which methodology (or methodologies) and why?

- A fund would only be permitted to use a historical VaR methodology if at least three years of historical data is available. Do commenters agree that this is an appropriate requirement? Would requiring three years of historical data make it difficult to model some instruments? Should we require that a fund have additional historical return data in order to use a historical VaR methodology? Conversely, would less than three years of historical return data be sufficient?

- The proposed rule would require that the VaR model used by the fund (whether based on the historical

simulation, Monte Carlo simulation, or parametric method) incorporate all significant, identifiable market risk factors associated with a fund's investments. Do commenters agree that this is an appropriate standard? Is it sufficiently clear?

- The proposed rule would provide a non-exclusive list of risk factors that may be relevant in light of a fund's strategy and investments, including equity price risk, interest rate risk, credit spread risk, foreign currency risk and commodity price risk, all material risks arising from the nonlinear price characteristics of options, and positions with embedded optionality, and the sensitivity of the market value of the fund's derivatives to changes in volatility or other material market risk factors. Do commenters agree that these are appropriate risk factors? Are there others we should include? Rather than include a non-exclusive list of risk factors that funds must consider, should we specify in any final rule the particular risk factors that must be included in specified circumstances? Would it be possible to do so in a way that would address the diversity of funds and their strategies?

- The proposed rule would require a fund to use a 99% confidence level for its VaR test. Do commenters agree that this is an appropriate confidence level? In particular, should we permit funds to use a lower confidence interval? Why or why not?

- The proposed rule would require a fund to calculate VaR using a time horizon of at least 10 trading days, but not more than 20 trading days. Do commenters agree that it is appropriate to provide a range of trading days, to give funds some flexibility in selecting a time horizon based on the fund's own particular characteristics? Do commenters agree that a range of 10 to 20 trading days would be appropriate? Should the number of trading days be lower than 10, or higher than 20? Should the number of trading days be a specific number, instead of a range? Why or why not? If so, which specific number would be appropriate? Should we, for example, specify 10 or 20 trading days?

- Regardless of which VaR model the fund chooses, the proposed rule would require the fund to apply its VaR model consistently when calculating the fund's securities VaR and the fund's full portfolio VaR. Do commenters agree that this requirement is appropriate? If not, how could we otherwise prevent the VaR test from being easily manipulated?

- We believe that the proposed rule affords appropriate flexibility for funds to tailor the VaR test in light of a fund's

strategy, investments and other relevant factors. Does this flexibility increase the risk that funds will be able to game or manipulate the test in order to obtain riskier investment exposures? If so, should the rule impose more specific requirements on a fund's VaR model or its parameters, and how?

- Should the proposed rule place restrictions on a fund's ability to change its VaR model? For example, should changes be permitted only with the approval of the fund's derivatives risk manager, or subject to other approval or oversight requirements?

c. 300 Percent Exposure Limit Under the Risk-Based Portfolio Limitation

A fund that relies on the risk-based portfolio limit would be required to limit its exposure to not more than 300% of the fund's net assets, rather than 150% (as would be required under the exposure-based portfolio limit). While we believe that the VaR test generally would indicate that the fund's derivatives transactions do not, in the aggregate, result in an increase in the speculative character of the fund as discussed above, we also believe it is appropriate for the risk-based portfolio limit to include an outside limit on exposure as discussed in this section.

If the risk-based portfolio limit did not include an outside limit on exposure, a fund might be able to use strategies that may not produce significant measurable amounts of VaR during normal market periods, but which employ derivatives exposures at a level that could subject a fund to a significant speculative risk of loss if markets become stressed. For example, some funds use strategies that entail large long and short notional exposures, with the expectation that the risk of the fund's long positions is largely offset by the fund's short positions during normal market conditions, and this may result in the fund having a low full portfolio VaR. During periods of market stress, however, correlations across different positions may break down, leading to the possibility of significant losses and payment obligations with respect to the fund's derivatives transactions.³¹²

Although a fund pursuing such a strategy might be considered hedged or balanced, we believe that its activities may be speculative—and that its use of derivatives could implicate the undue speculation concern expressed in section 1(b)(7) of the Act—if the fund's derivatives exposures are very large in comparison to the fund's net assets. In these circumstances the fund's use of

derivatives could create an amount of leverage—and a resulting potential for large losses and payment obligations under derivatives—that we believe under some circumstances or market conditions could “increase unduly the speculative character” of the fund's securities issued to common shareholders. Coupling the VaR test with a 300% exposure limit, instead of permitting such a fund to obtain unlimited exposures, is designed to address these considerations by placing an outside limit on the fund's exposure that is not based on a VaR or other risk-based assessment.

We believe that the proposed rule's outside exposure limit of 300% is important to address possible concerns regarding the effectiveness of the VaR test in all possible circumstances and market conditions while also preserving the utility of the risk-based portfolio limit for funds that use derivatives, in aggregate, to result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives. In determining to propose a 300% exposure limit as part of the risk-based portfolio limit we considered, as discussed above in connection with the exposure-based portfolio limit, that the vast majority of funds would be able to comply with a 150% exposure limit without modifying their portfolios. In considering the extent to which the risk-based portfolio limit should permit a fund to obtain additional exposure, in light of the derivatives' aggregate reduction in the fund's exposure to market risk, we also considered the extent to which funds included in the DERA sample with exposures exceeding 150% of net assets would appear to be able to satisfy the VaR test (including by modifying their portfolios to a certain extent in order to do so). Although the information disclosed by the sampled funds and otherwise available to our staff was not sufficient to allow our staff to calculate the funds' securities VaRs and full portfolio VaRs,³¹³ the available information about the funds does provide an indication of whether the funds reasonably could be expected to comply with the VaR test.

As discussed above, most of the funds included in the analysis conducted by DERA staff with the highest exposures were alternative strategy funds, with

³¹² See, e.g., *supra* note 128 and accompanying discussion.

³¹³ While we have proposed in the Investment Company Reporting Modernization Release to obtain additional information regarding derivatives transactions on proposed Form N-PORT, we do not currently have sufficient information in a structured format to evaluate derivatives holdings in the DERA sample of funds discussed in the White Paper to estimate those funds' securities VaRs and full portfolio VaRs.

approximately 27% of these funds having exposures in excess of 150% of net assets, with the funds' exposures ranging up to approximately 950% of net assets. The funds with the highest exposures were managed futures funds—as noted above, three of the four funds in DERA's sample with exposures exceeding 500% of net assets were managed futures funds with exposures ranging from a little over 500% to approximately 950% of net assets. Managed futures funds, and other funds that use derivatives primarily to obtain market exposure (rather than to reduce the fund's exposure to market risk) and whose physical holdings consist mainly of cash and cash equivalents, would not satisfy the VaR test.³¹⁴

Alternative strategy funds with exposures exceeding 150% that potentially could choose to use derivatives in a manner that would satisfy the VaR test had lower exposures. Funds in this group with lower exposures included those with unconstrained bond and multi-alternative strategies; the exposures of funds within these strategies that were in excess of 150% ranged from around 175% to just under 350% of net assets. These funds, and particularly unconstrained bond funds, may have securities investments that involve market risks that could be reduced by derivatives transactions, and thus could consider electing to comply with the risk-based portfolio limit (including by modifying their portfolios to a certain extent in order to do so). We believe that including a 300% exposure limit as part of the risk-based portfolio limit thus would appear to provide a limit that may be appropriate for the kinds of funds that could seek to operate under the risk-based portfolio limit. We note that the 300% exposure limit is only expected to serve as an adjunct limitation on a fund given the primary importance of the VaR test with respect to the risk-based portfolio limit. While we are seeking comment regarding the sufficiency of this exposure limit, we note that setting the exposure limit higher than 300% of net assets—in addition to potentially raising concerns about a fund operating with exposures at that level—would not appear to further the purposes of the risk-based

³¹⁴ A fund that holds only cash and cash equivalents and derivatives would not be able to satisfy the VaR test. In this case the fund's securities VaR would reflect the VaR of the cash and cash equivalents, and thus would be very low. The fund's derivatives, in aggregate, generally would add to, rather than reduce, the fund's exposure to market risk and thus generally would not result in a full portfolio VaR that is lower than the fund's securities VaR, as required under the VaR test.

portfolio limit. This is because funds in the DERA sample that have exposures substantially in excess of 300% of net assets would not appear to be able to satisfy the VaR test in any event, as discussed above. Accordingly, we believe that the 300% exposure limit is appropriate as a meaningfully higher limit than the 150% portfolio limit while providing an upper bound that does not appear to unduly constrain funds that may use derivatives on balance for risk-mitigating purposes.

We believe, based on these considerations and those discussed above in section III.B.1, that the proposed rule's outside exposure limit of 300% would address the concerns that led us to propose an exposure limit as part of the risk-based portfolio limit, while also preserving the utility of the risk-based portfolio limit for funds that use derivatives, in aggregate, to result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives.

We request comment on all aspects of the proposed risk-based portfolio limitation's inclusion of an outside limit of 300% of net assets.

- Do commenters agree that an outside limit on exposure can mitigate the concerns we discuss above concerning fund's use of strategies that could be considered hedged or balanced but that might experience speculative losses under certain circumstances? Why or why not? Are there other means to address these concerns that we should consider either in addition to or in lieu of an outside limit on the fund's exposure?

- Do commenters agree that the proposed 300% outer limit on exposure is appropriate? Do commenters agree that a 300% exposure limit would address the concerns we discuss above while also preserving the utility of the risk-based portfolio limit for funds that use derivatives, in aggregate, to result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives? Should we make it higher or lower, for example 250% or 350%, and how would a different limit address the concerns we discuss above?

3. Implementation and Operation of Portfolio Limitations

The proposed rule would require, to the extent that a fund elects to rely on the rule, the fund's board of directors, including a majority of the directors who are not interested persons of the fund, to approve which of the two alternative portfolio limitations will apply to the fund.³¹⁵ We believe that

³¹⁵ Proposed rule 18f-4(a)(5)(i).

requiring a fund's board, including a majority of the fund's independent directors, to approve the fund's portfolio limitation would appropriately focus the board's attention on the nature and extent of a fund's use of derivatives and other senior securities transactions as part of its investment strategy. We believe that requiring the fund's board to approve a fund's portfolio limitation would be an appropriate role for the board.³¹⁶

A fund relying on the rule would be required to comply with the applicable portfolio limitation after entering into any senior securities transaction, that is, any derivatives transaction or financial commitment transaction entered into by the fund pursuant to the proposed rule, or any other senior security transaction entered into by the fund pursuant to section 18 or 61 of the Act.³¹⁷ A fund therefore would not be required to terminate or otherwise unwind a senior securities transaction solely because the fund's exposure subsequently increased beyond the exposure limits included in either of the portfolio limitations. The fund, however, would not be permitted to enter into any additional senior securities transactions while relying on the exemption provided by the rule unless the fund would be in compliance with the applicable portfolio limitation immediately after entering into the transaction. This aspect of the proposed rule is designed to prevent a fund from having to unwind or terminate a senior securities transaction that the fund was permitted to enter into under the proposed rule at a later time when terminating or unwinding the transactions may be disadvantageous to the fund.³¹⁸ The Act and our rules

³¹⁶ Other exemptive rules under the Act similarly require the fund's board to take certain actions in order for the fund to rely on the exemption provided by the rule. *See, e.g.*, rules 18f-3, 17a-7, 10f-3, and 2a-7.

³¹⁷ Proposed rule 18f-4(a)(1)(i) and (ii).

³¹⁸ We similarly proposed an acquisition test (in contrast to a maintenance test) in proposed rule 22e-4, under which a fund would not be permitted to acquire any less liquid asset if, immediately after the acquisition, the fund would have invested less than its three-day liquid asset minimum in three-day liquid assets. Proposed rule 22e-4(b)(2)(iv)(C). In the Liquidity Release we noted that forced sales required under a maintenance test could require the fund to sell the less liquid assets at prices that incorporate a significant discount to the assets' stated value, or even at fire sale prices; we also noted that, if a fund needed to rebalance its portfolio frequently to maintain a specified percentage of the fund's net assets invested in three-day liquid assets, this could produce unnecessary transaction costs adversely affecting the fund's NAV, and could cause a fund to sell portfolio assets when it is not advantageous to do so (*e.g.*, when an asset's price is low, or when sales of an asset would have an undesirable tax impact). *See* Liquidity Release, *supra* note 5, at text accompanying nn.344-48. We similarly believe that requiring a

similarly measure compliance with certain portfolio limitations immediately after a fund acquires a security.³¹⁹ However, if a fund's exposure exceeded the applicable exposure limit and the fund entered into a new senior securities transaction, including a new senior securities transaction that was intended to reduce the fund's exposure, the fund would be required to reduce its exposure so that in the aggregate, its exposure was in compliance with the exposure limit.³²⁰

We request comment on all aspects of the operation of the proposed portfolio limitations.

- Does requiring a fund to comply with the proposed rule's portfolio limitations immediately after entering into any senior securities transaction pose any operational challenges, for example, in determining the notional amount of the transaction, the fund's net assets, or the fund's securities VaR or full portfolio VaR (if applicable)?

- The proposed rule would not require a fund to terminate a derivatives transaction if the fund complied with the applicable portfolio limitation immediately after entering into the transaction, even if, for example, the fund's net assets later declined with the result that the fund's exposure at that later time exceeded the relevant exposure limit. Do commenters agree

fund to unwind or otherwise terminate derivatives transactions as a result of subsequent changes in the fund's net assets could have adverse consequences for the fund.

³¹⁹ This acquisition test (in contrast to a maintenance test) reflects approaches that Congress and the Commission have historically taken in other parts of the Investment Company Act and the rules thereunder. See, e.g., Investment Company Act section 5(c) (a registered diversified company that at the time of its qualification meets the diversification requirements specified in Investment Company Act section 5(b)(1) shall not lose its status as a diversified company because of any subsequent discrepancy between the value of its various investments and the requirements of section 5(b)(1), so long as any such discrepancy existing immediately after its acquisition of any security or other property is neither wholly nor partly the result of such acquisition); rule 2a-7(d)(3) (portfolio diversification requirements of rule 2a-7 are determined at the time of portfolio securities' acquisition); rule 2a-7(d)(i) (limit on a money market fund's acquisition of illiquid securities if, immediately after the acquisition, the money market fund would have invested more than 5% of its total assets in illiquid securities); rule 2a-7(d)(4)(ii) and (iii) (minimum daily liquidity requirement and minimum weekly liquidity requirement of rule 2a-7 are determined at the time of portfolio securities' acquisition).

³²⁰ For example, suppose that a fund's exposure was initially 140% but subsequently increased to 160% solely due to losses in the value of the fund's securities portfolio. The fund would not be required to unwind its senior securities transactions in order to bring its exposure below 150%. However, if the fund entered into any new senior securities transaction then, immediately after entering into such transaction, the fund would be required to be in compliance with the 150% exposure limit.

that this is appropriate? Conversely, should we instead require a maintenance test for notional amounts such that funds would be required to adjust their derivatives transactions if the exposure exceeds 150% of net assets for longer than a certain period of time, even if the fund has not entered into any senior securities transactions? If so, should we consider including a cushion amount—for example, by only requiring a fund to adjust its positions if its exposure reaches a higher level, such as 175%? Should we limit the time period (e.g., to 30 days, 60 days, or 90 days) in which an exposure could exceed 150% of net assets (or 300% under the risk-based portfolio limit) as a result of changes in the fund's net assets so that a fund cannot persistently exceed the rule's exposure limits? Would such an approach better promote investor protection? Would there be operational challenges with this requirement?

- If a fund's exposure were to exceed the applicable exposure limit, should the proposed rule permit the fund to engage in a series of derivatives transactions where those transactions ultimately would reduce the fund's exposure below the applicable exposure limit, even if the fund's exposure were not below the applicable limit immediately after entering into certain of these transactions, in order to make it easier for funds to reduce their exposure under multiple derivatives transactions on a *pro rata* basis? If so, how would we permit these kinds of transactions without providing a means for funds to maintain exposure levels in excess of the applicable exposure limit for long periods of time? Should we, for example, permit funds to engage in a group of substantially contemporaneous derivatives transactions where the fund's exposure is below 150% immediately after entering into the group of transactions? Should we permit a fund to engage in derivatives transactions that reduce the fund's exposure, even if the reduced exposure still exceeds the applicable exposure limit? Could funds use such a provision to maintain exposure amounts in excess of the rule's limits for long periods of time? Could we address that concern by, for example, permitting a fund to engage in these exposure-reducing derivatives transactions provided that the fund brings its exposure below the applicable limit within a specified period of time, like thirty days?

C. Asset Segregation Requirements for Derivatives Transactions

In addition to requiring funds to comply with one of two alternative portfolio limitations designed to impose

a limit on the amount of leverage a fund could obtain through derivatives transactions and other senior securities transactions as described in section III.B.1.c above, the proposed rule would require a fund that enters into derivatives transactions in reliance on the rule to manage the risks associated with its derivatives transactions by maintaining an amount of certain assets (defined in the proposed rule as "qualifying coverage assets") designed to enable the fund to meet its obligations arising from such transactions.³²¹ This requirement is designed to address the asset sufficiency concern reflected in section 1(b)(8) of the Act.³²² In addition, the asset segregation requirement in the proposed rule would help to address the undue speculation concern reflected in section 1(b)(7) of the Act to the extent that funds limit their derivatives usage in order to comply with the asset segregation requirements.³²³

To rely on the proposed rule, a fund would be required to manage the risks associated with its derivatives transactions by maintaining a certain amount of qualifying coverage assets for each derivatives transaction, determined pursuant to policies and procedures approved by the fund's board of directors.³²⁴ For each derivatives transaction, a fund would be required to maintain qualifying coverage assets with a value equal to the amount that would be payable by the fund if the fund were to exit the derivatives transaction as of the time of determination and an

³²¹ Proposed rule 18f-4(a)(2), (c)(6), (c)(8), (c)(9).

³²² See section 1(b)(8) of the Investment Company Act. The asset segregation requirements in the proposed rule also are based in part on the considerations that informed our guidance in Release 10666 that maintaining assets in the segregated account would help "assure the availability of adequate funds to meet the obligations" arising from the trading practices described in that release. See Release 10666, *supra* note 20, at n.8.

³²³ See section 1(b)(7) of the Investment Company Act. Under the proposed rule, a fund would be required to maintain a certain amount of qualifying coverage assets—which generally would be required to be cash and cash equivalents—with respect to its derivatives transactions. A fund could determine not to enter into derivatives transactions that would otherwise be permitted under the proposed rule's exposure limits in order to avoid having to maintain qualifying coverage assets for the transactions. In addition, under certain circumstances, the asset segregation requirements could limit a fund's ability to enter into a derivatives transaction that would otherwise be permitted under the proposed rule's exposure limits because the fund does not have and is unable to acquire sufficient qualifying coverage assets to comply with the proposed rule. The proposed rule also would address concerns about leverage directly, though the proposed rule's portfolio limitations discussed in section V.B.1.

³²⁴ See proposed rule 18f-4(a)(2), (a)(5)(ii), (c)(6), (c)(8), (c)(9).

additional amount that represents a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions.³²⁵

Qualifying coverage assets for derivatives transactions would need to be identified on the books and records of the fund at least once each business day.³²⁶ With certain exceptions, the proposed rule would define qualifying coverage assets for derivatives transactions to mean cash and cash equivalents because, as further described below, these assets are extremely liquid and may be less likely to experience volatility in price or decline in value in times of stress than other types of assets.³²⁷ The proposed rule, by requiring a fund to hold a sufficient amount of these types of assets, is designed to enable the fund to meet its obligations under its derivatives transactions.³²⁸

The proposed rule's approach to asset segregation is designed to provide a flexible framework that would allow funds to apply the requirements of the proposed rule to particular derivatives transactions used by funds at this time as well as those that may be developed in the future as financial instruments and investment strategies change over time. As discussed in more detail below, the proposed rule's approach to asset segregation is designed to provide this flexibility by requiring funds to determine the amount of qualifying

³²⁵ Proposed rule 18f-4(a)(2), (c)(6), (c)(8), (c)(9).

³²⁶ Proposed rule 18f-4(a)(2).

³²⁷ See proposed rule 18f-4(c)(8); *infra* note 369 and accompanying text. The exceptions to the requirement to maintain cash and cash equivalents, discussed below, are for derivatives transactions under which a fund may satisfy its obligation by delivering a particular asset, in which case that particular asset would be a qualifying coverage asset. See proposed rule 18f-4(c)(8).

³²⁸ We note that, pursuant to proposed rule 22e-4, funds subject to that rule would be required to consider, in assessing the liquidity of a position in a particular portfolio asset, whether the fund invests in the asset because it is connected with an investment in another portfolio asset. See proposed rule 22e-4(b)(2)(ii)(I). As explained in more detail in the Liquidity Release, assets segregated to cover derivatives and other transactions would be classified, for purposes of rule 22e-4, using the liquidity of the transaction they are covering because such assets would only be available for sale to meet fund redemptions once the related transaction is disposed of or unwound. See Liquidity Release, *supra* note 5, at section III.B.2. Thus, for purposes of proposed rule 22e-4, the liquidity of qualifying coverage assets segregated pursuant to proposed rule 18f-4 to cover derivatives transactions would be classified using the liquidity of the corresponding derivatives transactions. Similarly, the liquidity of qualifying coverage assets segregated pursuant to proposed rule 18f-4 to cover a financial commitment transaction would be classified using the liquidity of the corresponding financial commitment transaction.

coverage assets in a way that can be applied by funds to various types of transactions and by permitting these amounts to be determined in accordance with board-approved policies and procedures. The proposed rule's approach to asset segregation also is consistent with the views expressed by many commenters on the Concept Release, as discussed below.³²⁹

We believe that requiring the fund's board to approve the policies and procedures for asset segregation, including a majority of the fund's independent directors, appropriately would focus the board's attention on the fund's management of its obligations under derivatives transactions and the fund's use of the exemption provided by the proposed rule. We believe that requiring the fund's board to approve these policies and procedures, in conjunction with the board's oversight of the fund's investment adviser more generally, would be an appropriate role for the board.³³⁰

1. Coverage Amount for Derivatives Transactions

Under the proposed rule, a fund would be required to manage the risks associated with its derivatives transactions by maintaining qualifying coverage assets for each derivatives transaction in an amount equal to the sum of (1) the amount that would be payable by the fund if the fund were to exit the derivatives transaction at the time of determination (the "mark-to-market coverage amount"), and (2) a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions (the "risk-based coverage amount").³³¹ The proposed rule's asset coverage requirements reflect that, although a fund will be able to determine its current mark-to-market payable under a derivatives transaction on a daily basis, the fund's investment in the derivatives transaction can involve future losses, and thus potential payments by the fund to counterparties, that will depend on future changes related to the derivative's reference asset or metric.

The proposed rule's asset coverage requirements for derivatives transactions also are consistent in many respects with the approach suggested by many commenters to the Concept

³²⁹ See *infra* note 332.

³³⁰ Other exemptive rules under the Act similarly require the fund's board to take certain actions in order for the fund to rely on the exemption provided by the rule. See, e.g., rules 18f-3, 17a-7, 10f-3, and 2a-7.

³³¹ Proposed rule 18f-4(a)(2), (c)(6), (c)(9).

Release.³³² These commenters suggested that, for derivatives transactions, a fund should segregate its daily mark-to-market liability as well as an additional amount, sometimes referred to as a "cushion" by commenters, designed to address future potential losses.

a. Mark-to-Market Coverage Amount

Under the proposed rule, the "mark-to-market coverage amount" for a particular derivatives transaction, at any time of determination, would be equal to the amount that would be payable by the fund if the fund were to exit the derivatives transaction at such time.³³³ We expect that the mark-to-market coverage amount generally would be consistent with a fund's valuation of a derivatives transaction because the amount of a fund's mark-to-market coverage amount would generally correspond to the amount of the fund's

³³² See, e.g., ICI Concept Release Comment Letter, at 11 ("The optimal amount of cover for many instruments may be somewhere in between full notional and mark to market amounts. It should be an amount expected to cover the potential loss to the fund, determined with a reasonably high degree of certainty. This amount—mark-to-market plus a 'cushion'—is more akin to the way portfolio officers and risk managers assess the portfolio risks created through the use of derivatives."); SIFMA Concept Release Comment Letter, at 4 ("... the AMG recommends that the Commission formulate a standard for asset segregation that would be calculated as the sum of (i) the current mark-to-market value of the derivative (representing the indebtedness on the instrument), plus (ii) a 'cushion' amount that would reflect potential future indebtedness); Comment Letter of AlphaSimplex Group, LLC on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("AlphaSimplex Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-41.pdf>, at 5 ("So long as the derivative in question has daily liquidity and daily margin calls . . . a fund may segregate assets equal to the sum of the daily marked-to-market obligation of the fund plus an allowance for some daily price move that could increase the fund's outstanding obligations . . ."); BlackRock Concept Release Comment Letter, at 5 ("Under a principles-based approach, the amount that would need to be segregated is the net payment amount to which the fund is potentially exposed under plausible scenarios, plus a risk premium."); Vanguard Concept Release Comment Letter, at 7 ("In our view, a fund's potential future exposure is the market value of the derivative (calculated daily) plus an additional amount that takes into account the derivative's potential intra-day price changes based on its volatility during reasonably foreseeable market conditions.").

³³³ Proposed rule 18f-4(c)(6). In some cases the fund would not be required to make any payments if the fund were to exit the derivatives transaction, such as where the fund invested in a swap that appreciates in value and the fund determines that it would receive a payment if it were to exit the transaction at that time. In this case the mark-to-market coverage amount would be equal to zero, but the fund would still be required to consider the risk-based coverage amount for such transaction, as discussed below. The mark-to-market coverage amount should reflect any accrued but unpaid premiums or other similar periodic payments owed under the derivatives transaction, as these amounts would influence the amount the fund would pay if it were to exit the derivatives transaction.

liability with respect to the derivatives transaction.³³⁴ The proposed rule's requirement that the fund manage the risks associated with its derivatives transactions by maintaining qualifying coverage assets with a value equal to the fund's mark-to-market coverage amount thus is designed to require the fund to have assets sufficient to meet its obligations under the derivatives transaction, which may include margin or similar payments demanded by the fund's counterparty as a result of mark-to-market losses, or payments that the fund may make in order to exit the transaction. A fund would be required to calculate the mark-to-market coverage amount at least once each business day under the proposed rule in order to provide the fund with a reasonably current estimate of the amount that may be payable by the fund with respect to the derivatives transaction.³³⁵

For example, if a fund has a swap position that has moved against the fund (*i.e.*, decreased in value) as a result of a change in the market value of the underlying reference asset, the fund's mark-to-market coverage amount would generally be equal to the fund's liability with respect to the swap because that would be the amount payable by the fund if the fund were to exit the swap at that time. The mark-to-market coverage amount thus would reflect the amount that would be payable by the fund based on market values and conditions existing at the time of determination. We understand that in many cases funds can readily calculate such amounts because they are already calculating their liability under the derivatives transaction for purposes of

determining their net asset value, and that such mark-to-market amounts may reflect the amounts that would be payable by the fund at such time if the fund were to exit the derivatives transaction due to a default or pursuant to other actions by the fund, such as a negotiated agreement with the fund's counterparty, a transfer to another party, or a close out of the position through execution of an offsetting transaction.

As another example, if a fund has written an option, it will generally have received a premium payment that would represent the option's fair value at that time. The amount of the premium initially received by the fund for writing the option thus would represent the fund's mark-to-market coverage amount at the inception of the transaction because it would represent the amount that would be payable by the fund at that time if the fund were to exit the transaction (in this case, by purchasing an offsetting option).³³⁶ The fund generally would be able to satisfy the proposed rule's requirement to maintain qualifying coverage assets with a value equal to the fund's mark-to-market coverage amount at the inception of the trade by maintaining the premium it received for writing the option because the mark-to-market coverage amount, at that time, would generally equal the amount of such premium received. If the option moved against the fund, however, the amount that would be payable by the fund if the fund were to exit the transaction would increase, and this increased amount would represent the fund's mark-to-market coverage amount.

Under the proposed rule, if a fund has entered into a netting agreement that allows the fund to net its payment obligations with respect to multiple derivatives transactions, the mark-to-market coverage amount for all derivatives transactions covered by the netting agreement could be calculated on a net basis, to the extent such calculation is consistent with the terms of the netting agreement.³³⁷ This aspect

³³⁴ We believe that the mark-to-market coverage amount also would generally be consistent with the practices of funds that segregate the mark-to-market liability associated with a derivatives transaction. *See, e.g.*, Rafferty Concept Release Comment Letter, at 12 ("For example, because the swap transactions in which the Direxion Trusts engage are fully cash settled, the Direxion Trusts segregate: (1) The amount (if any) by which the swap is out of the money to the fund (*i.e.*, the estimated amount that the fund would be required to pay upon an early termination, hereinafter referred to as the "fund's out of the money amount"), marked-to-market daily, plus (2) the amount of any accrued but unpaid premiums or similar periodic payments, net of any accrued but unpaid periodic payment payable by the counterparty."); Loomis Concept Release Comment Letter (indicating that the mark-to-market value of the derivative contract covers "the amount of the unrealized gain or loss on the transaction").

³³⁵ Proposed rule 18f-4(a)(2). We expect that funds would calculate their mark-to-market coverage amount as part of their determination of their net asset value, for those funds that calculate their net asset value each day. In addition, although the proposed rule does not require a fund to calculate the mark-to-market coverage amount more than once each business day, a fund may determine to calculate this amount more frequently.

³³⁶ *See, e.g.*, Options Clearing Corporation, *Understanding Stock Options* (1994), available at <http://www.cboe.com/learncenter/pdf/understanding.pdf>, at 8 (noting that the holder or writer of an exchange-traded option "can close out his position at any time simply by making an offsetting, or closing, transaction" which "cancels out an investor's previous position as the holder or writer of the option").

³³⁷ Proposed rule 18f-4(c)(6)(i). Under the proposed rule, the total amount of a fund's qualifying coverage assets must equal at least the sum of the fund's aggregate mark-to-market coverage amounts and risk-based coverage amounts. Proposed rule 18f-4(a)(2). Thus, qualifying coverage assets could not be used to cover more than one derivatives transaction unless the transactions are subject to a netting agreement and the fund

of the proposed rule thus is designed so that the mark-to-market coverage amount more accurately reflects the fund's current net amounts payable with respect to the derivatives transactions covered by such netting agreements.³³⁸ The proposed rule would only allow a fund to net derivatives transactions for purposes of determining mark-to-market coverage if the fund has a netting agreement that allows the fund to net its payment obligations with respect to such transactions because, absent such an agreement, the fund generally would not have the right to net its payment obligations and could be required to tender the full amount payable under all of its derivatives transactions.

The proposed rule would also allow a fund to reduce the mark-to-market coverage amount for a derivatives transaction by the value of any assets that represent variation margin or collateral to cover the fund's mark-to-market loss with respect to the transaction.³³⁹ This aspect of the proposed rule would allow a fund to receive credit for assets that the fund posts to cover the fund's current obligations under the derivatives transaction, and which would be applied as security for, or to satisfy, those obligations under the derivatives transaction.³⁴⁰ For example, if a fund that has entered into an OTC swap and has delivered collateral equal to its mark-to-market loss on the OTC swap, the fund generally would not also be required to segregate qualifying coverage assets with respect to the swap's mark-to-market coverage amount, because the collateral delivered

calculates its coverage amounts with respect to such transactions on a net basis. In addition, qualifying coverage assets used to cover a derivatives transaction could not also be used to cover a financial commitment transaction. Proposed rule 18f-4(c)(8).

³³⁸ *See also* section III.D.

³³⁹ Proposed rule 18f-4(c)(6)(ii).

³⁴⁰ The custody of fund assets is regulated by section 17(f) of the Act and the rules thereunder. Section 17(f) generally requires a fund to place and maintain its securities and similar investments in the custody of a qualified custodian of the type specified in section 17(f) and the rules thereunder. When we refer in this Release to assets being "posted" or "delivered," as margin or collateral, we are referring to a fund's posting or delivering those assets in compliance with the requirements of section 17 and the rules thereunder. We understand, for example, that in order to comply with these requirements in respect of non-centrally cleared OTC derivatives, funds generally do not deliver collateral directly to their counterparties, but instead hold posted collateral in a custody account (maintained with the fund's bank custodian) that is administered pursuant to a tri-party control agreement among the fund, its custodian and its counterparty, under which the counterparty maintains a security interest in the collateral, but may only have access to the collateral in the event of a fund's default.

would equal the amount payable by the fund, based on market conditions, if the fund were to exit the transaction at that time. As another example, if a fund that has invested in a futures contract posts variation margin to settle its daily margin obligations under the futures contract, the fund would not be required to also segregate qualifying coverage assets under the proposed rule to cover this same mark-to-market amount under the proposed rule.³⁴¹

In order to reduce the mark-to-market coverage amount, the assets must represent variation margin or collateral to cover the mark-to-market exposure of the transaction. Thus, initial margin (sometimes referred to as an “independent amount” with respect to certain OTC derivatives transactions) would not reduce the fund’s mark-to-market coverage amount with respect to the derivatives transaction because initial margin represents a security guarantee to cover potential future amounts payable by the fund and is not used to settle or cover the fund’s mark-to-market exposure.³⁴² Initial margin amounts would not be expected to be available to satisfy the fund’s variation margin requirements under a derivatives contract absent a default by the fund—and thus the fund would need additional assets to cover these mark-to-market payments—notwithstanding that the fund had previously posted initial margin with respect to such derivatives transaction.³⁴³

We expect that funds will be readily able to determine their mark-to-market coverage amounts because they are already engaging in similar calculations on a daily basis. For example, as

³⁴¹ Depending on the rules of the applicable futures exchange and local law, a variation margin payment with respect to a futures transaction may be deemed to settle the fund’s liability for the daily mark-to-market loss on the futures transaction, and such a payment once made would also eliminate the fund’s liability under the futures transaction. A fund that paid variation margin to settle the full amount of its mark-to-market loss on a futures transaction would not, at that time, have to pay any additional amount if the fund were to exit the transaction. If, at the time the fund determines its mark-to-market coverage amount, the fund would be required to pay an additional amount in excess of variation margin to exit the futures transaction, then the fund would need to have qualifying coverage assets in respect of such additional amount in order to comply with the mark-to-market coverage requirement.

³⁴² If the fund has posted variation margin or collateral in excess of its current liability under the derivatives transaction, such excess amount would not under the proposed rule reduce the fund’s mark-to-market coverage amount for other derivatives transactions, except as otherwise permitted under a netting agreement as described above.

³⁴³ The proposed rule would, however, allow a fund to reduce a derivative’s risk-based coverage amount by the value of assets posted as initial margin, as discussed below.

described in more detail in section II.D.1 above, funds today are determining their current mark-to-market losses, if any, each business day with respect to the derivatives for which they currently segregate assets on a mark-to-market basis.³⁴⁴ Funds also already calculate their liability under derivatives transactions on a daily basis for various other purposes, including to satisfy variation margin requirements and to determine the fund’s NAV. Funds also calculate their liability under derivatives transactions on a periodic basis in order to provide financial statements to investors. We generally expect that funds would be able to use these calculations to determine their mark-to-market coverage amounts.

We request comment on all aspects of the proposed rule’s requirements concerning the mark-to-market coverage amount.

- Is the definition of “mark-to-market coverage amount” sufficiently clear? Are there any derivatives transactions for which the definition of mark-to-market coverage amount would not provide an appropriate calculation of the amounts payable by the fund if the fund were to exit the transaction? Are there types of derivatives transactions for which funds may not be able to determine a mark-to-market coverage amount at least once each business day as proposed?

- Although we have not incorporated accounting standards with respect to the determination of mark-to-market coverage amount in the proposed rule, the mark-to-market coverage amount generally would be consistent with a fund’s valuation of a derivatives transaction, as noted above. Should we instead define a fund’s mark-to-market coverage amount based on accounting standards? Should we, for example, define the term mark-to-market coverage amount to mean the amount of the fund’s liability under the derivatives transaction? Would this approach result in mark-to-market coverage amounts that would differ from mark-to-market coverage amounts determined as proposed? If so, how would they differ? If we were to define a fund’s mark-to-market coverage amount based on accounting standards, are there adjustments to these accounting standards that we should make for purposes of the proposed rule?

- The proposed rule would allow a fund to determine its net mark-to-market coverage amount for multiple derivatives transactions if a fund has entered into a netting agreement that

allows the fund to net its payment obligations for the transactions. Is this appropriate? Should we impose further limitations on a fund’s ability to net transactions, including, for example, prohibiting netting across asset classes or across different types of derivatives? Should we, in contrast, permit netting more extensively? Are there other situations in which funds today net their obligations with derivatives counterparties that would not be permitted under the proposed rule and for which funds believe netting would be appropriate? Should we include specific parameters in the rule regarding the enforceability of the agreement in a bankruptcy or similar proceeding?

- The proposed rule would allow a fund to reduce its mark-to-market coverage amount by the value of assets that represent variation margin or collateral. Is this appropriate? Should we instead restrict this provision to variation margin or collateral that meets certain minimum requirements (e.g., cash, cash equivalents, high-quality debt securities)? Should we permit the fund to reduce its mark-to-market coverage for initial margin?

- Should we permit a fund to reduce its mark-to-market coverage amount in circumstances not involving netting or posting of margin or collateral? Should we, for example, permit funds to reduce their mark-to-market coverage amount for a derivatives transaction to reflect gains in other transactions that the fund believes would mitigate such losses? If we were to permit a fund to reduce its mark-to-market coverage amount in these circumstances, what limitations should we impose to assure that a fund would have liquid assets to meet its obligations under a particular derivatives transaction if a counterparty were to default on its obligation to the fund or that transaction did not perform in a way that would mitigate such losses?

- As noted above, we believe that many funds will be readily able to determine their mark-to-market coverage amounts because they today are determining their liability, if any, each business day with respect to the derivatives for which they apply mark-to-market segregation or for other purposes. Should the mark-to-market coverage amount be determined more than once per day? Is once per day too frequent? Should we require funds to make this determination at the same time they determine their NAV? Should closed-end funds or BDCs or both be subject to different requirements? If we were to permit closed-end funds or BDCs or any other fund to determine

³⁴⁴ See *supra* section II.D.1.

their mark-to-market coverage amounts less frequently, what additional limitations, if any, should we impose to assure that the funds would have liquid assets to meet their obligations under derivatives transactions?

b. Risk-Based Coverage Amount

As discussed above, the mark-to-market coverage amount generally represents the amount that would be payable by the fund if the fund were to exit the derivatives transaction at such time. The fund's payment obligations under a derivatives transaction could vary significantly over time, however, potentially resulting in a significant gap between the mark-to-market coverage amount, if any, and the fund's future payment obligations under the derivatives transaction.³⁴⁵ The mark-to-market coverage amount, if any, may thus be substantially smaller than the potential amounts payable by the fund in the future under the derivatives transaction.³⁴⁶ We observed the argument in the Concept Release that segregating only the mark-to-market liability "may understate the risk of loss to the fund"³⁴⁷ and many commenters suggested that we require funds to segregate assets in addition to a derivative's mark-to-market liability.³⁴⁸

Because the fund's mark-to-market coverage amount for a derivatives transaction would not reflect the potential amounts payable by the fund in the future under the derivatives transaction, the proposed rule would require a fund to segregate an additional amount called the "risk-based coverage amount" that would represent a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions.³⁴⁹ A fund would be required to determine this amount at least once each business day, consistent with the timing applicable to the calculation of the mark-to-market coverage amount as described above, in order to provide the fund with a reasonably current estimate of the potential amounts payable under the derivatives transaction, based on the

current market values and conditions existing at the time the fund makes this determination.

This risk-based coverage requirement in the proposed rule is consistent with the views expressed by several commenters to the Concept Release that funds should segregate, not only their current liability under the contract, but also an additional amount meant to cover future losses.³⁵⁰ Several commenters recognized that a fund may be obligated to make future payments in excess of its current liabilities under a derivatives transaction.³⁵¹ For example, one commenter stated that funds should "segregate not just the mark-to-market value, but also an additional amount calculated using a measure of potential future losses."³⁵² Another commenter also noted that requiring funds to segregate a mark-to-market amount under the contract as well as an additional amount meant to cover future losses "is more akin to the way portfolio managers and risk officers assess the portfolio risks created through the use of derivatives."³⁵³

Under the proposed rule, the risk-based coverage amount for each derivatives transaction would be determined in accordance with policies and procedures approved by the fund's board of directors.³⁵⁴ By requiring funds to establish appropriate policies and procedures, rather than prescribing specific segregation amounts or methodologies, the proposed rule is designed to allow funds to assess and determine risk-based coverage amounts based on their specific derivatives transactions, investment strategies and associated risks. We expect that funds may be best situated to evaluate and determine the appropriate risk-based coverage amount for each of their derivatives transactions based on a careful assessment of their own particular facts and circumstances.

We believe an approach to asset segregation that is based, in part, on a fund's assessment of its own particular facts and circumstances would be more appropriate than a requirement to segregate only a fund's mark-to-market liability, on one hand, or the full notional amount, on the other. As we noted in the Concept Release, "both

notional amount and a mark-to-market amount have their limitations."³⁵⁵ A fund's segregation only of any mark-to-market liability, if any, may not effectively assure the fund will have sufficient assets to meet its obligations under the derivatives transaction for the reasons we discuss above in section II.D.1.c. A fund's segregation of the full notional amount for all of its derivatives transactions, in contrast, could in some cases require funds to hold more liquid assets than may be necessary to address the investor protection purposes and concerns underlying section 18 because the notional amount of a derivatives transaction does not necessarily equal, and often will exceed, the amount of cash or other assets that fund ultimately would likely be required to pay or deliver under the derivatives transaction. The proposed rule seeks to address these concerns, which also were shared by commenters on the Concept Release, by requiring a fund to segregate the mark-to-market and risk-based coverage amounts associated with its derivatives transactions.

Under the proposed rule, a fund's policies and procedures for determining the risk-based coverage amount for each derivatives transaction would be required to take into account, as relevant, the structure, terms and characteristics of the derivatives transaction and the underlying reference asset.³⁵⁶ The fund's risk-based coverage amount for a derivatives transaction, therefore, would be an amount determined in accordance with the fund's policies and procedures that takes into account these and any other relevant factors in determining a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions. This may include, for example, consideration of the fund's ability to terminate the trade or otherwise exit the position under stressed conditions, which could include an assessment of the derivative's terms and the fund's intended use of the derivative in connection with its investment strategy. We note that, if a fund has a derivatives transaction that is not traded or has an underlying reference asset that is not traded (or, in either case, is not traded on a regular basis) or the fund does not have the ability to terminate the transaction, then a fund's policies and procedures should consider whether the risk-based coverage amount should, in certain circumstances, be increased to reflect the full potential amount that

³⁴⁵ See, e.g., The Report of the Task Force on Investment Company Use of Derivatives and Leverage, Committee on Federal Regulation of Securities, ABA Section of Business Law (July 6, 2010) ("2010 ABA Derivatives Report"); SIFMA Concept Release Comment Letter.

³⁴⁶ Moreover, there may be no mark-to-market coverage amount if, as a result of the appreciation of a derivatives transaction, the fund would not be required to make a payment (but rather would receive a payment from its counterparty) if the fund were to exit the derivatives transaction at such time.

³⁴⁷ See Concept Release, *supra* note 3, at n.83.

³⁴⁸ See *supra* note 332.

³⁴⁹ Proposed rule 18f-4(a)(2), (c)(9).

³⁵⁰ See, e.g., ICI Concept Release Comment Letter, *supra* note 8; Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Nov. 23, 2011) (File No. S7-33-11).

³⁵¹ See SIFMA Concept Release Comment Letter; ICI Concept Release Comment Letter; Loomis Sayles Concept Release Comment Letter; BlackRock Concept Release Comment Letter.

³⁵² See SIFMA Concept Release Comment Letter.

³⁵³ See ICI Concept Release Comment Letter.

³⁵⁴ Proposed rule 18f-4(a)(2), (a)(5), (c)(9).

³⁵⁵ See Concept Release, *supra* note 3, at n.27.

³⁵⁶ Proposed rule 18f-4(c)(9).

may be payable by the fund under the derivatives transaction. In any case, the risk-based coverage amount must be a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions, regardless of whether the fund is currently required to make such payments under the terms of the derivatives contract.

The requirements that we are proposing with respect to a fund's determination of the risk-based coverage amount are intended to permit a fund to tailor its procedures for determining the risk-based coverage amount to respond to the particular risks and circumstances associated with a fund's derivatives transactions. In developing policies and procedures to determine the risk-based coverage amount, a fund could use one or more financial models to determine the risk-based coverage amount, provided that the calculation reflects a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions and takes into account, as relevant, the structure, terms and characteristics of the derivatives transaction and the underlying reference asset, as required by the proposed rule. These tools may be useful in estimating the potential amounts payable by the fund under certain derivatives transactions, and may be an efficient way for a fund to determine the risk-based coverage amount for its derivatives, particularly for those funds that already use such methods for other purposes.

For example, as discussed in section III.D.2 below, a fund's policies and procedures under its derivatives risk management program could include stress testing. A fund that uses stress testing could consider using this approach to estimate the potential amount payable by the fund to exit a derivatives transaction by estimating the effects of various adverse events. Alternatively, a fund's policies and procedures could provide that, for a particular type of derivatives transaction, the fund's adviser would use a stressed VaR model to estimate the potential loss the fund could incur, at a given confidence level, under stressed conditions.³⁵⁷

³⁵⁷ Stressed VaR refers to a VaR model that is calibrated to a period of market stress. As noted in section III.B.2.a, a concern that has been recognized with VaR is that it may not adequately reflect "tail risks," *i.e.*, the size of losses that may occur on the trading days on which the greatest losses occur, and that VaR may underestimate the risk of loss under stressed market conditions. However, by calibrating VaR to a period of market stress, stressed VaR may better reflect the potential losses that a fund could incur through a derivatives transaction, and thus

As noted above, a fund's policies and procedures for determining its risk-based coverage amount would be required to take into account, as relevant, the structure, terms and characteristics of the derivatives transaction and the underlying reference asset. In calculating its risk-based coverage amount, a fund may take into account considerations in addition to these factors. For example, if a fund elects to conduct stress testing for other purposes and such stress tests incorporate factors other than those specified under the proposed rule, the fund should consider incorporating the results of this stress testing into the determination of its risk-based coverage amount.

As with the calculation of mark-to-market coverage amounts, if the fund has entered into a netting agreement that allows the fund to net its payment obligations with respect to multiple derivatives transactions, the proposed rule would allow a fund to calculate its risk-based coverage amount on a net basis for all derivatives transactions covered by the netting agreement, in accordance with the terms of the netting agreement.³⁵⁸ This aspect of the proposed rule is designed to recognize that if a fund has a netting agreement in effect, the potential amounts payable by the fund under a derivatives transaction covered by such agreement could be reduced by any future payments owed to the fund under other derivatives transactions covered by the netting agreement, with the fund being required to pay only the net amount. Thus, the proposed rule would allow the fund to calculate its risk-based coverage amount for all derivatives transactions covered by the netting agreement on a net basis. For example, if a fund has two derivatives transactions that are covered by a netting agreement, and one of the transactions is inversely correlated with the other position, the fund could determine its risk-based coverage amount for both derivatives transactions on a net basis, taking into account anticipated gains that it reasonably expects may reduce potential amounts payable by the fund under stressed conditions under other derivatives transactions covered by the same netting agreement. The proposed rule would only allow a fund to net derivatives transactions for purposes of determining risk-based coverage if the fund has a netting agreement that allows the fund

serve as an appropriate method for determining a reasonable estimate of the potential amount payable by the fund if the fund were to exit the transaction under stressed conditions.

³⁵⁸ Proposed rule 18f-4(c)(9)(i).

to net its payment obligations with respect to such transactions because, absent such an agreement, the fund may not have the right to reduce its payment obligations and could potentially be required to tender the full amount payable under each derivatives transaction.

The proposed rule would also allow a fund to reduce the risk-based coverage amount for a derivatives transaction by the value of any assets that represent initial margin or collateral in respect of such derivatives transaction.³⁵⁹ This would allow a fund to receive credit for assets that are already posted as a security guarantee to cover potential future amounts payable by the fund under the derivatives transaction, and which could ultimately be used by the fund's counterparty to satisfy those obligations if needed. In order to reduce the risk-based coverage amount, the assets must represent initial margin or collateral to cover the fund's future potential amounts payable by the fund under the derivatives transaction.³⁶⁰ Further, initial margin or collateral can only reduce the risk-based coverage amount for the specific derivatives transaction for which such assets were posted.³⁶¹

The proposed rule therefore would give a fund credit for initial margin by not requiring the fund to maintain risk-based coverage assets in respect of future amounts payable that could be satisfied by the fund's initial margin. We believe that giving a fund credit for initial margin in this way is more appropriate than an approach suggested by at least one commenter under which we would provide that a fund's "cushion" would be equal to the required initial margin for a particular transaction.³⁶² Final rules regarding the

³⁵⁹ Proposed rule 18f-4(c)(9)(ii).

³⁶⁰ Assets that represent variation margin are used to satisfy the fund's current mark-to-market liability under the derivatives transaction and would not be available to cover the fund's potential future liabilities under the transaction. Thus, assets that represent variation margin would not reduce the fund's risk-based coverage amount with respect to the derivatives transaction. We believe it is appropriate to count only initial margin given that the risk-based coverage amount is designed to cover potential future amounts payable by the fund.

³⁶¹ The proposed rule requires the fund to calculate risk-based coverage amounts on a transaction-by-transaction basis in respect of each of the fund's derivatives transactions. Assets delivered as collateral for a particular derivatives transaction thus cannot be used to cover other derivatives transactions unless the transactions are covered by a netting agreement. In the event that a fund posts initial margin or collateral to cover multiple derivatives transactions, the risk-based coverage amount for all derivatives transactions covered by such initial margin or collateral cannot be reduced by more than the total amount of the initial margin or collateral.

³⁶² See SIFMA Concept Release Comment Letter.

margin requirements for OTC swaps have not been adopted by all federal agencies, and we note that not all funds may be required to post initial margin for their OTC swaps under those rules.³⁶³ Therefore, while these margin requirements may provide benchmarks that may assist a fund in the evaluation of risk-based coverage amounts, they do not appear to provide a means of implementing a risk-based coverage amount requirement for all funds that engage in the use of derivatives.³⁶⁴

A fund could, however, consider any applicable initial margin requirements when determining its risk-based coverage amount for a derivatives transaction. But if a fund determines that its risk-based coverage amount—that is, a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions—is greater than the initial margin the fund would be required to post, the fund would need to maintain qualifying coverage assets equal to such greater

³⁶³ See Prudential Regulator Margin and Capital Adopting Release, *supra* note 160; CFTC Margin Proposing Release, *supra* note 160; *cf.* 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 70214 (Nov. 23, 2012)] (“Margin and Capital Proposing Release”). Under rules adopted by the banking regulators and rules proposed by the CFTC, initial margin may be calculated using either an internal models approach (under which initial margin would be calculated using an approved model calibrated to a period of stress conditions) or a standardized initial margin approach (under which initial margin would be calculated using a standardized initial margin schedule). Under these rules, however, not all funds would be required to post initial margin. For example, under rules adopted by the banking regulators, a covered swap entity, such as a bank, would only be required to collect initial margin from a swap counterparty, such as a fund, if the fund has “material swaps exposure,” which is a threshold under the rule that would apply if a fund and its affiliates have average daily aggregate notional exposure from swaps, security-based swaps, foreign exchange forwards, and foreign exchange swaps that exceeds \$8 billion. See Prudential Regulator Margin and Capital Adopting Release, *supra* note 160. The rules proposed by the CFTC have a similar threshold and would only require a covered swap entity to collect initial margin from a swap counterparty, such as a fund, if the fund has material swaps exposure that exceeds \$3 billion. See CFTC Margin Proposing Release, *supra* note 160. Thus, these rules would generally only require a fund to post initial margin if the fund has average daily exposure to swaps in excess of \$8 billion or \$3 billion. See Prudential Regulator Margin and Capital Adopting Release, *supra* note 160; CFTC Margin Proposing Release, *supra* note 160. (The initial margin rules proposed by the Commission for uncleared security-based swaps do not impose minimum thresholds for the collection of initial margin. See Margin and Capital Proposing Release, *supra*).

³⁶⁴ See Prudential Regulator Margin and Capital Adopting Release, *supra* note 160; CFTC Margin Proposing Release, *supra* note 160.

amount in order to comply with the proposed rule.

We request comment on all aspects of the proposed rule’s requirement that a fund manage the risks associated with its derivatives transactions by maintaining qualifying coverage assets equal to the fund’s aggregate risk-based coverage amounts for its derivatives transactions.

- Is the definition of risk-based coverage amount sufficiently clear to allow a fund to develop policies and procedures to determine a risk-based coverage amount for all derivatives transactions?
- Rather than determining the risk-based coverage amount in accordance with policies and procedures approved by the board, should we prescribe risk-based coverage amounts in the proposed rule? Should we, for example, provide that the risk-based coverage amount must be determined based on a specific financial model (*i.e.*, VaR at a particular confidence level)? Should we specify a percentage of the derivative’s notional value? If so, what percentage should we choose? Should it vary for different types of derivatives? For example, should the proposed rule include a standardized schedule that specifies the risk-based coverage amount for particular derivatives transactions? If so, should the schedule be similar to, or different from, the standardized schedules under rules that have been proposed or adopted for swap entities that are required to collect initial margin and elect to use a standardized schedule approach instead of an internal model approach? If so, should the standardized schedule approach be in addition to, or in place of, the approach currently described in the proposed rule? Why or why not?

- Should we retain the proposed rule’s approach that the risk-based coverage amount be determined in accordance with board-approved policies and procedures, but also provide funds the option to use certain prescribed standards for the calculation of the risk-based coverage amount? In other words, should the proposed rule prescribe a specific financial model or amount of the derivative’s notional amount that could be used by funds to determine the risk-based coverage amount without the need for additional policies and procedures? If so, which models or notional amounts should we specify? Should we provide, for example, that a fund may use as its risk-based coverage amount for a particular derivatives transactions the VaR calculated using a VaR model that meets the minimum criteria for a VaR model

under the proposed rule and that provides stressed VaR estimates?

- Are there additional items that a fund should be required to consider when preparing policies and procedures in respect of the risk-based coverage amount?

- The risk-based coverage amount as proposed would be a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions. Is the term “stressed conditions” clear? If not, how could the term “stressed conditions” be made more clear? Is “stressed conditions” an appropriate standard? Is there an alternative standard that would be more appropriate? Should it be an estimate that does not involve stressed conditions?

- The proposed rule would allow a fund to net derivatives transactions for purposes of determining the risk-based coverage amount if a fund has a netting agreement in effect that would allow the fund to net its payment obligations for such transactions. Is this appropriate? Should we impose further limitations on a fund’s ability to net transactions, including, for example, prohibiting netting across asset classes or different types of derivatives? Should we, in contrast, permit netting more extensively? Are there situations in which initial margin for funds is calculated on a net basis that would not be permitted under the proposed rule and for which funds believe netting would be appropriate? Are there other situations in which funds today net their obligations with derivatives counterparties that would not be permitted under the proposed rule and for which funds believe netting would be appropriate? Should we include specific parameters in the rule regarding the enforceability of the agreement in a bankruptcy or similar proceeding?

- In situations not involving a netting agreement, should we allow a fund to reduce its risk-based coverage amount for a derivatives transaction to reflect anticipated or actual gains in other transactions that the fund believes are likely to produce gains for the fund at the same time as other derivatives experience losses? If so, what parameters or guidelines should we prescribe to address market risk, counterparty risk or other payment risks if netting is permitted under the proposed rule for these separate transactions?

- The proposed rule would allow a fund to reduce its risk-based coverage amount by the value of assets that represent initial margin or collateral. Is this appropriate? Should we instead

restrict this reduction to initial margin or collateral that meets certain minimum requirements (e.g., cash, cash equivalents, high-quality debt securities)? Should we, in contrast, give the fund more flexibility to reduce its risk-based coverage?

- Should we require the risk-based coverage amount to be calculated based expressly on initial margin

- requirements, rather than requiring funds to determine these amounts in accordance with policies and procedures, as proposed, which could be informed by margin requirements? Should we require the risk-based coverage amount to be no less than the initial margin requirement, without regard to minimum transfer amounts or limits that would apply to a particular fund?

- Should we require any type of stress testing or back-testing with respect to the calculation of the risk-based coverage amount?

- Should the risk-based coverage amount be determined more than once per day? Is once per day too frequent?

- The risk-based coverage amount as proposed would generally be determined on an instrument-by-instrument basis (but would permit the fund to determine risk-based coverage amounts on a net basis in certain circumstances as discussed above). Should we, instead, permit or require funds to determine the risk-based coverage amount on a fund's entire portfolio? Alternatively, should we permit the risk-based coverage amount to be determined on a net basis with respect to particular subsets of the portfolio? For example, should we allow a fund to calculate separate risk-based coverage amounts for instruments that fall within different broad risk categories, such as equity, credit, foreign exchange, interest rate, and commodity risk? If so, how should funds calculate such risk-based coverage amounts? Would either of these approaches be more or less effective at assuring funds will have liquid assets to meet their obligations under their derivatives transactions? Would either of these approaches be more or less cost efficient for funds?

2. Qualifying Coverage Assets

As described above, the proposed rule would require a fund to manage the risks associated with its derivatives transactions by maintaining qualifying coverage assets, identified on the books and records of the fund and determined at least once each business day, in respect of each derivatives transaction. Under the proposed rule, "qualifying coverage assets" in respect of a

derivatives transaction would be fund assets that are either: (1) Cash and cash equivalents; or (2) with respect to any derivatives transaction under which the fund may satisfy its obligations under the transaction by delivering a particular asset, that particular asset. The total amount of a fund's qualifying coverage assets could not exceed the fund's net assets.³⁶⁵

a. Cash and Cash Equivalents

Under the proposed rule, a fund would generally be required to segregate cash and cash equivalents as qualifying coverage assets in respect of its coverage obligations for its derivatives transactions.³⁶⁶ Current U.S. generally accepted accounting principles define cash equivalents as short-term, highly liquid investments that are readily convertible to known amounts of cash and that are so near their maturity that they present insignificant risk of changes in value because of changes in interest rates.³⁶⁷ Examples of items commonly considered to be cash equivalents include certain Treasury bills, agency securities, bank deposits, commercial paper, and shares of money market funds.³⁶⁸

We believe that cash and cash equivalents are appropriate qualifying coverage assets for derivatives transactions because these assets are extremely liquid because they are cash or could be easily and nearly immediately converted to known amounts of cash without a loss in value.³⁶⁹ Other types of assets, in

³⁶⁵ Proposed rule 18f-4(c)(8).

³⁶⁶ Proposed rule 18f-4(c)(8). The proposed rule would not require funds to place qualifying coverage assets in a separate segregated account. In this Release when we refer to assets that a fund would "segregate" under the proposed rule, these are assets that the fund would identify as qualifying coverage assets on the fund's books and records determined at least once each business day, as noted above.

³⁶⁷ FASB Accounting Standards Codification paragraph 305-10-201; see also Money Market Fund Reform: Amendments to Form PF, Investment Company Act Release No. 31166 (July 23, 2014) [79 FR 47736 (Aug. 14, 2014)] ("2014 Money Market Fund Reform Adopting Release"), at sections III.A.7 and III.B.6 (clarifying that the reforms to the regulation of money market funds adopted by the Commission in 2014 should not preclude an investment in a money market fund from being classified as a cash equivalent under U.S. GAAP under normal circumstances).

³⁶⁸ See Liquidity Release, *supra* note 5; FASB Accounting Standards Codification paragraph 305-10-201; Form PF: Glossary of Terms (defining "cash and cash equivalents").

³⁶⁹ See Liquidity Release, *supra* note 5, at 123 ("Cash and cash equivalents are extremely liquid (in that they either are cash, or could be easily and nearly immediately converted to cash without a loss in value), and significant holdings of these instruments generally decrease a fund's liquidity risk because the fund could use them to meet redemption requests without materially affecting the fund's NAV.").

contrast, may be more likely to experience volatility in price or to decline in value in times of stress, even if subject to a haircut. We are not proposing to include as qualifying coverage assets other types of assets, such as equity securities or other debt securities, because we are concerned about the risk that such assets could decline in value at the same time the fund's potential obligations under the derivatives transactions increase, thus increasing the possibility that such assets could be insufficient to cover the fund's obligations under derivatives transactions. In addition, we understand that cash and cash equivalents are commonly used for posting collateral or margin for derivatives transactions. For example, ISDA reported in a 2015 survey that cash represented 77% of collateral received for uncleared derivatives transactions (with government securities representing an additional 13% percent), while for cleared OTC transactions with clients, cash represented 59% of initial margin received (with government securities representing an additional 39%) and 100% of variation margin received.³⁷⁰ Given that the proposed rule's requirements relating to the mark-to-market coverage amount and risk-based coverage amount are conceptually similar to initial margin (which represents an amount collected to cover potential future exposures) and variation margin (which represents an amount collected to cover current exposures), and that the proposed rule would permit the mark-to-market coverage amount and risk-based coverage amount to be reduced by the value of assets that represent initial or variation margin, we believe that limiting qualifying coverage

³⁷⁰ ISDA Margin Survey 2015 (Aug. 2015), available at <https://www2.isda.org/functional-areas/research/surveys/margin-surveys>. The ISDA Margin Survey included 41 ISDA members, approximately 90% of whom were banks or broker-dealers, in the Americas (32%), Europe/Middle East Africa (53%) and Asia (16%). Figures for uncleared margin reflect responses of large firms, *i.e.*, those having more than 3,000 active non-cleared ISDA collateral agreements. Under the ISDA Margin Survey, government agency and government sponsored entity securities, US municipal bonds and supranational bonds were categorized separately from the "government securities" category and therefore are not included in the percentages cited above. As previously noted, examples of items commonly considered to be "cash equivalents" include certain Treasury bills, agency securities, bank deposits, commercial paper, and shares of money market funds (see *supra* note 368 and accompanying text). In light of the global nature of the survey and the types of entities surveyed, we request comment below on whether cash and cash equivalents are the assets most commonly used by funds for posting initial and variation margin to their counterparties.

assets to cash and cash equivalents would be appropriate.

We note that some commenters on the Concept Release opposed a more restrictive requirement for asset segregation, such as the one we are proposing today, stating that a more restrictive approach could limit certain funds' ability to use derivatives.³⁷¹ However, we note that these comments were made in the context of the Concept Release, which sought comment on the appropriate amount of segregated assets for a derivatives transaction in the context of the current approach, under which funds segregate the full notional amount for some types of derivatives transactions. The proposed rule, however, would not require funds to segregate a derivative's full notional amount, and instead would require the fund to segregate its mark-to-market and risk-based coverage amounts. Given the proposed rule's requirement to segregate these amounts with respect to their derivatives transactions, we believe it is appropriate to require that the segregated assets be assets that are extremely liquid.

b. Assets Required To Be Delivered Under the Derivatives Transaction

With respect to any derivatives transaction under which a fund may satisfy its obligations under the transaction by delivering a particular asset, the proposed rule would allow the fund to segregate that particular asset as a qualifying coverage asset.³⁷² Because, in such derivatives transactions, the fund could satisfy its obligations by delivering the asset itself, we believe that these assets would be an appropriate qualifying coverage asset for such transactions. For example, if the fund has written a call option on a particular security that the fund owns, then the security could be considered a qualifying coverage asset in respect of the written option.³⁷³ In that example,

the fund's delivery of such security would satisfy its obligations under the written option and any change in the value or liquidity of such security should not affect the ability of the fund to satisfy its payment obligation under the call option.

Under the proposed rule, the *particular asset* that the fund may deliver to satisfy its obligations under the derivatives transaction would be a qualifying coverage asset. However, a qualifying coverage asset for a derivatives transaction generally would not include a derivative that provides an offsetting exposure. For example, if a fund has written a CDS on a bond, a purchased CDS on the same bond entered into with a different counterparty generally would not be considered a qualifying coverage asset in respect of the written CDS because the fund would be exposed to the risk that its counterparty could default or fail to perform its obligation under the purchased CDS, thereby potentially leaving the fund without sufficient assets to satisfy its obligations under the written CDS.³⁷⁴ Such a result would be inconsistent with the purpose of the asset segregation requirement in the proposed rule, which is designed to enable the fund to meet its obligations arising from the derivatives transaction. In addition, and as discussed in more detail in section III.B.1.d above, we have not included in the proposed rule provisions for particular types of potential hedging and other cover transactions. The same considerations we discuss above in section III.B.1.d similarly weigh against our including

risk-based coverage amount for such written option is equal to the value of the security. Thus, the fund could satisfy the asset segregation requirements of the proposed rule by segregating the security itself, without segregating additional qualifying coverage assets.

³⁷⁴ We note, however, that if a fund entered into two transactions that were covered by a netting agreement, the proposed rule would permit the mark-to-market coverage amount and risk-based coverage amount to be determined on a net basis, which could result in a reduction in the amount of qualifying coverage assets that the fund would need to segregate if such transactions were offsetting. As discussed in section III.B.1.b.ii, for purposes of the exposure limits under the proposed rule, a fund may net directly offsetting derivatives transactions that are the same type of instrument and have the same underlying reference asset, maturity and other material terms, even if those transactions are entered into with different counterparties and without regard to whether those transactions are subject to a netting agreement. See proposed rule 18f-4(c)(3)(i). We believe that it is appropriate to allow such netting for purposes of the proposed rule's exposure limits because in those circumstances, netting can be expected to eliminate a fund's market exposure. By contrast, the proposed rule's asset coverage requirements are designed to address a different primary concern, namely, the ability of a fund to meet its obligations arising from derivatives transactions.

exceptions to the asset coverage requirements in the proposed rule for these kinds of transactions.

We recognize that commenters to the Concept Release generally advocated for retaining the flexibility offered by the cover transaction approach.³⁷⁵ The proposed rule is designed instead to provide some flexibility to funds to determine the appropriate risk-based coverage amount (rather than a derivative's full notional amount), and in this context, we believe that additional flexibility regarding particularized cover transactions (other than those covered by a netting agreement as described above) may not address the asset sufficiency concern under the Act.

c. Limit on the Total Amount of Qualifying Coverage Assets

Under the proposed rule, the total amount of a fund's qualifying coverage assets could not exceed the fund's net assets.³⁷⁶ This aspect of the proposed rule is designed to require a fund to have sufficient qualifying coverage assets to meet its obligations under its derivatives transactions and also prohibit a fund from entering into a financial commitment transaction or otherwise issuing senior securities pursuant to section 18 or 61 of the Act and then using the additional assets resulting from such leveraging transactions to support an additional layer of leverage through senior securities transactions. Thus, if a fund borrowed from a bank, for example, the aggregate amount of the fund's assets that the fund might otherwise use as qualifying coverage assets for derivatives transactions would be reduced by the amount of the outstanding bank borrowing. We believe it is appropriate for a fund that enters into derivatives transactions in reliance on the proposed rule to have qualifying coverage assets in excess of the amounts the fund owes to other counterparties so that the fund's qualifying coverage assets would be available to satisfy the fund's obligations under its derivatives transactions if necessary. Therefore, under the proposed rule, the total amount of a fund's qualifying coverage assets could not exceed the fund's net assets.

We request comment on all aspects of the proposed rule's definition of qualifying coverage assets.

- For derivatives transactions, the proposed rule contains the same

³⁷¹ See, e.g., AQR Concept Release Comment Letter, at 4 ("If the Merrill Lynch Letter were withdrawn, we believe investors in certain funds would be harmed. Equity funds or high yield funds, for example, would find it difficult to utilize derivatives because these funds do not usually hold large quantities of cash and high grade debt obligations that could be used as collateral."); BlackRock Concept Release Comment Letter, at 5 ("Holding cash and U.S. Government securities to satisfy asset coverage requirements may be in conflict with the stated investment objectives of a fund and effectively would prevent many equity and certain bond funds from being able to use derivatives when derivatives are the most effective ways of implementing portfolio strategies.").

³⁷² Proposed rule 18f-4(c)(8).

³⁷³ We note that, in this type of "covered call" transaction where a fund owns the security that is required to be delivered under the written option, the fund could reasonably conclude that the sum of the mark-to-market coverage amount and the

³⁷⁵ See, e.g., ICI Concept Release Comment Letter; SIFMA Concept Release Comment Letter; Oppenheimer Concept Release Comment Letter.

³⁷⁶ Proposed rule 18f-4(c)(8).

requirements for qualifying coverage assets in respect of the mark-to-market coverage amount and the risk-based coverage amount. Should there be a difference in the requirements for qualifying coverage assets in respect of the mark-to-market coverage amount and the risk-based coverage amount? If so, what changes should be made? Should we, for example, permit funds to use a broader range of assets as qualifying coverage assets with respect to a fund's risk-based coverage amount because that amount reflects potential amounts payable by the fund, rather than the mark-to-market payable amounts represented by the fund's mark-to-market coverage amount?

- Under the proposed rule, a fund would generally be required to segregate cash and cash equivalents. Is the range of assets that would be included as cash and cash equivalents sufficiently clear? Are there other types of assets that commenters believe are cash equivalents that we should identify by way of example? Should we instead define "cash equivalents" in the proposed rule? If so, how should we define "cash equivalents"?

- Should we allow funds to segregate other types of assets in addition to cash and cash equivalents? If so, what other types of assets should we allow? For example, should we permit funds to segregate any U.S. government security (*i.e.* any security issued or guaranteed by principal and interest by the U.S. government)? Should we allow funds to segregate high grade debt obligations as discussed in Release 10666? If so, how should we define high grade debt obligations for this purpose? Should we permit funds to segregate assets that would be eligible as collateral for margin under the rules that have been proposed or adopted for swap entities? Should we instead allow funds to segregate any Three-Day Liquid Asset as defined in proposed rule 22e-4? If we were to permit funds to segregate other types of assets in addition to cash and cash equivalents, should we place restrictions on these other types of assets to protect against the risk that the gains and losses on these coverage assets held by the fund may be correlated with the performance of reference assets underlying the fund's derivatives transactions in such a way that they could lose value in stressed market conditions when the fund's liabilities under derivatives transactions may be increasing?

- If we were to allow funds to segregate other assets as qualifying coverage assets (whether for all purposes or only the fund's risk-based coverage amount), what additional

measures, if any, should we require funds to undertake in order to protect against potential changes in the value and/or liquidity of such assets? For example, should we impose haircuts on such assets? If so, how should we determine the appropriate haircut? For example, should we incorporate the haircuts described in the SEC's proposed margin requirements for security-based swap dealers and major security-based swap participants?³⁷⁷ Or, should we incorporate the haircut schedule included in the rules adopted by the banking regulators for covered swap entities?³⁷⁸ Is there a different haircut schedule that would be more appropriate for the proposed rule?

- If we were to allow funds to segregate other assets as qualifying coverage assets (whether for all purposes or only the fund's risk-based coverage amount), should we impose additional restrictions if the assets are closely correlated with the exposure created by the derivatives transaction? What types of requirements should we impose for assessing these correlations?

- Under the proposed rule, qualifying coverage assets for derivatives transactions generally would not include a derivative that provides an offsetting exposure. Is this appropriate? Why or why not?

- Some commenters to the Concept Release stated that requiring funds to segregate cash and other high-quality debt obligations could make it difficult for certain funds to use derivatives.³⁷⁹ Given that the proposed rule would not require funds to segregate assets equal to the full notional value of its derivatives transactions, and would permit a fund to reduce its mark-to-market and risk-based coverage amounts to take account of margin posted by the fund, do such concerns remain?

- Under the proposed rule, the total amount of a fund's qualifying coverage assets could not exceed the fund's net assets. Do commenters agree that this is appropriate? Should we, instead, specify that qualifying coverage assets must not be "otherwise encumbered"? Is there a different approach we should take to prevent a fund from using assets to cover multiple different obligations or potential obligations?

- The proposed rule's asset segregation requirements for derivatives

³⁷⁷ See Margin and Capital Proposing Release, *supra* note 363.

³⁷⁸ See Prudential Regulator Margin and Capital Adopting Release, *supra* note 160.

³⁷⁹ See Basel Committee on Banking Supervision & Board of the International Organization of Securities Commissions, *Margin Requirements for Non-Centrally Cleared Derivatives* (Mar. 2015), available at <http://www.bis.org/bcbis/publ/d317.pdf>.

transactions, although designed primarily to enable the fund to meet its obligations arising from its derivatives transactions, also could serve to limit a fund's ability to obtain leverage through derivatives transactions to the extent that a fund limits its derivatives usage in order to comply with the asset segregation requirements. As noted above, a fund might limit its derivatives transactions in order to avoid having to maintain qualifying coverage assets for the transactions, and the asset segregation requirements may limit a fund's ability to enter into a derivatives transaction if the fund does not have, and cannot acquire, sufficient qualifying coverage assets to engage in additional derivatives transactions. To what extent do commenters believe that the proposed rule's asset segregation requirements would impose a practical limit on the amount of leverage a fund could obtain?

D. Derivatives Risk Management Program

The use of derivatives can pose a variety of risks to funds and their investors, although the extent of the risk may vary depending on how a fund uses derivatives as part of the fund's investment strategy. As discussed previously, these risks can include the risk that a fund may operate with excessive leverage or without adequate assets and reserves, which are both core concerns of the Act.³⁸⁰ Other potential risks associated with derivatives use can include market, counterparty, leverage, liquidity, and operational risk. While many of these risks are not limited to derivatives investments, the complexity and character of derivatives investments may heighten such risks.³⁸¹

The proposed rule's portfolio limitations and asset coverage requirements are intended to help limit the extent of the fund's exposure to many of these risks. These requirements are designed both to impose a limit on the amount of leverage a fund may obtain from derivatives and to require the fund to manage its risks by having qualifying coverage assets to meet its obligations while providing funds with flexibility to engage in a wide variety of derivatives transactions and investment strategies. These restrictions on funds' use of derivatives are generally intended to provide limits on the magnitude of funds' derivatives exposures, and in the case of a fund operating under the risk-

³⁸⁰ See, *e.g.*, Investment Company Act sections 1(b)(7), 1(b)(8), 18(a), and 18(f); see also section I.B.1.

³⁸¹ See, *e.g.*, 2008 IDC Report, *supra* note 72. See also *Mutual Funds and Derivative Instruments*, Division of Investment Management.

based limit, to require that the fund's derivatives transactions, in the aggregate, have the effect of reducing the fund's exposure to market risk. These limits and associated risk management requirements would be complemented by the proposed rule's formalized derivatives risk management program requirement, which would require funds that engage in more than a limited amount of derivatives transactions, or that use complex derivatives transactions as defined in the proposed rule, to also have a formalized program that includes policies and procedures reasonably designed to assess and manage the particular risks presented by the fund's use of derivatives.

We have observed that fund investments in derivatives can pose risk management challenges, and poor risk management may cause significant harm to funds and their investors.³⁸² We understand that, today, the advisers to many funds whose investment strategies could entail derivatives risk routinely conduct risk management to evaluate a fund's derivatives usage.³⁸³ A fund's use of derivatives presents challenges for its investment adviser and board of directors in managing derivatives transactions so that they are employed in a manner consistent with the fund's investment objectives, policies, and restrictions, its risk profile, and relevant regulatory requirements, including those under the federal securities laws.³⁸⁴ Funds and their advisers may face liability under the antifraud provisions of the federal securities laws if their use of derivatives is inconsistent with these constraints. Accordingly, we understand that advisers to many funds whose investment strategies entail the use of derivatives already assess and manage such risk.

Fund advisers that today engage in active risk management of their derivatives may use a variety of tools. Depending on the fund and its derivatives use, these tools might include a formalized derivatives risk management program led by a dedicated risk manager or risk committee, the use of other checks and balances put in place by a fund's portfolio management

team, or other tools.³⁸⁵ We understand that many fund boards oversee the fund adviser's risk management process as part of their general oversight of the fund.³⁸⁶ As a result, we believe that the proposed program would likely have the effect of enhancing practices that are in place at many funds today by specifying requirements for funds that rely on the rule to evaluate the risks associated with the funds' use of derivatives and to inform the funds' boards of directors about these risks as part of a regular dialogue with officers of the fund or its adviser.

The proposed measures will help enhance derivatives risk management by requiring that any fund that engages in more than a limited amount of derivatives transactions pursuant to the proposed rule, or that uses complex derivatives transactions, adopt and implement a formalized derivatives risk management program (a "program").³⁸⁷ The program's requirements would be in addition to the requirements related to derivatives risk management that would apply to every fund that enters into derivatives transactions, including, for example, the requirement to manage derivatives risk through determining the risk-based coverage amounts on a daily basis, and the requirement to monitor compliance with the proposed portfolio limit under which the fund's derivatives exposure may not exceed 50% of net assets and the fund may not enter into complex derivatives transactions. The formalized risk management program condition would require a fund to have policies and procedures reasonably designed to:

- Assess the risks associated with the fund's derivatives transactions, including an evaluation of potential leverage, market, counterparty, liquidity, and operational risks, as applicable, and any other risks considered relevant;
- Manage the risks of the fund's derivatives transactions, including by monitoring the fund's use of derivatives transactions and informing portfolio management of the fund or the fund's board of directors, as appropriate,

regarding material risks arising from the fund's derivatives transactions;

- Reasonably segregate the functions associated with the program from the portfolio management of the fund; and
- Periodically (but at least annually) review and update the program.³⁸⁸

The program, which would be administered by a designated derivatives risk manager, would require funds, at a minimum, to adopt policies and procedures reasonably designed to implement certain specified elements, and would include administration and oversight requirements. The program is expected to be tailored by each fund and its adviser to the particular types of derivatives used by the fund and the manner in which those derivatives relate to the fund's investment portfolio and strategy. Funds that make only limited use of derivatives would not be subject to the proposed condition requiring the adoption of a formalized derivatives risk management program under the proposed rule.

Proposed rule 18f-4 would include board oversight provisions related to the derivatives risk management program requirement. Specifically, a fund's board would be required to approve the fund's derivatives risk management program, any material changes to the program, and the fund's designation of the fund's derivatives risk manager (who cannot be a portfolio manager of the fund).³⁸⁹ The board also would be required to review written reports prepared by the designated derivatives risk manager, at least quarterly, that review the adequacy of the fund's derivatives risk management program and the effectiveness of its implementation.³⁹⁰ A fund might, as it determines appropriate, expand its derivatives risk management procedures beyond the required program elements and should consider doing so whenever it would be necessary to ensure effective derivatives risk management.

The proposed derivatives risk management program would serve as an important complement to the other conditions of proposed rule 18f-4. We expect that the rule's portfolio limitations and asset coverage requirements would provide "guard rails" designed to impose a limit on leverage and to require funds to have qualifying coverage assets to meet their obligations, which should help to limit funds' exposure to some of the risks associated with the use of derivatives. Nonetheless, for funds that engage in more than a limited amount of

³⁸² See *supra* section I.L.D.1.d.

³⁸³ See, e.g., *Mutual Fund Derivative Holdings: Fueling the Need for Improved Risk Management*, JPMorgan Thought Magazine (Summer 2008) ("2008 JPMorgan Article"), available at <http://www.jpmorgan.com/cm/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1158494213964&blobheader=application%2Fpdf&blobncache=true&blobheadername1=Content>; 2008 IDC Report, *supra* note 72.

³⁸⁴ See *supra* note 27 and accompanying text.

³⁸⁵ See, e.g., 2008 IDC Report, *supra* note 72; *Fund Board Oversight of Risk Management*, Independent Directors Council (Sept. 2011) ("2011 IDC Report"), available at http://www.ici.org/pdf/pub_11_oversight_risk.pdf.

³⁸⁶ See, e.g., 2011 IDC Report, *supra* note 385, at 9.

³⁸⁷ Proposed rule 18f-4(a)(3). As discussed in greater detail below, the derivatives risk management program requirement that we are proposing today would only apply to "derivatives transactions," and not to other senior securities transactions, such as financial commitment transactions as defined under the rule.

³⁸⁸ See proposed rule 18f-4(a)(3).

³⁸⁹ Proposed rule 18f-4(a)(3)(ii).

³⁹⁰ Proposed rule 18f-4(a)(3)(ii)(B).

derivatives use, or that use complex derivatives, we believe that the outside limits set by the proposed portfolio limitations and the protections provided by the asset coverage requirements should be coupled with a formalized risk management program tailored to the ways which funds use derivatives and the specific risks to which funds are exposed.

While we recognize that many funds already engage in significant risk management of their derivatives transactions, we have observed that the quality and extent of such practices vary among funds in that some funds have carefully structured risk management programs with clearly allocated functions and reporting responsibilities while others are left largely to the discretion of the portfolio manager. In light of the dramatic growth in the volume and complexity of the derivatives markets over the past two decades, and the increased use of derivatives by certain funds, we believe that in connection with providing exemptive relief from section 18, it is appropriate to require certain funds to have a formalized risk management program focused on the particular risks of these transactions. We believe that requiring a risk management program that meets the requirements in the proposed rule should serve to establish a standardized level of risk management for funds that engage in more than a limited amount of derivatives use or that use complex derivatives, and thus should provide valuable additional protections for the shareholders of such funds.

1. Funds Subject to the Proposed Risk Management Program Condition

We are proposing that funds that exceed a 50% threshold of notional derivatives exposure would be subject to the specific risk management program condition discussed here. Under section 18, open- and closed-end funds are permitted to engage in certain senior securities transactions, as discussed above, subject to a 300% asset coverage requirement or a 200% coverage requirement for closed-end fund issuance of preferred equity. A mutual fund therefore can borrow from a bank (and a closed-end fund can issue other senior securities) under section 18 provided that the amount of such borrowings (or other senior securities) does not exceed one-third of the fund's total assets, or 50% of the fund's net assets.³⁹¹ This threshold represents a

³⁹¹ Under section 18(h), "asset coverage" of a class of senior security representing an indebtedness of an issuer means the ratio which the

determination by Congress of an appropriate amount of senior security transactions that funds may achieve through bank borrowings (and certain other transactions in the case of closed-end funds).³⁹²

As discussed previously, for a number of reasons we have determined to propose to permit a fund to engage in derivatives transactions provided it complies with all of the conditions in proposed rule 18f-4. Under the proposal, if a fund exceeds a threshold of 50% notional amount of derivatives transactions, that fund must adopt and implement a formalized risk management program.³⁹³ We believe that a threshold analogous to the statutorily defined threshold for senior securities under section 18 represents a level of derivatives use, which if exceeded, should be managed through such a derivatives risk management program.³⁹⁴ Because we expect that a risk management program should help mitigate the risks associated with a fund incurring obligations from the use of derivatives above the statutory defined level that would be permitted for borrowings, we believe that this requirement is consistent with the exemption we are providing today for these transactions.

While we are proposing that a formalized risk management program would be a requirement only for those funds that exceed the 50% threshold or

value of the total assets of such issuer, less all liabilities and indebtedness not represented by senior securities, bears to the aggregate amount of senior securities representing indebtedness of such issuer." Take, for example, an open-end fund with \$100 in assets and with no liabilities or senior securities outstanding. The fund could, while maintaining the required coverage of 300% of the value of its assets subject to section 18 of the Act, borrow an additional \$50 from a bank; the \$50 in borrowings would represent one-third of the fund's \$150 in total assets, measured after the borrowing (or 50% of the fund's \$100 net assets).

³⁹² As discussed in section III.B.1.c above, we also have considered whether the 50% limitation that Congress established for obligations and leverage through the use of bank borrowings should also be applied to limit the use of derivatives transactions and have noted that derivatives differ in certain respects from borrowings permitted under section 18. See *supra* note 207 and accompanying text.

³⁹³ We note that under the proposed rule, the threshold for implementing a derivatives risk management program would be triggered by the notional exposure of the fund's derivatives transactions only, and would not include the exposure to a fund's financial commitment or other senior securities transactions. This is in contrast to other aspects of the proposed rule's calculations of exposure, which would include in the calculation all senior securities transactions, not just derivatives. Rule 18f-4(a)(4). We are taking this approach because, as discussed throughout this Release, the risks of derivatives transactions often differ in magnitude and kind from the risks of other senior securities transactions.

³⁹⁴ See *supra* section II.D.1.d. See also *supra* note 207 and accompanying text.

that use complex derivatives transactions, all funds that enter into derivatives transactions in reliance on the proposed rule would also be required to manage risks relating to their derivatives transactions through compliance with various other requirements of the proposed rule and other rules under the Act. For example, under our proposal, a fund that engages in even a *single* derivatives transaction would be required to manage the risks of those derivatives transactions by segregating qualifying coverage assets determined at least once each business day.³⁹⁵ This would require the fund each business day to determine the risk-based coverage amount for each of its derivatives transactions which we believe would enable the funds to better manage their risks relating to the use of derivatives. This risk-based coverage amount would be determined in accordance with policies and procedures approved by the fund's board and would represent a reasonable estimate of the amount payable by the fund if it were to exit the derivatives transaction under stressed conditions. Thus, the fund would be required to monitor and manage the potential risk of loss associated with each of its derivatives transactions on a daily basis as part of the fund's determination of its risk-based coverage amounts, and all funds would therefore be required under the proposed rule to make an assessment of potential losses associated with their derivatives transactions under stressed conditions. This risk management requirement applies to every fund that uses derivatives, regardless of whether it is also subject to the formalized derivatives risk management program condition.

In addition, a fund that is not required to establish a formalized risk management program must comply, and monitor its compliance, with the portfolio limitation under which the fund may not permit its derivatives exposure to exceed 50% of the fund's net assets immediately after entering into any derivatives transactions and may not enter into any complex derivatives transactions.³⁹⁶ A fund that uses *any* derivatives would be required to monitor the types and notional amounts of the fund's derivatives transactions and the fund's aggregate exposure to prevent the fund's derivatives exposure from exceeding 50% of net assets and to prevent the fund from entering into complex

³⁹⁵ This risk management requirement is discussed in detail in section III.C of this Release.

³⁹⁶ Proposed rule 18f-4(4).

derivatives transactions.³⁹⁷ Thus, funds that are not subject to the proposed formalized risk management program condition would nevertheless need to manage risks relating to their use of derivatives through their compliance with the risk assessment, monitoring, and other regulatory requirements discussed above.

The risks and potential impact of derivatives transactions on a fund's portfolio generally increase as the fund's level of derivatives usage increases.³⁹⁸ When derivatives are used to a significant extent, we expect the risks relating to their use, and the challenge of managing risks relating to expected or intended interactions among derivatives and other investments and managing relationships with counterparties, may increase. Complex derivatives also may involve more significant risks and potential impacts. Conversely, for funds that make only limited use of derivatives and do not use complex derivatives, we expect that the risks and potential impact of these funds' derivatives transactions may not be as significant in comparison to the risks of the funds' overall investment portfolios and may be appropriately addressed by the rule's other requirements, including the requirement to determine risk-based coverage amounts.³⁹⁹ Therefore, we

³⁹⁷ In addition, rule 38a-1 would also require funds to have policies and procedures reasonably designed to prevent the fund from exceeding any other applicable portfolio limitation under the proposed rule. See Compliance Programs of Investment Companies and Investment Advisers, Release Nos. IA-2204 and IC-26299 (December 17, 2003). If a fund were to breach the portfolio limitation established by the board, this would likely be a material compliance matter that would be required to be disclosed in writing to the fund's board in the CCO's annual report to the board. We expect that this may serve to further enhance funds' risk management practices. In addition, a fund's exceeding its portfolio limit also could be a serious compliance issue that should be brought to the board's attention promptly. See *infra* note 449.

³⁹⁸ We acknowledge that derivatives can be used for both hedging and speculative purposes, but even if primarily used for hedging purposes, we believe that significant use of derivatives instruments poses additional risks that may need to be assessed, monitored, and managed. See, e.g., David Weinberger, et al., *Using Derivatives: What senior managers must know*, Har. Bus. Rev. (Jan.-Feb. 1995), available at <https://hbr.org/1995/01/using-derivatives-what-senior-managers-must-know>; Sergey Chernenko & Michael Faulkender, *The Two Sides of Derivatives Usage: Hedging and Speculating with interest rate swaps*, J. of Fin. and Quantitative Analysis, (Dec. 2011), available at http://journals.cambridge.org/download.php?file=%2FJFQ%2FJFQ46_06%2FS0022109011000391a.pdf&code=0d15622321dedaa274f024857fd4885c.

³⁹⁹ Funds that are not required to adopt and implement a derivatives risk management program should generally still consider the risks of derivatives, because even small amounts of derivatives may pose significant risks if engaged in by an entity that is an inexperienced user of such instruments or when adverse market events occur.

believe that a formalized risk management program that includes the specific program elements included in the proposed rule is most appropriate for funds that meet a threshold level of derivatives usage (or that use complex derivatives transactions).

Accordingly, proposed rule 18f-4 would not require that a fund adopt a formalized derivatives risk management program if the fund's board determines that the fund will comply, and monitor its compliance, with a portfolio limitation under which the fund limits its aggregate exposure to derivatives transactions to no more than 50% of its NAV and does not use complex derivatives transactions as defined in the rule.⁴⁰⁰ We believe that a fund that limits its exposure to derivatives in such a way (in conjunction with the other requirements of the rule) should be able to limit the derivatives' associated risk so that their usage is consistent with the concerns of the Act.⁴⁰¹ Requiring a formalized program for managing derivatives when a fund engages in non-complex derivatives transactions below the statutorily defined limit established by Congress with respect to senior securities transactions could potentially require funds (and therefore their shareholders) to incur costs that might be disproportionate to the resulting benefits, and thus we are not proposing to require that all funds that use derivatives to any extent implement one. Nonetheless, as discussed in greater detail below, we request comment on whether the risks of derivatives use are significant enough (or significantly different from securities investments) that we should require funds that engage in any derivative use at all to comply with the proposed formalized risk management program condition.

To identify the number of funds that would need to adopt a program under this condition we evaluated the DERA White Paper data and evaluated which funds would be likely to be subject to this proposed condition. Based on this analysis, approximately 10% of the sampled open-end funds (representing

See, e.g., Rene M. Stulz, *Should we fear derivatives?*, J. of Econ. perspectives (Summer 2004), available at <http://fisher.osu.edu/supplements/10/10402/Should-We-Fear-Derivatives.pdf>.

⁴⁰⁰ Proposed rule 18f-4(a)(4).

⁴⁰¹ Although we believe that any fund that engages in derivatives would likely evaluate the risks of such transactions as part of the adviser's management of the fund's portfolio, we are not proposing that funds that keep their use of derivatives below the 50% threshold be subject to the proposed program requirements under rule 18f-4 unless the fund uses complex derivative transactions, as discussed below.

about 10% of such funds' assets under management ("AUM")) and approximately 9% of the sampled closed-end funds (representing about 13% of their AUM) would be required to adopt a program.⁴⁰² We further note that this condition also would effectively sort funds that would need to adopt a program based on fund strategy. For example, approximately 52% of sampled alternative strategy funds (representing around 70% of AUM) would need to implement a program. On the other hand, the analysis shows that only about 6% of sampled funds (representing about 8% of their AUM) that employ more traditional strategies use derivatives in excess of a 50% level.⁴⁰³

This 50% exposure condition would include exposures from derivatives transactions entered into by a fund in reliance on the proposed rule, but would not include exposure from financial commitment transactions or other senior securities transactions entered into by the fund pursuant to section 18 or 61 of the Act. We are proposing to focus this exposure threshold on exposures from derivatives transactions for several reasons. Derivatives transactions generally can pose different kinds of risks than many other kinds of senior securities transactions, in that the amount of a fund's market exposure and payment obligations under many derivatives transactions often will be more uncertain than for other types of senior securities transactions. In contrast, the fund's payment obligation may be largely known and fixed at the time the fund enters into many financial commitment transactions, such as reverse repurchase agreements or firm commitment agreements. In addition, the proposed rule would require a fund that engages in financial commitment transactions in reliance on the rule to maintain qualifying coverage assets equal in value to the fund's conditional and unconditional obligations under its financial commitment transactions.⁴⁰⁴ Requiring a fund to maintain qualifying coverage assets sufficient to cover its full obligations under a financial commitment transaction may effectively address many of the risks that otherwise would be managed through a risk

⁴⁰² We note that no BDC's identified in the DERA White Paper used derivatives at any level, and thus we do not expect that any BDCs would be required to implement a program under the proposed condition.

⁴⁰³ We note the exception of certain leveraged index ETFs that serve as trading tools and that commonly have notional exposure of 200 or 300% of assets.

⁴⁰⁴ Proposed rule 18f-4(b).

management program. The mark-to-market segregation approach would not be permitted under the proposed rule for financial commitment transactions. Finally, commenters on the Concept Release and on the FSOC Request for Comment have suggested that funds obtain leverage primarily from the use of derivatives and not financial commitment transactions, further indicating that derivatives use poses a different set of challenges than other types of senior securities transactions.⁴⁰⁵

We also are proposing to require a fund that engages in *any* complex derivatives transaction as defined under the proposed rule to implement a program. We believe that complex derivatives transactions pose special risk management challenges in light of their complicated structure and the difficulties they can pose in evaluating their impact on a fund's portfolio. As discussed in more detail above in section III.B.1, a complex derivatives transaction may expose a fund to greater risk of loss and can have market risks that are difficult to estimate due to the effect of multiple contingencies, path dependency or other non-linear factors associated with complex derivatives. We believe that a fund that engages in complex derivatives transactions under the proposed rule should be required to implement a derivatives risk management program to manage these risks as they are more complex and difficult to assess and manage than typical derivatives. Because of their potentially highly asymmetric and unpredictable outcomes, complex derivatives transactions may pose risks that are not as correlated to the size of a fund's exposure, and thus we believe that if a fund engages in any of these transactions, those risks should be assessed and managed through a formalized derivatives risk management program overseen by a risk manager and the funds' board. Accordingly, we are proposing that a fund that engages in any amount of complex derivatives

transactions adopt a derivatives risk management program.

We request comment on our proposed approach for identifying funds that must comply with the program requirement for funds that engage in a limited amount of derivatives transactions.

- Should the formalized derivatives risk management program apply not just to derivatives transactions, but to all senior securities transactions? Should it apply to just derivatives and financial commitment transactions? Do commenters agree that derivatives transactions generally can pose different kinds of risks than many other kinds of senior securities transactions, and that requiring a fund to maintain qualifying coverage assets sufficient to cover its full obligations under a financial commitment transaction may effectively address many of the risks that otherwise would be managed through a risk management program?

- As we are proposing, should we exclude from the formalized program requirement funds that engage in a limited amount of derivatives transactions? Are the risks associated with derivatives use significant enough (or significantly different from securities investments) that a fund should be required to adopt a program if it engages in any derivatives transactions? Should we instead require any fund that engages in derivatives transactions to any extent be subject to the program requirement?

- Should we require a formalized risk management program for funds that engage in even lower levels of derivatives use than under the proposed condition if they rely on the proposed rule? Should this condition not be based on the statutory threshold but instead on a different threshold? For example, are the risks of derivatives use significant enough that we should require a fund to have a program at a lower threshold, for example at 0%, 10%, 25%, or 33% of net assets? On the other hand, are the risks of derivatives use manageable enough that we should increase the threshold to avoid requiring funds to incur costs associated with a derivatives risk management program unless they make more extensive use of derivatives? For example, should the threshold for exposure instead be 66% or 75% of net assets? If we were to use a higher threshold, would that permit funds to obtain levels of derivative exposure that could pose more substantial risks to the fund before the fund would be required to establish a formalized derivatives risk management program?

- The 50% exposure condition only includes exposure from a fund's

derivatives transactions but not its financial commitment transactions or other senior securities transactions. Do commenters agree that it is appropriate to exclude exposures from other senior securities transactions in determining whether to require a formalized derivatives risk management program? Should we treat particular types of derivatives transactions or financial commitment transactions differently for purposes of the 50% exposure condition? Should we, for example, require a fund to include the exposure associated with financial commitment transactions other than reverse repurchase agreements, which may be more similar to bank borrowings and thus may not involve some of the risks and uncertainties associated with other senior securities transactions?

- Should we vary the condition based on fund characteristics or the types of derivatives transactions? For example, should we provide tiered thresholds based on a fund's assets under management, requiring funds of a larger size to be subject to a lower threshold? Would such a tiered threshold provide material protections for investors at a reasonable cost? Would it create disparate competitive effects on different sized funds? Is the size of the fund an appropriate metric to scale requirements designed to manage the risk of derivatives use? Should we provide for higher thresholds if a fund engages only in certain kinds of derivatives transactions? If so, then what types of derivatives transactions would be expected to present less risk?

- Should we use some test other than an exposure threshold for excluding funds that make a limited use of derivatives from the program requirement? For example, should we use a risk-based test? If so, should we specify what kind of test (e.g., VaR, expected shortfall, or some other metric) and what threshold should we use? Should we require a specified threshold at all, or should we instead allow a board to determine a risk-based threshold?

- As we are proposing, should we require that all funds that engage in any complex derivatives transactions implement a program? Why or why not? Should we instead permit funds to obtain a limited amount of exposure through complex derivatives transactions (e.g., 1% or 5% of net assets) before being required to implement a derivatives risk management?

As discussed above, a risk management program should be tailored to the scale of the fund's usage of derivatives, as well as the particular

⁴⁰⁵ See, e.g., Comment Letter of T. Rowe Price Associates, Inc. on the FSOC Request for Comment (Mar. 25, 2015) (FSOC 2014-0001) ("T. Rowe Price FSOC Comment Letter"), available at <http://www.regulations.gov/#!documentDetail;D=FSOC-2014-0001-0038>, at 3; Comment Letter of State Street Corporation on the FSOC Request for Comment (Mar. 25, 2015) (FSOC 2014-0001) ("State Street FSOC Comment Letter"), available at <http://www.regulations.gov/#!documentDetail;D=FSOC-2014-0001-0042> at 11; Oppenheimer Concept Release Comment Letter, at 1-2; Comment Letter of Independent Directors Council on Concept Release (Nov. 7, 2011) (File No. S7-33-11) ("IDC Concept Release Comment Letter"), available at <http://www.sec.gov/comments/s7-33-11/s73311-24.pdf>, at 2-4.

risks of the derivatives used by the fund. Therefore, funds that engage in significant amounts of derivatives transactions, or that use complex derivatives transactions, are likely to have more detailed and complex programs, while funds that make more minimal use or limit their use to more standard derivatives may have more streamlined programs tailored to their particular usage. As proposed, all of the elements of the proposed risk management program, however, would apply equally to all funds that exceed the 50% threshold.⁴⁰⁶ We expect that providing a single set of requirements for all funds that engage in more than a limited amount of derivatives transactions or that use complex derivatives transactions should provide a consistent baseline for these funds' risk management programs. Nonetheless, we acknowledge that this approach may cause certain funds to bear higher costs in complying with all of the requirements of the program than if we were to further scale or otherwise tailor the program depending on the amount or type of fund derivatives use.

- We request comment on whether we should further tailor or scale the program depending on the fund's use of derivatives. For example, should we have multiple tiered thresholds, with differing program requirements tailored to each level of use? If so, which thresholds should we use and which program elements should be included at each level? Should we otherwise tier or scale the program such as, for example, by requiring certain additional program elements for funds that engage in specific types of derivatives? If so, how should we tailor such a requirement? For example, should we require funds that only engage in certain simple types of derivatives not to have a derivatives risk manager?

- If we were to eliminate the proposed 50% threshold and require funds that engage in any amount of derivatives transactions to comply with the risk management program condition, should we provide a more streamlined or simpler program that does not include all of the elements of the full program we are proposing today? If so, which elements should we not include in such a more limited program? If we were to provide for a more limited

⁴⁰⁶ Although, as discussed previously, we note that all funds, even those not subject to the formalized risk management condition, would be required to manage the risks associated with their derivative transactions through compliance with our regulatory requirements, and we request comment on whether we should apply the program's requirements to all funds that engage in derivatives transactions at any level.

program for such funds, should we continue to require all of the proposed program elements for funds that use derivatives above the proposed 50% threshold?

2. Required Elements of the Program

Under the proposal, a derivatives risk management program must include, at a minimum, four specified elements, discussed in detail below.

a. Assessment of Risks

The first proposed element of the program would be to require funds subject to the condition to have policies and procedures reasonably designed to assess the risks associated with the fund's derivatives transactions, including an evaluation of potential leverage, market, counterparty, liquidity, and operational risks, as applicable, and any other risks considered relevant.⁴⁰⁷ This element would require funds to engage in a process of identifying and evaluating the potential risks posed by their derivatives transactions. This element provides flexibility for funds to customize their derivatives risk management programs so that the scope, and related costs and burdens, of such programs are appropriate to manage the anticipated derivatives risks faced by a particular fund. Thus, in complying with this element, a fund generally should identify the types of derivatives it currently uses, as well as any potential derivatives transactions it reasonably expects to use in the future and then evaluate the risks of engaging in those transactions as contemplated.

This program element would require certain identified potential risks that are common to most derivatives transactions, as appropriate.⁴⁰⁸ The first

⁴⁰⁷ While these risks are not unique to a fund's use of derivatives and may be associated with the fund's investments in other instruments as well, the proposed condition would require that the program assess and manage the risks associated with the derivatives transactions engaged in by the fund, but would not generally apply to other fund transactions. Proposed rule 18f-4(a)(3).

⁴⁰⁸ Proposed rule 18f-4(a)(3)(i)(A). See also *Comprehensive Risk Management of OTC Derivatives: A Tricky Endeavour*, Numerix (July 16, 2013) ("Comprehensive Risk Management of OTC Derivatives"), available at <http://www.numerix.com/comprehensive-risk-management-otc-derivatives-tricky-endeavor>; *Statement on best practices for managing risk in derivatives transactions*, RMA ("Statement on best practices for managing risk in derivatives transactions"), available at <http://www.rmahq.org/securities-lending/best-practices>; 2008 IDC Report, *supra* note 72; *Derivatives Danger: Internal auditors can play a role in reigning in the complex risks associated with financial instruments*, Lawrence Metzger, FSA Times ("FSA Times Derivatives Dangers"), available at <http://www.theiia.org/fsa/2011-features/derivatives-danger>.

is the potential leverage risks associated with a fund's derivatives transactions. Leverage risk, which includes the risk associated with potential magnified effects on a fund resulting from changes in the market value of assets underlying its derivatives transactions where the value of the underlying assets exceeds the amount paid by the fund under the derivatives transactions, would need to be assessed under the fund's risk management program.⁴⁰⁹ Leverage can be calculated in different ways, and the appropriateness of a leverage metric used by the fund, if any, to assess leverage risk may depend on various factors, such as a fund's strategy, the fund's particular investments and investment exposures, and the historical and expected correlations among the fund's investments.⁴¹⁰

While the proposed exposure limitations included in each of the portfolio limitations are designed to provide a limit on the amount of leverage a fund may obtain by placing an outside limit on the overall amount of market exposures that a fund can achieve through derivatives transactions, the exposure limitations are not designed to be used as a precise measure of the leverage used by funds. A fund, in assessing the leverage risk associated with its derivatives, could consider using metrics for measuring the extent of its leverage, and which metrics to use, in light of these and other relevant factors.⁴¹¹ Assessing leverage risks might include, for example, a review of the fund's derivatives transactions to evaluate the leverage resulting from the fund's derivatives transactions, whether such leverage is consistent with any

⁴⁰⁹ See, e.g., 2008 IDC Report, *supra* note 72, at 12.

⁴¹⁰ See, e.g., An Overview of Leverage, *supra* note 167 (distinguishing between financial, construction and instrument leverage and measurement of leverage using gross market exposure vs. net market exposure). See also Off-Balance-Sheet Leverage IMF Working Paper, *supra* note 79 (discussing means of measure leverage in various derivatives and other off-balance-sheet transactions). See also Ang, Gorovyy & Inwegen, *supra* note 72 (discussing differences among gross leverage, net leverage and long-only leverage calculations as applied to long-only, dedicated long-short, general leveraged and dedicated short funds).

⁴¹¹ We note that commenters have suggested a variety of methods of calculating leverage for various purposes. For example, one commenter on our recent proposal to modernize reporting for investment companies suggested a possible methodology for calculating leverage that might be reported to the Commission. See, Comment Letter of Blackrock on Data Gathering Release (Aug. 11, 2015) (File No. S7-09-15), available at <http://www.sec.gov/comments/s7-09-15/s70915-39.pdf>, at 20. We request comment below in section II.G on whether we should require the reporting of leverage (including potentially using this approach) to us on N-PORT.

guidelines established by the fund, and whether the leverage used by the fund is consistent with its disclosure to investors.⁴¹²

The second risk that the fund would be required to have policies and procedures reasonably designed to evaluate is the market risk associated with its derivatives transactions. Market risk includes the risk related to the potential that markets may move in an adverse direction in relation to the fund's derivatives positions and so adversely impact fund returns and the fund's obligations and exposure.⁴¹³ Evaluating market risk could include examining any models or metrics used to measure and monitor market movements, reviewing historical market movements to help develop an understanding of the potential impact of future market movements, and assessing the method and sources for receiving information about current events that may have market impacts. Scenario or stress testing can also serve as an important tool in assessing market risk. To effectively monitor market risk, the adequacy of any assumptions and parameters underlying a fund's techniques for estimating potential market risk should generally be reviewed periodically against actual experience and updated market information, especially during periods of heightened market volatility.⁴¹⁴

The third risk the fund would be required to have policies and procedures reasonably designed to evaluate is counterparty risk. This might include, for example, an evaluation of the risk that the counterparty on a derivatives transaction may not be willing or able to perform its obligations under the derivatives contract, and the related risks of having a concentration of transactions with any one such

counterparty. Assessing counterparty risk could involve reviewing the creditworthiness or financial position of significant derivatives counterparties, understanding the level of counterparty concentration in the fund, and evaluating contractual protections, such as collateral or margin requirements, netting agreements and termination rights.⁴¹⁵

The fourth risk the fund would be required to have policies and procedures reasonably designed to evaluate is liquidity risk. Under this program element, a fund should assess the potential liquidity of the fund's derivatives positions, an evaluation which might include both normal and stressed scenarios.⁴¹⁶ Assessing liquidity risk could involve understanding the secondary market liquidity of the fund's derivatives holdings; whether the fund has the right to terminate a particular derivative or the ability to enter into offsetting transactions; the relationship between a particular derivative and other portfolio positions of the fund, including whether the derivative is intended to hedge risks relating to other positions; and the potential effect of market stress events on the liquidity of the fund's derivatives transactions.

In addition to the liquidity of the derivatives positions themselves, assessing liquidity risk generally should include an evaluation of the potential liquidity demands that may be imposed on the fund in connection with its use of derivatives. As discussed in more detail above in section III.C, each fund would be required under the proposed rule to manage the risks associated with its derivatives transactions by maintaining qualifying coverage assets to cover the funds' mark-to-market coverage amount and risk-based coverage amount with respect to the fund's derivatives transactions. In addition, counterparties or applicable regulations generally require funds to

post variation margin when derivatives positions move against the fund, and the coverage amounts required under the proposed rule can be expected to increase during periods of increased market stress or volatility. A risk management program, as part of the assessment of liquidity risk, generally should consider how the fund would address potential liquidity demands during reasonably foreseeable stressed market periods.⁴¹⁷

Finally, the fund would be required to have policies and procedures reasonably designed to assess the operational risks associated with the fund's derivatives transactions. Operational risk encompasses a wide variety of possible events, including risks related to potential documentation issues, settlement issues, systems failures, inadequate controls, and human error.⁴¹⁸ Policies and procedures for evaluating such risks could include, for example, assessments of the robustness of relevant systems and procedures and reviews of training processes.

These five identified potential categories of risk discussed above are common to many derivatives transactions. However, this proposed element would not limit this assessment to an examination of only those identified risks. This element should also generally include evaluation of other applicable risks associated with derivatives transactions. For example, some derivatives transactions could pose certain idiosyncratic risks, such as the legal risk associated with the potential that a bespoke OTC contract⁴¹⁹ or netting agreement might not be held to be legally valid or binding or compliant with other legal requirements, or that have provisions that may be one-sided or difficult to enforce in the event of a counterparty's default.⁴²⁰ Such risks should also be

⁴¹² See *supra* note 167 and section III.B.1.d regarding ways that commenters have noted that they engage in an evaluation of leverage used by funds.

⁴¹³ Market risk should be considered together with leverage risk because leveraged exposures can magnify such impacts. See, e.g., Derivatives and Risk Management Made Simple, NAPF (Dec. 2013), available at https://www.jpmorgan.com/cm/BlobServer/is_napfms2013.pdf?blobkey=id&blobwhere=1320663533358&blobheader=application/pdf&blobheadername1=Cache-Control&blobheadervalue1=private&blobcol=urldata&blobtable=MungoBlobs.

⁴¹⁴ See, e.g., *Top ten best practices for managing model risk*, FinCAD, available at <http://www.fincad.com/resources/resource-library/whitepaper/top-10-best-practices-managing-model-risk>. In addition, as discussed in more detail below, one of the elements of the proposed program would require the fund to adopt and implement written policies and procedures to periodically review and update the program and any tools that are used as part of the program. See *infra* section III.D.2.d.

⁴¹⁵ See, e.g., Nils Beier, et al., *Getting to Grips with Counterparty Risk*, McKinsey Working Papers on Risk, Number 20 (June 2010).

⁴¹⁶ We have recently proposed a comprehensive set of reforms designed to enhance funds' liquidity management processes, which includes evaluating the liquidity of fund derivative holdings, as well as a definition of liquidity risk. See *Liquidity Release*, *supra* note 5. If we were to adopt the liquidity risk management program, we expect that such program would serve as a complement to the proposed derivatives risk management program with respect to assessing the liquidity of fund derivatives and that these programs might coordinate and overlap regarding assessment of liquidity risk for derivatives. We note that overlapping activities associated with the program would not need to be duplicated for each program, but that a fund might assess and monitor liquidity risk in a holistic way, consistent with the individual requirements of each program.

⁴¹⁷ See, e.g., Peter Neu & Pascal Vogt, *Liquidity Risk Management*, The Boston Consulting Group (Oct. 2010), available at <http://www.bostonconsulting.com.au/documents/file93481.pdf>; Board of the International Organization of Securities Commissions, *Principles of Liquidity Risk Management for Collective Investment Schemes*, OICU-IOSCO (Mar. 2013), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD405.pdf>.

⁴¹⁸ See, e.g., 2008 IDC Report, *supra* note 72; Statement on best practices for managing risk in derivatives transactions, *supra* note 408.

⁴¹⁹ Because derivatives contracts that are traded over the counter are not standardized, they bear a certain amount of legal risk in that poor draftsmanship, changes in laws, or other reasons may cause the contract to not be legally enforceable against the counterparty. See, e.g., *Comprehensive Risk Management of OTC Derivatives*, *supra* note 408.

⁴²⁰ For example, many derivatives contracts and prime brokerage agreements that hedge funds and other counterparties had entered into with Lehman

included in the fund's risk assessment, if applicable.

We request comment on all aspects of this proposed element of the program.

- Should we require policies and procedures to include an assessment of particular risks based on an evaluation of certain identified risk categories as proposed? If not, why?

- Are the categories of risks that we have identified in the proposed rule appropriate? Should we remove any of the identified risk categories? Should we provide further guidance regarding the assessment of any of these risks?

- Should we add any other categories of required risks that would be required for each fund to have policies and procedures reasonably designed to evaluate as part of its program? If so what additional categories and why?

- Should we require policies and procedures for any additional evaluation of derivatives positions that are used by a fund to provide a hedge for, or otherwise reduce risks with respect to, other investments by the fund, to evaluate the effectiveness of the hedging or risk reduction?

b. Management of Risks

The second proposed element of the program would be a requirement that the fund have policies and procedures reasonably designed to manage the risks of its derivatives transactions, including by monitoring whether those risks continue to be consistent with any investment guidelines established by the fund or the fund's investment adviser, the fund's portfolio limitation established under the proposed rule, and relevant disclosure to investors, and informing portfolio management of the fund or the fund's board of directors, as appropriate, regarding material risks arising from the fund's derivatives transactions.⁴²¹ Implementing this element might include building or enhancing portfolio tracking systems, exception reporting, or other mechanisms designed to monitor the risks associated with the fund's derivatives transactions and provide current information regarding those

Brothers included cross-netting that allowed for payments owed to and from different Lehman affiliates to be offset against each other, and cross-liens that granted security interests to all Lehman affiliates (rather than only the specific Lehman entity entering into a particular transaction). In 2011, the U.S. Bankruptcy Court for the Southern District of New York held that cross-affiliate netting provisions in an ISDA swap agreement were unenforceable against a debtor in bankruptcy. *In re Lehman Brothers Inc.*, Bankr. Case No. 08–01420 (JPM) (SIPA), 458 B.R. 134, 1135–137 (Bankr. S.D.N.Y. Oct. 4, 2011).

⁴²¹ Proposed rule 18f-4(a)(3)(i)(B).

risks to relevant personnel.⁴²² We believe that various kinds of stress testing may also be useful tools to monitor and manage risks.

Under this element, a fund would be required to have policies and procedures reasonably designed to manage the risks of derivatives transactions, but this element would not require a fund to impose particular risk limits.⁴²³ Instead, it would require a fund to have policies and procedures reasonably designed to manage the risks of derivatives transactions so that they are consistent with any investment guidelines established by the fund or the fund's investment adviser and the fund's portfolio limitations, disclosure, and investment strategy.⁴²⁴

Funds may use a variety of approaches in developing policies and procedures to manage the risks associated with the fund's derivatives transactions.⁴²⁵ As a preliminary step, a fund would likely review its relevant disclosure and investment guidelines to establish the appropriate risks that the fund could undertake through derivatives transactions (for example through specified allowable types of derivatives transactions or overall limits). This review could involve establishing an appropriate limit for allowable fund risk, and its relationship to the risks associated with the derivatives transactions in which the

⁴²² Such systems may provide notifications of red flags, such as frequent or unusual overrides of policies. Funds may wish to consider whether such monitoring mechanisms are sophisticated enough to identify outlier activity caused by unapproved employee activity (such as a rogue trader). See, e.g., Geoff Kates, *No Surprises-Combating Rogue Trading*, LEPUS, available at http://www.isda.org/c_and_a/ppt/Rogue_Traders_presentation.ppt; Banking Tech, *Stopping the rogues: Reactions to the UBS rogue trader* (Oct. 6, 2011), available at <http://www.bankingtech.com/48103/Stopping-the-rogues-Reactions-to-the-UBS-rogue-trader/>.

⁴²³ See, e.g., Mutual Fund Directors Forum, *Risk Principles for Fund Directors: Practical Guidance for Fund Directors on Effective Risk Management Oversight* (Apr. 2010) ("MFDF Guidance"), available at http://www.mfdf.org/images/Newsroom/Risk_Principles_6.pdf.

⁴²⁴ Investment guidelines may be established by the fund or the adviser and approved by the board and typically provide a set of limits on the fund's investment activities. These guidelines may be of varying degrees of specificity and typically are distinct from the fund's disclosure to investors. The rule does not require funds to establish such guidelines, but we understand that most funds do have such guidelines in place. This element would require that funds manage the risks of their derivatives transactions so that they are consistent with any such established guidelines, as well as being consistent with relevant portfolio limitations and disclosure.

⁴²⁵ See, e.g., Comprehensive Risk Management of OTC Derivatives, *supra* note 408; Statement on best practices for managing risk in derivatives transactions, *supra* note 408; 2008 IDC Report, *supra* note 72.

fund engages.⁴²⁶ Funds today use a variety of models or methodologies to measure the risks associated with these transactions (for example, VaR, stress testing, or horizon analysis) to help manage those risks.

In managing and monitoring the relevant risks, a fund might consider establishing written guidelines describing the scope and objectives of the fund's use of derivatives. A fund could also consider establishing an "approved list" of specific derivative instruments or strategies that may be used, as well as a list of persons authorized to engage in the transactions on behalf of the fund.⁴²⁷ Funds may also wish to consider establishing corresponding investment size controls or limits for approved transactions across the fund, along with appropriate risk measurement monitoring mechanisms designed to prevent the fund from violating any portfolio limitations or investment guidelines, along with implementing tools to monitor such restrictions. Establishing clear risk management processes for approving exceptions to any established limits, with oversight and approval of any exceptions from senior management, generally is also a key aspect of effective risk management, and something funds may wish to consider implementing. Effective risk management generally also may include evaluation of counterparties, for example, through review of their financial position, overall trading relationship with the fund, and total credit exposure.⁴²⁸ Funds may wish to consider establishing an approved list of counterparties, or trade-by-trade decision making in some cases.⁴²⁹ In addition, counterparty risk mitigation also could include requirements related to the type and amount of collateral posted.

Managing derivatives transaction risk could also involve reviewing existing, and potentially establishing new, contingency plans and tools in case of adverse market or system events. This could include establishing committed

⁴²⁶ This could also include creating maximum effective leverage limits for the fund, if such limits are determined to be useful tools for managing the risks of derivatives transactions.

⁴²⁷ Funds may wish to provide new instruments (or instruments newly used by a fund) additional scrutiny. See, e.g., MFDF Guidance, *supra* note 423, at 8.

⁴²⁸ See, e.g., Christina Ginfrida, *Mitigating Counterparty Risk in Derivatives Trades*, Treasury & Risk (June, 2013), available at <http://www.treasuryandrisk.com/2013/06/19/mitigating-counterparty-risk-in-derivatives-trades>.

⁴²⁹ An important consideration may be whether a counterparty is a central counterparty or a counterparty dealing in over the counter instruments.

reserve lines of credit, evaluating potential legal remedies in the case of counterparty default, and having robust systems (including back-ups as appropriate) across front, mid, and back office operations. Funds may also consider establishing processes to manage the particular accounting, custody, legal, and other operational risks posed by derivatives transactions.

The element also would require policies and procedures for informing the portfolio manager or board of risks associated with the fund's derivatives transactions.⁴³⁰ We believe that such communication would generally be a key part of any risk management and monitoring program, because information about relevant risks should not remain solely with the derivatives risk manager, but should be shared up the chain as needed so that appropriate action to address risks can be taken if warranted. We understand that funds today use various tools (for example, risk dashboards) to identify evolving risks that may serve as a key signal indicating when information should be provided to relevant parties. We believe that this communication requirement should help ensure that information about derivatives transactions risks is not siloed, but instead is shared with parties who can take actions as needed to mitigate risks. This requirement is also intended to encourage the derivatives risk manager to engage in communication with relevant parties on a current and ongoing basis as needed, and not limit communication solely to quarterly reports.

The potential risk management and monitoring mechanisms discussed above are just examples of the techniques funds might consider including in their policies and procedures to manage the risks of their derivatives transactions under this proposed element. To effectively manage its own particular risks, a fund generally should carefully review its current and planned use of derivatives well as any relevant limitations (including internal limitations established by the fund's adviser), and develop risk management tools and processes effectively tailored to its own circumstances.

We request comment on the proposed element of the program requiring funds to have policies and procedures reasonably designed to manage the risks of the derivatives transactions.

- Should we establish any additional risk management requirements within the program element itself, or should we keep it generally principles based as we

are proposing? For example, should we specifically require the creation of approved transactions lists or derivative size controls? Should we require that funds use specific risk management tools such as stress testing? If so, what tools should we require?

- Should we require that a fund institute specific investment guidelines regarding its use of derivatives transactions? If so what would those guidelines be?

- Should we require the derivatives risk manager to provide material risk information to portfolio management or the board as appropriate, or would this be generally included in the quarterly reports provided by the officer to the board? If we did not include such an information requirement, would risk information potentially become stale and not be acted upon in a timely manner?

c. Segregation of Functions

We are also proposing to require, as an element of the program, that a fund have policies and procedures reasonably designed to reasonably segregate the functions associated with the program from the portfolio management of the fund.⁴³¹ We believe that independence of risk management from portfolio management should promote objective and independent risk assessment to complement and cross check portfolio management,⁴³² and that maintaining separation of these functions should enhance the protections provided by the program. We understand that funds today often make efforts to reasonably segregate risk management from portfolio management and believe that this proposed requirement would therefore be consistent with existing practices. Many commentators have observed that independent oversight of derivatives activities by compliance and internal audit functions is valuable.⁴³³ Because fund management personnel may be compensated in part based on the returns of the fund they manage, the incentives of portfolio managers may not always be consistent with the restrictions imposed by a risk management program. Thus, we believe that keeping the functions separate should help mitigate the possibility that

the program's effectiveness could be diminished if it were not independent of portfolio management. Separation of functions creates important checks and balances and can be instituted through a variety of methods such as independent reporting chains, oversight arrangements, or separate monitoring systems and personnel.⁴³⁴

However, this segregation of functions is not meant to indicate that the derivatives risk manager and portfolio management should be subject to a communications "firewall."⁴³⁵ We recognize the important perspective and insight to the fund's use of derivatives that the portfolio manager can provide and would expect that the derivatives risk manager would work closely with portfolio management as he or she implements all aspects of the program. We believe that regular communication between the risk manager and portfolio management should be a part of any well-functioning program. Indeed, as discussed above, the derivatives risk management program would require that risk management personnel monitor the risks associated with the fund's derivatives transactions and inform portfolio management (or the fund's board) regarding those risks as appropriate.

We request comment on the proposed element requiring funds to maintain controls reasonably segregating the program functions from portfolio management.

- Do commenters agree that segregation of risk management functions from portfolio management would enhance the protections provided by the proposed derivatives risk management program requirement?

- Would this element pose difficulties for particular entities, for example, funds managed by small advisers? Should we provide any additional clarification of what it means to have reasonable segregation of

⁴³⁴ Another important segregation tool may be ensuring that the compensation of the risk management oversight personnel is not tied to or dependent on the performance of the fund. *See, e.g.,* Raffaele Scalcone, *The Derivatives Revolution: a trapped innovation and a blueprint for change* (2011), at 334.

⁴³⁵ In particular, we recognize that this segregation requirement may pose challenges for certain entities that may have a limited number of employees. In such cases, the program should still have policies and procedures designed to reasonably segregate the functions of the program from fund portfolio management. As noted previously, however, the proposed rule would require reasonable segregation, not complete segregation of functions. We also note that the derivatives risk manager would not be permitted to be a portfolio manager of the fund, which we believe is likely to encourage reasonable segregation of functions as a result of such separation of roles.

⁴³¹ Proposed rule 18f-4(a)(3)(i)(C).

⁴³² *See, e.g.,* Comptroller of the Currency Administrator of National Banks, *Risk Management of Financial derivatives: Comptroller's handbook*, (Jan. 1997), at 9 (discussing the importance of independent risk management functions in the banking context).

⁴³³ *See, e.g.,* COSO, *Internal Control Issues in Derivatives Usage*, available at <http://coso.org/documents/Internal%20Control%20Issues%20in%20Derivatives%20Usage.pdf>; *see also*, FSA Times Derivatives Dangers, *supra* note 408.

⁴³⁰ Proposed rule 18f-4(a)(3)(i)(B)(ii).

functions in such cases? If so, what changes should we make?

- Are there other ways to incentivize objective and independent risk assessment of portfolio strategies that we should consider?

d. Periodic Review

The fourth element of the proposed program is that a fund would need to have policies and procedures reasonably designed to periodically (but at least annually) review and update the program, including any models (including any VaR calculation models used during the covered period), measurement tools, or policies and procedures that are part of, or used in, the program to evaluate their effectiveness and reflect changes in risks over time.⁴³⁶ Under the proposed derivatives risk management program requirement, each fund would need to develop and adopt policies and procedures to review the fund's derivatives risk, tailored as appropriate to reflect the fund's particular facts and circumstances. As part of this program, funds are likely to use a variety of models, tools, and policies and procedures as part of its implementation. The derivatives markets are dynamic and evolving, and tools and processes should be reviewed and modified as appropriate.

We believe that the periodic review of a fund's derivatives risk management program is necessary to determine whether, in light of current circumstances, these risks are appropriately being addressed. The proposed program review requirement would require each fund to develop and adopt procedures to annually review and update the fund's derivatives risk management program. This review and update would need to include any models (including any VaR calculation models used during the covered period),⁴³⁷ measurement tools, or policies and procedures that are part of, or used in, the program to evaluate their effectiveness and reflect changes in risks relating to the use of derivatives. However, beyond this, proposed rule 18f-4 would not include prescribed review procedures or incorporate specific developments that a fund must consider as part of its review. A fund might generally consider whether its periodic review procedures should

include procedures for evaluating regulatory, market-wide, and fund-specific developments affecting its program.

We are also proposing that this periodic review take place at least annually. We believe that the program should be reviewed and updated on at least an annual basis because the risks of derivatives transactions and tools available change and evolve rapidly. An annual review is a minimum requirement, but a fund should consider whether more frequent reviews are appropriate depending on the circumstances. We expect that such a review and update should take place frequently enough to take into account the particular risks that may be presented by the fund's use of derivatives, including the potential for rapid or significant increases in risks in changing market conditions.

We request comment on the proposed element requiring funds to periodically review and update the program.

- Do commenters agree that the rule should specifically require that a fund periodically review and update the program and any tools that are used as part of the program as proposed?

- As proposed, should we require this review to take place at least annually, or should we require a more frequent review, such as quarterly (to coincide with proposed reporting to the fund's board discussed below)? Should we instead not prescribe a minimum frequency for the periodic review and update?

- Are there certain review procedures that the Commission should require and/or on which the Commission should provide guidance? Should the Commission expand its guidance on regulatory, market-wide, and fund-specific developments that a fund's review procedures might cover?

3. Administration of the Program

Proposed rule 18f-4 would expressly require a fund to designate an employee or officer of the fund or the fund's investment adviser (who may not be a portfolio manager of the fund) responsible for administering the policies and procedures of the derivatives risk management program, whose designation must be approved by the fund's board of directors, including a majority of the directors who are not interested persons of the fund.⁴³⁸ We

believe that having a designated individual responsible for managing the program should enhance its accountability and effectiveness. The derivatives risk manager may also have other roles, including, for example, serving as the fund's chief compliance officer or chief risk manager (if it has one).⁴³⁹ Under the proposed rule, the derivatives risk manager must be an employee of the fund or its investment adviser, but may not be a portfolio manager for the fund.⁴⁴⁰ We recognize that some small advisers may have a limited number of employees or officers who are not portfolio managers of the fund. In such a case, the fund's chief compliance officer might be designated as the program's risk manager (with assistance from third parties as appropriate) or the fund or adviser may determine that they need to hire new personnel to administer the program. In any event, the derivatives risk manager should generally be sufficiently knowledgeable about the risks and use of derivatives that he or she can effectively fulfill the responsibilities of their position.

For the same reasons discussed above regarding the maintenance of controls that segregate functions of the program from portfolio management, we believe that interdependence of the derivatives risk manager is important for a well-functioning program.⁴⁴¹ If a derivatives risk manager were a person making portfolio management decisions, the risk manager may be influenced to selectively apply or otherwise weaken or not fully comply with the program's requirements if the restrictions of the program potentially conflict with the preferred investment strategy of the portfolio manager.

Unlike the chief compliance officer under rule 38a-1, proposed rule 18f-4

the derivatives risk management program condition would apply only to a limited subset of funds that choose to use derivatives to obtain exposure exceeding 50% of the fund's net assets (or that choose to use complex derivatives), while all open-end funds (other than money market funds) and ETFs would be required to have a liquidity program under proposed rule 22e-4. As noted above, we believe that the risks of derivatives transactions are complex and significant. Having a specific person designated as responsible for administering the program rather than a committee or group should help to more clearly delineate lines of responsibility and oversight over these risks for those funds that choose to engage in them.

⁴³⁹ See, e.g., Investment Company Institute, *Chief Risk Officers in the Mutual Fund Industry: Who are they and what is their role within the organization* (2007), available at <http://www.ici.org/pdf/21437.pdf>.

⁴⁴⁰ A fund could also formally designate an employee or officers of the fund's sub-adviser to be responsible for administering the derivatives risk management program.

⁴⁴¹ See, e.g., MFDF Guidance, *supra* note 423.

⁴³⁶ Proposed rule 18f-4(a)(3)(i)(D).

⁴³⁷ Because of the importance of VaR calculations in the proposed rule for funds that operate under the risk-based portfolio limitation, the proposed element would specifically require that any VaR models used by the fund during the covered period be included as part of this periodic review and update.

⁴³⁸ Proposed rule 18f-4(a)(3)(ii)(C). This would differ from the approach taken in our recent liquidity rulemaking proposal, which would not require the designation of a specific person to administer the program, but would instead allow the designation of the fund's adviser or multiple employees to administer the program. We note that

would not require that a derivatives risk manager only be removable by the board, nor would the board need to approve the derivatives risk manager's compensation. While we expect that a derivatives risk manager would play an important role, we do not believe that his or her removal or compensation would in all cases be so central to the fund's investment activities or compliance function to require that risk managers should generally be appointed or removed only by the board.⁴⁴²

We request comment on the proposed requirement that a program be administered by a derivatives risk manager.

- Under the proposed rule, the derivatives risk manager may not act as a portfolio manager of the fund. Do commenters agree that this is appropriate and would improve the effectiveness of the program? If not, why?

- Under the proposed rule, a specific person who is an employee or officer of the fund or its adviser would be designated as the risk manager. Is this appropriate? Should we instead allow the fund to designate the adviser as a whole or a group of people (such as a risk committee) as the program's risk manager?

- Is it appropriate to specify that the derivatives risk manager may not be a portfolio manager for the fund and must be an employee or officer of the fund or its adviser? Would any small fund complexes have difficulty meeting the proposed requirement?

- Rule 38a-1(c) prohibits officers, directors, and employees of the fund and its adviser from, among other things, coercing or unduly influencing a fund's CCO in the performance of their duties. Should we include such a prohibition on unduly influencing a fund's derivatives risk officer in the proposed risk management condition? Why, or why not? Should the Commission prohibit any officers, directors, or employees of a fund and its adviser from, directly or indirectly, taking any action to coerce, manipulate, mislead, or fraudulently influence the derivatives risk officer in the performance of his or her responsibilities?

- This requirement would effectively bar funds from outsourcing the administration of the derivatives risk manager to third parties. Is this appropriate, or should we instead allow third parties to administer the program

as some funds and investment advisers do with respect to their chief compliance officer? Would allowing third parties to act as risk managers enhance the program by allowing specialized personnel to administer the program or detract from it by allowing for a risk manager who may not be as focused on the specific risks of the particular fund and its program?

- If we were not to require the independence between the derivatives risk manager and the fund's portfolio managers, how could we ensure that the program management is not unduly influenced by portfolio management personnel who may have conflicting incentives?

- Do commenters agree that it would be appropriate to require a fund to designate the fund's derivatives risk manager, subject to board approval?

- Should we require the derivatives risk manager to be removable only by the fund's board and the manager's compensation to be approved by the board as is the case with the chief compliance officer of a fund? If so why? Would such a requirement pose significant burdens on fund boards?

- Should we include any other administration requirements? For example, should we include a requirement for training staff responsible for day-to-day management of the program, or for portfolio managers, senior management, and any personnel whose functions may include engaging in, or managing the risk of, derivatives transactions? If we require such training, should that involve setting minimum qualifications for staff responsible for carrying out the requirements of the program? Should training and education be required with respect to any new derivatives instruments that a fund may trade?

4. Board Approval and Oversight

Under the proposed rule, the fund's derivatives risk management program would be administered by the derivatives risk manager, with oversight provided by the board. Requiring the derivatives risk manager to be responsible for the day-to-day administration of the fund's derivatives risk management program, subject to board oversight, is consistent with the way we believe many funds currently manage derivatives risk.

4. Board Approval and Oversight

We believe that boards should understand the derivatives risk management program and the risks it is designed to manage.⁴⁴³ Accordingly,

proposed rule 18f-4 would require each fund to obtain initial approval of its written derivatives risk management program from the fund's board of directors, including a majority of independent directors.⁴⁴⁴ Directors, and particularly independent directors, play a critical role in overseeing fund operations, although they may delegate day-to-day management to a fund's adviser.⁴⁴⁵ Given the board's historical oversight role, we believe it is appropriate to require a fund's board to approve the fund's derivatives risk management program. This requirement is designed to facilitate scrutiny by the board of directors of the derivatives risk management program—an area where there may potentially be conflicts of interest between the investment adviser and the fund with respect to the use of derivatives by the fund.

In considering whether to approve the program or any material changes to it, boards generally should consider the types of derivatives transactions in which the fund engages or plans to engage, their particular risks, and whether the program sufficiently addresses the fund's compliance with its investment guidelines, any applicable portfolio limitation, and relevant disclosure. Boards generally should consider the adequacy of the program from time to time in light of past experience (both by the fund in particular and with market derivatives use in general) and recent compliance experiences. Boards may also wish to consider best practices used by other fund complexes, or consult with other experts familiar with derivatives risk management by similar funds or market participants. Directors may satisfy their obligations with respect to this initial approval by reviewing summaries of the derivatives risk management program prepared by the fund's derivatives risk manager, legal counsel, or other persons familiar with the derivatives risk management program. The summaries might familiarize directors with the salient features of the program and provide them with an understanding of how the derivatives risk management program addresses the fund's use of derivatives. In considering whether to approve a fund's derivatives risk management program, the board may

Derivatives-Key Areas of Risk on Which I Would Focus (Nov. 2007), available at <http://www.sec.gov/news/speech/2007/spch110807gg.htm>.

⁴⁴⁴ In this Release, we refer to directors who are not "interested persons" of the fund as "independent directors." Section 2(a)(19) of the Investment Company Act identifies persons who are "interested persons" of a fund.

⁴⁴⁵ See, e.g., Liquidity Release, *supra* note 5, at 175.

⁴⁴² This approach is also consistent with the designation process we recently proposed in the liquidity rulemaking proposal. See Liquidity Release, *supra* note 5.

⁴⁴³ See, e.g., 2011 IDC Report, *supra* note 385, at 9; MFDF Guidance, *supra* note 423. See also, Gene Gohlke, *If I Were a Director of a Fund Investing in*

wish to consider the nature of the fund's derivatives risk exposures. A board also may wish to consider the adequacy of the fund's derivatives risk management program in light of recent experiences regarding the fund's use of derivatives.⁴⁴⁶

Proposed rule 18f-4 also would require each fund to obtain approval of any material changes to the fund's derivatives risk management program from the fund's board of directors, including a majority of independent directors. As with the initial approval of a fund's derivatives risk management program, the requirement to obtain approval of any material changes to the fund's derivatives risk management program from the board is designed to facilitate independent scrutiny of material changes to the derivatives risk management program by the board of directors.

The fund's board would be required under the proposed rule to review a written report from the fund's derivatives risk manager, provided no less frequently than quarterly, that reviews the adequacy of the fund's derivatives risk management program and the effectiveness of its implementation.⁴⁴⁷ We believe regular reporting to the board should assist boards in being adequately informed about the effectiveness and implementation of the program, enhancing their oversight ability.⁴⁴⁸ To the extent that a serious compliance issue arises under the program, it should be brought to the board's attention promptly.⁴⁴⁹ Regular reporting will also help to reduce the risk that issues are not addressed promptly and increase the likelihood that the derivatives risk manager is actively involved in addressing issues as they arise. We believe that this reporting should take place on at least a quarterly basis, rather than an annual one, in light of the significant impact that derivatives transactions can have on a fund over a short period of time.

⁴⁴⁶ See also Liquidity Release, *supra* note 5 (which provides similar board oversight of liquidity risk management).

⁴⁴⁷ Proposed rule 18f-4(a)(3)(ii)(B).

⁴⁴⁸ The derivatives risk manager generally should consider whether significant issues should be reported to the adviser or board more quickly than in the quarterly report, for example pursuant to the requirement laid out in proposed rule 18f-4(a)(3)(i)(B)(ii).

⁴⁴⁹ See Compliance Programs of Investment Companies and Investment Advisers Release No. 2204, at n.84 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (“2003 Adopting Release”) (noting, in the case of a rule 38a-1 compliance program, that “[s]erious compliance issues must, of course, always be brought to the board’s attention promptly”).

We request comment on the proposed board approval and oversight requirements.

- Should the board be required to approve the program and any material changes as proposed? If not, why? In the absence of such board approval, would a board be able to effectively oversee the adequacy of a program?

- Should we require reporting to the board about the effectiveness of the program as proposed? Should we require a frequency other than quarterly? If so, how frequent and why? Should we not require a frequency but instead require periodic reporting as appropriate?

- Instead of requiring boards to review the report, should we instead take an approach similar to rule 38a-1 and require reports to be submitted to the board?

E. Requirements for Financial Commitment Transactions

The proposed rule also would address and limit funds' use of financial commitment transactions. The proposed rule would define a “financial commitment transaction” as any reverse repurchase agreement, short sale borrowing, or any firm or standby commitment agreement or similar agreement.⁴⁵⁰ The requirements applicable to financial commitment transactions in the proposed rule thus would address funds' use of the trading practices described in Release 10666, as well as short sales of securities.

The proposed rule would require a fund that engages in financial commitment transactions in reliance on the rule to maintain qualifying coverage assets equal in value to the amount of cash or other assets that the fund is conditionally or unconditionally obligated to pay or deliver under each of its financial commitment transactions.⁴⁵¹ The proposed rule thus is designed to require the fund to maintain qualifying coverage assets equal in value to the fund's full obligations under its financial commitment transactions. Because in many cases the timing of the fund's payment obligations under a financial commitment transaction may be specified under the terms of the transaction or the fund may otherwise have a reasonable expectation regarding

⁴⁵⁰ Proposed rule 18f-4(c)(4). The rule includes, as a similar agreement, an agreement under which a fund has obligated itself, conditionally or unconditionally, to make a loan to a company or to invest equity in a company, including by making a capital commitment to a private fund that can be drawn at the discretion of the fund's general partner.

⁴⁵¹ Proposed rule 18f-4(b)(1), (c)(5).

the timing of the fund's payment obligations with respect to its financial commitment transactions, the proposed rule would allow the fund to maintain as qualifying coverage assets certain other assets in addition to cash and cash equivalents, as generally required for derivatives transactions.⁴⁵² Qualifying coverage assets for each financial commitment transaction would need to be identified on the books and records of the fund at least once each business day.

By requiring the fund to maintain qualifying coverage assets to cover the fund's full potential obligation under its financial commitment transactions, the proposed rule generally would take the same approach to these transactions that we applied in Release 10666, with some modifications. As we discussed above in section III.A, requiring a fund to segregate assets equal in value to the fund's full obligations under financial commitment transactions may be an effective way both to impose a limit on the amount of leverage a fund could obtain through those transactions, and to require the fund to have adequate assets to meet its obligations. The asset segregation requirement in the proposed rule is designed to limit the amount of leverage the fund could obtain through financial commitment transactions because the fund could not incur obligations under those transactions in excess of the fund's qualifying coverage assets. This would limit a fund's ability to incur obligations under financial commitment transactions to an amount not greater than the fund's net assets. This approach also is designed to help the fund to have adequate assets to meet its obligations under financial commitment transactions by requiring the fund to have qualifying coverage assets equal in value to those obligations.

Under the proposed rule, the fund's board of directors (including a majority of the directors who are not interested persons of the fund) would be required to approve policies and procedures reasonably designed to provide for the fund's maintenance of qualifying coverage assets. We believe that requiring the fund's board to approve the policies and procedures, including a majority of the fund's independent directors, appropriately would focus the board's attention on the fund's management of its obligations under financial commitment transactions and the fund's use of the exemption provided by the proposed rule. We

⁴⁵² Proposed rule 18f-4(c)(8)(iii) (defining “qualifying coverage assets” for purposes of financial commitment transactions).

believe that requiring the fund's board to approve these policies and procedures, in conjunction with the board's oversight of the fund's investment adviser more generally, would be an appropriate role for the board.⁴⁵³

1. Coverage Amount for Financial Commitment Transactions

Under the proposed rule, a fund would be required to maintain qualifying coverage assets for each financial commitment transaction with a value equal to at least the amount of the financial commitment obligation associated with the transaction.⁴⁵⁴ The proposed rule would define the term "financial commitment obligation" to mean the amount of cash or other assets that the fund is conditionally or unconditionally obligated to pay or deliver under a financial commitment transaction.⁴⁵⁵ Thus, for example, if a fund commits, conditionally or unconditionally, to purchase a security for a stated price at a later time under a firm or standby commitment agreement or similar agreement, the fund would be required to maintain qualifying coverage assets equal in value to the stated purchase price.⁴⁵⁶

In addition, where the fund is conditionally or unconditionally obligated to deliver a particular asset, the financial commitment obligation under the proposed rule would equal the value of the asset, determined at least once each business day.⁴⁵⁷ Thus, for example, if a fund commits to return a security at a later time under a short sale borrowing, the fund would be required to maintain qualifying coverage assets equal to the value of the security, determined at least once each business day. If the fund owns the security it would be required to deliver under the short sale borrowing, the fund would satisfy the proposed rule's asset segregation requirement by segregating that particular security for the same reasons we discuss above in section III.C.2.b.⁴⁵⁸

⁴⁵³ Other exemptive rules under the Act similarly require the fund's board to take certain actions in order for the fund to rely on the exemption provided by the rule. See, e.g., rules 2a-7, 10f-3, 17a-7, and 18f-3.

⁴⁵⁴ Proposed rule 18f-4(b)(1).

⁴⁵⁵ Proposed rule 18f-4(c)(5).

⁴⁵⁶ Similarly, if a fund commits, conditionally or unconditionally, to pay cash or other assets as an additional loan or contribution to an existing portfolio company under an agreement, the fund would be required to maintain qualifying coverage assets equal in value to the stated commitment amount.

⁴⁵⁷ Proposed rule 18f-4(c)(5).

⁴⁵⁸ Proposed rule 18f-4(b)(1), (c)(5), (c)(8)(ii). As described in more detail below, if the fund has pledged assets with respect to the short sale

The proposed rule would require the fund to maintain qualifying coverage assets to cover the full amount of the fund's obligations under its financial commitment transactions, rather than a mark-to-market and risk-based coverage amount as proposed for derivatives transactions, because a fund may in many cases be required to fulfill its full obligation under a financial commitment transaction as compared to a derivatives transaction. For example, if a fund enters into a firm commitment agreement under which it is obligated to purchase a security in the future, the fund is required under the agreement, and must be prepared, to have sufficient assets to complete the transaction. Similarly, if a fund borrows a security from a broker as part of a short sale borrowing, the fund is obligated to return the security to the broker at the termination of the transaction and must be prepared to meet this obligation, either by owning the security or having assets available to purchase it in the market. By contrast, under many types of derivatives transactions, a fund would generally not expect to make payments or deliver assets equal to the full notional amount.

We recognize that certain financial commitment transactions, such as standby commitment agreements, are contingent in nature and may not always require a fund to fulfill its full potential obligation under the transaction. We also recognize that certain derivatives transactions, such as written options, could result in a fund having to fulfill its full potential obligation under the contract. On balance, however, we believe it would be appropriate to require a fund to maintain qualifying coverage assets to cover its financial commitment obligations, as proposed, to require the fund to have assets to meet its financial commitment obligations. We also note that, as discussed in more detail below, the proposed rule would permit a fund to use assets other than cash and cash equivalents as qualifying coverage assets for financial commitment transactions. In this way the proposed rule is designed both to require a fund to have assets to meet its financial commitment obligations and to address concerns that might be raised if the fund were required to maintain cash and cash equivalents for the fund's longer-term financial commitment obligations. We also believe that this approach would be

borrowing and such assets could be expected to satisfy the fund's obligation under the transaction, the fund could also satisfy the proposed rule's asset segregation requirement by segregating such pledged assets. See proposed rule 18f-4(c)(8)(iii).

consistent with funds' current practices in that we understand that funds that rely on Release 10666 when entering into financial commitment transactions generally segregate assets to cover the funds' full potential obligations under these transactions.

In addition, by requiring the fund to maintain qualifying coverage assets equal in value to the fund's aggregate financial commitment obligations, the proposed rule also would impose a limit on the amount of leverage a fund could obtain through financial commitment transactions. This is because a fund relying on the rule would not be permitted to incur obligations under financial commitment transactions in excess of the fund's qualifying coverage assets. As noted in section III.C.2.c, the total amount of a fund's qualifying coverage assets could not exceed the fund's net assets.⁴⁵⁹ As a result, the fund's financial commitment obligations could not exceed the fund's net assets under the proposed rule.

We have proposed to limit the total amount of fund assets available for use as qualifying coverage assets because, absent this provision, the proposed rule would not impose an effective limit on the amount of leverage a fund could obtain through financial commitment transactions. This is because, in addition to creating a liability for the fund, some financial commitment transactions also generate proceeds that increase the total assets of the fund. If the total amount of a fund's qualifying coverage assets was not reduced to reflect the fund's liability from these transactions, the requirement to maintain qualifying coverage assets would not provide an effective limit on the fund's ability to enter into those transactions because a financial commitment transaction can generate fund assets that could otherwise be used as qualifying coverage assets.

Take, for example, a fund that has \$100 in assets and no liabilities or senior securities outstanding. The fund then borrows a security from a broker and sells it short, generating \$10 on the sale. The fund would then have \$110 in total assets and a corresponding liability of \$10. If the fund were not required to reduce the total amount of its qualifying coverage assets by the amount of the liability from this transaction, the fund would have \$110 in total assets that potentially could be used as qualifying coverage assets if they otherwise met the rule's requirements for qualifying coverage assets; the fund's selling a security short could be viewed as increasing the fund's ability to engage in

⁴⁵⁹ Proposed rule 18f-4(c)(8).

transactions requiring asset segregation under the proposed rule because the transaction itself generated assets. The proposed rule would require the fund to reduce the amount of otherwise available qualifying coverage assets by the amount of the liability from the short sale in this example (*i.e.*, \$10) so that the requirement to maintain qualifying coverage assets would impose an effective limit on the amount of leverage a fund could obtain through financial commitment transactions.⁴⁶⁰

Finally, as noted above, a fund's qualifying coverage assets for its financial commitment transactions, like the qualifying coverage assets for the fund's derivatives transactions, would be required to be identified on the fund's books and records and determined at least once each business day.⁴⁶¹ This requirement is designed so that the fund's assessments of the extent of its financial commitment obligations and the eligibility of its segregated assets as qualifying coverage assets (discussed below) remain reasonably current because the value of certain qualifying coverage assets and the amount of certain financial commitment obligations may fluctuate on a daily basis. Based on staff experience, we believe that this frequency of determination would be consistent with funds' current practices because funds that engage in financial commitment transactions today do so in reliance on Release 10666.⁴⁶²

We request comment on all aspect of the proposed rule's requirement that a fund maintain assets in respect of the financial commitment obligation for its financial commitment transactions and the requirement that the fund's qualifying coverage assets be identified on the fund's books and records and determined at least once each business day.

- The proposed rule's approach to financial commitment transactions, as discussed above, is based on the approach we took in Release 10666 for financial commitment transactions and is designed to impose a limit on the amount of leverage a fund could obtain through those transactions, and to require the fund to have adequate assets

⁴⁶⁰ In addition, and as discussed in more detail in section III.C.2.c, the limit on the total amount of a fund's qualifying coverage assets also is designed to prohibit a fund from entering into financial commitment transactions or issuing other senior securities and then using the proceeds of such leveraging transactions as assets that would then support an additional layer of leverage through financial commitment transactions or derivatives transactions under the proposed rule.

⁴⁶¹ Proposed rule 18f-4(b)(1).

⁴⁶² See Release 10666, *supra* note 20, at discussion of "Segregated Account."

to meet its obligations. Do commenters agree with the proposed rule's approach to financial commitment transactions? Do commenters believe that it would be effective in addressing concerns about leverage and adequacy of assets in connection with a fund's use of financial commitment transactions?

- Is the definition of financial commitment transaction obligation sufficiently clear to allow a fund to determine the amount of assets necessary to comply with the rule? Does the definition adequately capture all of a fund's potential obligations under a financial commitment transaction?

- Should we continue to require funds to segregate their full potential obligation under financial commitment transactions, consistent with Release 10666? Or, should we instead treat financial commitment transactions similar to derivatives transactions and require funds to segregate the mark-to-market coverage amount and a risk-based coverage amount for each financial commitment transaction? If we were to take this approach, are there types of financial commitment transactions for which it may be difficult to determine a mark-to-market coverage amount because, for example, there are not market prices available for the transactions?

- Under the proposed rule, all financial commitment transactions would be subject to the same asset segregation requirement, regardless of whether the fund's obligation under the transaction is conditional or whether the amount of the financial commitment obligation could fluctuate over time. Should we treat conditional financial commitment transactions, such as standby commitment agreements, differently than financial commitment transactions where the obligations are not conditional? If so, how should the asset segregation requirement differ? Should these conditional financial commitment transactions be treated like derivatives transactions? Should we treat short sales, which have a financial commitment obligation that can vary over time, differently than other financial commitment transactions that have a fixed financial commitment obligation amount? If so, how should the asset segregation requirement differ? Should short sales be treated like derivatives transactions and require a risk-based coverage amount or some other amount designed to address future losses?

- The asset segregation requirement in the proposed rule would effectively impose a limit on the fund's ability to enter into financial commitment transactions by limiting the total

amount of a fund's qualifying coverage assets and providing that qualifying coverage assets shall not exceed the fund's net assets. Does the proposed rule appropriately limit the extent to which funds should be permitted to enter into financial commitment transactions? Should the proposed rule include a separate portfolio limitation, similar to the 150% portfolio limitation on derivatives transactions in the exposure-based portfolio limit, rather than limiting the extent to which a fund could incur obligations under financial commitment transactions indirectly through the asset segregation requirement? If so, should that limit be 100% of the fund's net assets (consistent with the proposed rule's limit on the total amount of qualifying coverage assets)? Should it be lower, such as 50% of the fund's net assets, or higher, such as the 150% limitation applicable to derivatives transactions under the exposure-based portfolio limit? Are there other limits, higher or lower, that would be appropriate?

- The proposed rule would require a fund to identify and determine its qualifying coverage assets for its financial commitment obligations at least once each business day. Should the proposed rule instead require the fund to identify and determine these qualifying coverage assets more or less frequently?

2. Qualifying Coverage Assets for Financial Commitment Transactions

Under the proposed rule, "qualifying coverage assets" in respect of a financial commitment transaction would be fund assets that are: (1) Cash and cash equivalents; (2) with respect to any financial commitment transaction under which the fund may satisfy its obligations under the transaction by delivering a particular asset, that particular asset; or (3) assets that are convertible to cash or that will generate cash, equal in amount to the financial commitment obligation, prior to the date on which the fund can be expected to be required to pay such obligation or that have been pledged with respect to the financial commitment obligation and can be expected to satisfy such obligation, determined in accordance with policies and procedures approved by the fund's board of directors.⁴⁶³ The total amount of a fund's qualifying coverage assets could not exceed the fund's net assets.⁴⁶⁴

⁴⁶³ Proposed rule 18f-4(c)(8).

⁴⁶⁴ Proposed rule 18f-4(c)(8). In addition, qualifying coverage assets used to cover a financial commitment transaction could not also be used to

For financial commitment transactions, the proposed rule would permit a fund to maintain assets in addition to cash and cash equivalents, as proposed for derivatives transactions, as qualifying coverage assets for the fund's financial commitment transactions.⁴⁶⁵ This is because we understand that funds use financial commitment transactions for a variety of financial and investment purposes, including obtaining financing for investments acquired (or to be acquired) by the fund and establishing contractual relationships under which the fund agrees to make or acquire loans, debt securities or additional interests in portfolio companies in the future. In many cases, the timing of the fund's payment obligations may be specified under the terms of the financial commitment or the fund may otherwise have a reasonable expectation regarding the timing of the fund's payment obligations with respect to its financial commitment transactions. In addition, certain financial commitment transactions require a fund to pledge assets having an aggregate value that is greater than the financial commitment obligation and, given that the amount and value of these assets will have been evaluated both by the fund and its counterparty, we believe that such assets would generally be expected to satisfy the fund's obligation under such financial commitment transaction unless there subsequently occurs a material reduction in the value of such assets.

The proposed rule therefore would permit a fund to maintain assets that are convertible to cash or that will generate cash, equal in amount to the financial commitment obligation, prior to the date on which the fund can be expected to be required to pay its financial commitment obligation or that have been pledged with respect to a financial commitment obligation and can be expected to satisfy such obligation, determined in accordance with policies and procedures approved by the fund's board of directors.⁴⁶⁶ For example, if a fund enters into a firm commitment agreement whereby the fund agrees to purchase a security from a counterparty at a future date and at a stated price, the fund would know at the outset of the transaction the date on which the

obligation is due and the full amount of the obligation. Rather than being required to maintain cash and cash equivalents equal in value to the amount of this obligation—which the fund may not be required to pay for some time—the proposed rule would permit the fund to maintain assets that are convertible to cash or that will generate cash prior to the date on which the fund can be expected to be required to pay such obligation, determined in accordance with board-approved policies and procedures.

In this example, if the purchase price of the firm commitment is \$100 and the transaction will be completed on a fixed date, the fund, if consistent with its policies and procedures relating to qualifying coverage assets, could segregate a fixed-income security with a value of \$100 or more that would pay \$100 or more upon maturity and would mature in time for the fund to use the principal payment to complete the firm commitment transaction. As another example, the fund could, if consistent with its policies and procedures relating to qualifying coverage assets, segregate a fixed-income security with a value of \$100 or more that would generate \$100 or more in interest payments that the fund could use to complete the firm commitment agreement.

Qualifying coverage assets under the proposed rule include assets that are convertible to cash or able to generate cash, equal in amount to the financial commitment obligation, prior to the date on which the fund can be expected to be required to pay such obligation.⁴⁶⁷ Where the fund can be expected to pay the obligation on a short-term basis, the assets maintained by the fund as qualifying coverage assets also would have to be convertible to cash or able to generate cash on a short-term basis. For example, if the fund has entered into a standby commitment agreement and the fund could be expected to be required to pay the purchase price under the agreement on a short-term basis, the fund would need to segregate assets that could be convertible to cash or able to generate cash in a short period of time to enable the fund to meet its expected obligation. We would expect these assets to be highly liquid assets given the short-term nature of the fund's obligation under the transaction and the proposed rule's requirement that qualifying coverage assets be convertible to cash or generate cash, equal in amount to the financial commitment obligation, prior to the date on which

the fund can be expected to be required to pay such obligation.

The proposed rule would require that an asset's convertibility to cash or the ability to generate cash, and the date on which the fund can be expected to be required to pay the financial commitment obligation, be determined in accordance with policies and procedures approved by the fund's board of directors.⁴⁶⁸ By requiring funds to establish appropriate policies and procedures, rather than prescribing specific segregation methodologies, the proposed rule is designed to allow funds to assess and determine when they can be required to pay financial commitment obligations and their assets' convertibility to cash or ability to generate cash based on the funds' specific financial commitment transactions and investment strategies. As with respect to the determination of risk-based coverage amounts for derivatives transactions, we believe that funds are best situated to evaluate their obligations under their financial commitment transactions and the eligibility of their assets to be used as qualifying coverage assets based on an assessment of their own particular facts and circumstances.

We note that, if we adopt proposed rule 22e-4, funds subject to that rule already would be considering their assets' convertibility to cash in order to comply with rule 22e-4, as explained in more detail in the Liquidity Release.⁴⁶⁹ In classifying and reviewing the liquidity of portfolio positions, proposed rule 22e-4 would require the fund to consider the number of days within which the fund's position in a portfolio asset (or portions of a position in a particular asset) would be convertible to cash at a price that does not materially affect the value of that asset immediately prior to sale.⁴⁷⁰ Proposed rule 22e-4 would require the fund to consider certain specified factors in classifying the liquidity of its portfolio positions.⁴⁷¹ Funds

⁴⁶⁸ Proposed rule 18f-4(c)(8).

⁴⁶⁹ Proposed rule 22e-4(b)(2)(i).

⁴⁷⁰ Liquidity Release, *supra* note 5.

⁴⁷¹ Liquidity Release, *supra* note 5. Specifically, proposed rule 22e-4 would require the fund to consider the following factors, to the extent applicable: (1) Existence of an active market for the asset, including whether the asset is listed on an exchange, as well as the number, diversity, and quality of market participants; (2) frequency of trades or quotes for the asset and average daily trading volume of the asset (regardless of whether the asset is a security traded on an exchange); (3) volatility of trading prices for the asset; (4) bid-ask spreads for the asset; (5) whether the asset has a relatively standardized and simple structure; (6) for fixed income securities, maturity and date of issue; (7) restrictions on trading of the asset and limitations on transfer of the asset; (8) the size of

cover a derivatives transaction. Proposed rule 18f-4(c)(8).

⁴⁶⁵ Proposed rule 18f-4(c)(8).

⁴⁶⁶ Proposed rule 18f-4(c)(8)(iii). As noted above, where the fund is conditionally or unconditionally obligated to deliver a particular asset, the fund also could satisfy the proposed rule's asset segregation requirements by segregating that particular asset. Proposed rule 18f-4(c)(8)(ii).

⁴⁶⁷ Proposed rule 18f-4(c)(8).

undertaking this analysis for purposes of rule 22e-4 thus already would have considered their assets' convertibility to cash and could use this analysis (and related policies and procedures) for purposes of rule 18f-4.

Although not every fund that would be subject to proposed rule 18f-4 would be subject to proposed rule 22e-4, to the extent that fund advisers and third-party service providers develop methodologies or other tools for assessing positions' convertibility to cash in a manner consistent with proposed rule 22e-4, we anticipate that such tools could be used by all funds subject to proposed rule 18f-4 in assessing convertibility to cash for purposes of rule 18f-4. Thus, closed-end funds and BDCs, which are not within the scope of proposed rule 22e-4 but which may enter into financial commitment transactions, could nevertheless employ tools that were developed in response to proposed rule 22e-4 in determining whether an asset is a qualifying coverage asset.⁴⁷² In sum, although proposed rule 18f-4 would not require the fund's policies and procedures to include the factors specified in proposed rule 22e-4, funds may find it efficient to consider those factors and methodologies and tools designed to address them.

The proposed rule would also allow a fund to use, as qualifying coverage assets, assets that have been pledged with respect to a financial commitment obligation and can be expected to satisfy such obligation.⁴⁷³ For example, assets that are pledged by a fund to its broker in connection with a short sale borrowing that can be expected to

the fund's position in the asset relative to the asset's average daily trading volume and, as applicable, the number of units of the asset outstanding; and (9) relationship of the asset to another portfolio asset. *See Id.*, at section III.A.

⁴⁷² Money market funds also are not proposed to be subject to the requirements of proposed rule 22e-4 because they are subject to extensive requirements concerning the liquidity of their portfolio assets under rule 2a-7. *See* Liquidity Release, *supra* note 138. Under rule 2a-7, money market funds are required to limit their investments to short-term, high-quality debt securities that fluctuate very little in value under normal market conditions. Money market funds thus do not engage in derivatives transactions, but may enter into certain financial commitment transactions to the extent permitted under rule 2a-7. Although money market funds could choose to evaluate their assets' convertibility to cash using the factors in proposed rule 22e-4, we generally would expect that they would not need to do so for purposes of proposed rule 18f-4 because we expect that a money market fund, in order to comply with the conditions of rule 2a-7 (including the rule's liquidity requirements and limitations on the maturity of portfolio assets), already would be evaluating when its assets will generate cash (or be convertible to cash) and when it could be expected to pay its financial commitment obligations.

⁴⁷³ Proposed rule 18f-4(c)(8)(iii).

satisfy the fund's obligations under such transaction could, if consistent with the fund's policies and procedures relating to qualifying coverage assets, be segregated on the fund's books and records as qualifying coverage assets for such short sale transaction. Assets that a fund has transferred to its counterparty in connection with a reverse repurchase agreement could be regarded as having been pledged by the fund for purposes of paragraph (c)(8)(iii) of the proposed rule. If such assets can be expected to satisfy the fund's obligations under such transaction, the fund could, if consistent with its policies and procedures relating to qualifying coverage assets, segregate such assets on its books and records as qualifying coverage assets for such transaction.

We request comment on all aspects of the proposed rule's requirements for qualifying coverage assets for financial commitment transactions.

- Do commenters agree that it is appropriate to permit a fund to maintain assets in addition to cash and cash equivalents as qualifying coverage assets for the fund's financial commitment transactions? Should we, instead, require funds to use cash and cash equivalents, as proposed for derivatives transactions, or otherwise specify the types or liquidity profiles of assets that may be used? Should we specify that certain types of assets should not be included as qualifying coverage assets?

- Do commenters agree that, in many cases, the timing of the fund's payment obligations may be specified under the terms of the financial commitment or the fund may otherwise have a reasonable expectation regarding the timing of the fund's payment obligations with respect to its financial commitment transactions? If so, do commenters agree that the proposed rule appropriately recognizes this aspect of many types of financial commitment transactions by permitting a fund to segregate assets that are convertible to cash or that will generate cash prior to the date on which the fund can be expected to be required to pay its financial commitment obligations, determined in accordance with board-approved policies and procedures?

- Under the proposed rule, qualifying coverage assets in respect of a financial commitment transaction would include fund assets that have been pledged by the fund with respect to the financial commitment obligation and can be expected to satisfy such obligation. Do commenters agree that such assets should be considered qualifying coverage assets? Does the proposed rule appropriately describe such assets? Are

there additional requirements that we should impose on the use of such assets as qualifying coverage assets?

- The proposed rule would require that an asset's convertibility to cash or the ability to generate cash, and the date on which the fund can be expected to be required pay the financial commitment obligation, be determined in accordance with policies and procedures approved by the fund's board of directors. Do commenters agree that it is appropriate to allow funds to assess and determine when they can be expected to be required to pay financial commitment obligations and their assets' convertibility to cash or ability to generate cash based on the funds' specific financial commitment transactions and investment strategies?

- The proposed rule would not specify the particular factors that must be included in a fund's policies and procedures for purposes of determining an asset's convertibility to cash or the ability to generate cash, and the date on which the fund can be expected to be required to pay the financial commitment obligation. Are there particular factors we should specify in any final rule? We noted above that, in developing these policies and procedures, a fund could consider the factors specified in proposed rule 22e-4. Should we specifically require that a fund's policies and procedures include the factors specified in rule 22e-4 if we adopt that rule? If so, should only those funds subject to the requirements of proposed rule 22e-4 be required to include those factors? Should we specify additional factors? If so, what factors should be specified?

- The proposed rule would allow a fund to segregate as qualifying coverage assets any assets that are convertible to cash or that will generate cash equal in amount equal to the financial commitment obligation prior to the date on which the fund can be expected to be required to pay such obligation. Should we instead allow a fund to segregate specific types of assets subject to a haircut? If so, how should we determine the appropriate haircut? For example, should we incorporate the haircuts described in the SEC's proposed rule on Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers?⁴⁷⁴ Or should we incorporate the haircut schedule included in the rules adopted by the banking regulators for covered

⁴⁷⁴ *See* Margin and Capital Proposing Release, *supra* note 363.

swap entities?⁴⁷⁵ Is there a different haircut schedule that would be more appropriate for the proposed rule?

F. Recordkeeping

Proposed rule 18f-4 also would include certain recordkeeping requirements relating to the fund's selection of a portfolio limitation; its compliance with the other requirements of the proposed rule; and if the fund is required to implement a formalized derivatives risk management program, records of the program's policies and procedures, and any materials provided to the board of directors related to its operation.⁴⁷⁶ All the records would be required to be kept for 5 years (the first 2 years in an easily accessible place).⁴⁷⁷

First, the proposed rule would require a fund to maintain a record of each determination made by the fund's board that the fund will comply with one of the portfolio limitations under the proposed rule, which would include the fund's initial determination as well as a record of any determination made by the fund's board to change the portfolio limitation.⁴⁷⁸ Such a record should allow our examiners to better evaluate compliance with the proposed exemptive rule.

Second, the proposed rule would require the fund to maintain certain records so that the fund's ongoing compliance with the conditions of the proposed rule can be evaluated by our examiners or the fund's board or compliance personnel. Specifically, the fund would be required to maintain a written copy of the policies and procedures approved by the board

⁴⁷⁵ See Prudential Regulator Margin and Capital Adopting Release, *supra* note 160.

⁴⁷⁶ Proposed rule 18f-4(a)(6).

⁴⁷⁷ The proposed recordkeeping time period is consistent with the retention periods in rule 38a-1 and proposed rule 22e-4. As we explained in the Liquidity Release with respect to proposed rule 22e-4, we believe consistency in these retention periods is appropriate because funds currently have program-related recordkeeping procedures in place incorporating a five-year retention period, which we believe would lessen the compliance burden to funds slightly, compared to choosing a different retention period, such as the six-year recordkeeping retention period under rule 31a-2 under the Act. Taking this into account, we believe a five-year retention period is a sufficient period of time for our examination staff to evaluate whether a fund is in compliance (and has been in compliance) with the proposed rule and anticipate that such information would become less relevant if extended beyond a five-year retention period. Furthermore, we believe that the proposed five-year retention period appropriately balances recordkeeping-related burdens on funds. See Liquidity Release, *supra* note 5, concerning the five-year retention periods included in proposed rule 22e-4.

⁴⁷⁸ See proposed rule 18f-4(a)(6)(i). The fund would be required to maintain this record for a period of not less than five years (the first two years in an easily accessible place) following each determination.

regarding the fund's maintenance of qualifying coverage assets, as required under the proposed rule.⁴⁷⁹ The fund also would be required to maintain a written record demonstrating that immediately after the fund entered into any senior securities transaction, the fund complied with the portfolio limitation applicable to the fund immediately after entering into the senior securities transaction, reflecting the fund's aggregate exposure, the value of the fund's net assets and, if applicable, the fund's full portfolio VaR and its securities VaR.⁴⁸⁰

The fund also would be required to maintain written records reflecting the fund's mark-to-market and risk-based coverage amounts and the fund's financial commitment obligations, and identifying the qualifying coverage assets maintained by the fund to cover these amounts.⁴⁸¹ For derivatives transactions, the fund would be required to maintain written records identifying the qualifying coverage assets maintained by the fund to cover the aggregate amount of its mark-to-market and risk-based coverage amounts—rather than identifying the qualifying coverage assets maintained in respect of each specific derivatives transaction—because the proposed rule generally would require the fund to maintain cash and cash equivalents for its derivatives transactions.⁴⁸² For financial commitment transactions, the fund would be required to maintain written records identifying the specific qualifying coverage assets maintained by the fund to cover each financial commitment transaction in order to allow our examination staff to evaluate whether, as required under the proposed rule, the qualifying coverage assets maintained for specific financial commitment transactions are assets that are convertible to cash or that will generate cash, equal in amount to the financial commitment obligation, prior to the date on which the fund can be expected to be required to pay such

⁴⁷⁹ See proposed rule 18f-4(a)(6)(ii) (derivatives transactions); proposed rule 18f-4(b)(3) (financial commitment transactions). The fund would be required to maintain these policies and procedures that are in effect, or at any time within the past five years were in effect, in an easily accessible place.

⁴⁸⁰ See proposed rule 18f-4(a)(6)(iv). The fund would be required to maintain this record for a period of not less than five years (the first two years in an easily accessible place) following each senior securities transaction.

⁴⁸¹ See proposed rule 18f-4(a)(6)(v); proposed rule 18f-4(b)(3)(ii). The fund would be required to determine these amounts and identify qualifying coverage assets at least once each business day, and would be required to maintain these records for a period of not less than five years (the first two years in an easily accessible place).

⁴⁸² See proposed rule 18f-4(a)(6)(v).

obligation or that have been pledged with respect to the financial commitment obligation and can be expected to satisfy such obligation, determined in accordance with the fund's policies and procedures.⁴⁸³

Finally, the proposed rule would require a fund to maintain records relating to the derivatives risk management program, if the fund is required to adopt and implement a derivatives risk management program.⁴⁸⁴ The proposed rule would require funds to maintain a written copy of the policies and procedures approved by the board.⁴⁸⁵ It would also require funds to maintain records of any materials provided to the board in connection with its approval of the program, as well as any written reports provided to the board relating to the program⁴⁸⁶ and records documenting periodic updates and reviews required as part of the risk management program.⁴⁸⁷ Such records should serve to provide data about the operation of a fund's program to better allow our examiners and compliance personnel to evaluate compliance with the conditions of the proposed rule.

We request comment on the proposed rule's recordkeeping requirements.

- Should we require such recordkeeping provisions? Are there any other records relating to a fund's senior securities transactions that a fund should be required to maintain?

- The proposed rule's recordkeeping requirements generally are designed to allow our examiners or the fund's board or compliance personnel to evaluate the fund's ongoing compliance with the proposed rule's conditions. Do commenters believe that the proposed rule's recordkeeping requirements

⁴⁸³ See proposed rule 18f-4(b)(3)(ii).

⁴⁸⁴ See proposed rule 18f-4(a)(6)(iii).

⁴⁸⁵ See proposed rule 18f-4(a)(6)(iii)(A). The fund would be required to maintain a written copy of the policies and procedures that are in effect, or at any time within the past five years were in effect, in an easily accessible place.

⁴⁸⁶ See proposed rule 18f-4(a)(6)(iii)(B). The fund would be required to maintain these records for at least five years after the end of the fiscal year in which the documents were provided to the fund's board, the first two years in an easily accessible place.

⁴⁸⁷ Specifically, the fund would be required to maintain records documenting the periodic reviews and updates conducted in accordance with paragraph (a)(3)(i)(D) of the proposed rule (including any updates to any VaR calculation models used by the fund and the basis for any material changes thereto), for a period of not less than five years (the first two years in an easily accessible place) following each review or update. See Proposed rule 18f-4(a)(6)(iii)(C). We note that, because of the importance of VaR models under the rule, this provision would require funds to maintain records explaining the basis for any material changes to the VaR calculation models used during the covered period.

would appropriately balance recordkeeping-related burdens on funds? Are there feasible alternatives to the proposed recordkeeping requirements that would minimize recordkeeping burdens, including the costs of maintaining the required records?

- We specifically request comment on any alternatives to the proposed recordkeeping requirements that would minimize recordkeeping burdens on funds, on the utility and necessity of the proposed recordkeeping requirements in relation to the associated costs and in view of the public benefits derived, and on the effects that additional recordkeeping requirements would have on funds' internal compliance policies and procedures. Are the record retention time periods that we have selected appropriate? Should we require records to be maintained for a longer or shorter period? If so for how long?

G. Amendments to Proposed Forms N-PORT and N-CEN

On May 20, 2015, in an effort to modernize and enhance the reporting and disclosure of information by investment companies, we issued a series of proposals, including proposals for two new reporting forms. First, our proposal would require registered management investment companies and ETFs organized as unit investment trusts, other than registered money market funds or small business investment companies, to electronically file with the Commission monthly portfolio investment information on proposed Form N-PORT.⁴⁸⁸ As we discussed in the Investment Company Reporting Modernization Release, we believe that the information that would be filed on proposed Form N-PORT would enhance the Commission's ability to effectively oversee and monitor the activities of investment companies in order to better carry out its regulatory functions. We also stated that we believe that the information on proposed Form N-PORT would allow investors and other potential users to better understand investment strategies and risks, and help investors make more informed investment decisions.⁴⁸⁹

Among other things, proposed Form N-PORT would require funds to disclose certain risk metrics—

⁴⁸⁸ Submissions on Form N-PORT would be required to be submitted no later than 30 days after the close of each month. Only information reported for the third month of each fund's fiscal quarter on Form N-PORT would be publicly available, and such information would not be made public until 60 days after the end of the third month of the fund's fiscal quarter. See Investment Company Reporting Modernization Release, *supra* note 138.

⁴⁸⁹ See *id.*

specifically, the delta for derivatives instruments with optionality,⁴⁹⁰ as well as the portfolio's interest rate risk (DV01)⁴⁹¹ and credit spread risk (SDV01/CR01/CS01).⁴⁹² As we stated in the Investment Company Reporting Modernization Release, disclosure of delta—a measure of the sensitivity of an option's value to changes in the price of the referenced asset—would provide the Commission, investors, and other potential users with an important measurement of the impact, on a fund or group of funds that hold options on an asset, of a change in such asset's price. Moreover, disclosure of delta would assist the Commission and others with measuring exposure to leverage through options, which would allow the Commission, investors, and other potential users to better understand the risks that the fund faces as asset prices change, because the use of this type of leverage can magnify losses or gains in assets.

Second, all registered investment companies, including money market funds but excluding face amount certificate companies, would be required to file annual reports on proposed Form N-CEN.⁴⁹³ Proposed Form N-CEN would require these registered investment companies to provide census-type information that would assist our efforts to modernize the reporting and disclosure of information by registered investment companies and enhance the staff's ability to carry out its regulatory functions, including risk monitoring and analysis of the industry.⁴⁹⁴ Among other things, proposed Form N-CEN would require funds to report whether they relied upon certain enumerated rules under the Act during the reporting period.⁴⁹⁵ We proposed to collect this information to better monitor reliance on exemptive rules and assist us with our accounting, auditing and oversight functions, including, for some rules, compliance with the Paperwork Reduction Act.⁴⁹⁶

1. Reporting of Risk Metrics by Funds That Are Required To Implement a Derivatives Risk Management Program

In the Investment Company Reporting Modernization Release, we requested

⁴⁹⁰ See Item C.11.c.iii.1 of proposed Form N-PORT.

⁴⁹¹ See Item B.3.a of proposed Form N-PORT.

⁴⁹² See Item B.3.b of proposed Form N-PORT.

⁴⁹³ See Investment Company Reporting Modernization Release, *supra* note 138.

⁴⁹⁴ *Id.*

⁴⁹⁵ Item 31 of proposed Form N-CEN.

⁴⁹⁶ See Investment Company Reporting Modernization Release, *supra* note 138, at Part II.E.4.c.iv.

comment on our proposal to require funds to report on Form N-PORT certain portfolio- and position-level risk metrics. We also requested comment on additional risk metrics such as gamma, which enables more precise position-level estimation of sensitivity to underlying price movements, and vega, which provides position-level sensitivity to volatility. The proposal requested comment on whether gamma and vega would enhance the utility of the derivatives information reported in Form N-PORT and the costs and burdens to funds and benefits to investors and other potential users of requiring funds to report such risk metrics.

We received several comment letters relating to our proposal to require funds to report certain portfolio- and position-level risk metrics. Some commenters reflected positively on our proposal, noting that risk metrics could allow the Commission to better understand the risks associated with investments in derivatives.⁴⁹⁷ However, another commenter questioned the utility of reporting risk metrics, such as delta, given the time-lag associated with reporting on Form N-PORT.⁴⁹⁸ Others expressed concern with making specific risk metrics public, as, given the inherent subjectivity of computing risk metrics, disclosure could be of limited utility and potentially confusing for investors.⁴⁹⁹

⁴⁹⁷ See, e.g., Comment Letter of CFA Institute on Investment Company Reporting Modernization (Aug. 10, 2015) (File No. S7-08-15), available at <http://www.sec.gov/comments/s7-08-15/s70815-228.pdf>, at 6-7; Comment Letter of Interactive Data Pricing and Reference Data LLC on Investment Company Reporting Modernization (Aug. 10, 2015) (File No. S7-08-15), available at <http://www.sec.gov/comments/s7-08-15/s70815-329.pdf>, at 1, 9-11; Comment Letter of State Street Corporation on Investment Company Reporting Modernization (Aug. 11, 2015) (File No. S7-08-15), available at <http://www.sec.gov/comments/s7-09-15/s70915-27.pdf>, at 3-4 (specifically recommending, among other risk metrics, that Form N-PORT require disclosure of vega); Comment Letter of Pioneer Investments (Aug. 11, 2015) (File No. S7-08-15), available at <http://www.sec.gov/comments/s7-08-15/s70815-302.pdf>, at 13 (supporting the Commission's desire to standardize disclosure and increase transparency regarding a fund's derivative usage, and recommending that derivative reporting be subject to a de minimis threshold).

⁴⁹⁸ See, e.g., Comment Letter of Dreyfus Corporation on Investment Company Reporting Modernization (Aug. 11, 2015) (File No. S7-08-15), available at <http://www.sec.gov/comments/s7-08-15/s70815-333.pdf>, at 3, 10.

⁴⁹⁹ See, e.g., Comment Letter of Investment Company Institute on Investment Company Reporting Modernization (Aug. 12, 2015) (File No. S7-08-15), available at <http://www.sec.gov/comments/s7-08-15/s70815-315.pdf>, at 7, 21-22, 41-42, 46-47; Comment Letter of Vanguard on Investment Company Reporting Modernization (Aug. 11, 2015) (File No. S7-08-15), available at

We recognize that collecting and reporting alternative risk metrics, such as vega and gamma, could be more burdensome than reporting delta only. However, we believe that requiring funds to report information about the fund's exposures with metrics such as vega and gamma would assist the Commission in better assessing the risk in a fund's portfolio. In consideration of the additional burdens of reporting selected risk metrics to the Commission and the benefits of more complete disclosure of a fund's risks, we are proposing to limit the reporting of vega and gamma to only those funds that are required to implement a formalized derivatives risk management program as required by proposed rule 18f-4(a)(3).⁵⁰⁰ Our reasons for limiting the reporting of vega and gamma are two-fold: First, we understand that there are added burdens to reporting risk metrics and we are therefore proposing to limit the reporting of these risk metrics to only those funds who are engaged in more than a limited amount of derivatives transactions or that use certain complex derivatives transactions, as opposed to funds that engage in a more limited use of derivatives. Second, based on staff experience regarding portfolio management practices and outreach to service providers that calculate risk metrics we believe many of the funds that would be required to implement a derivatives risk management and that invest in derivatives as part of their investment strategy currently calculate risk metrics for their own internal risk management programs, or have risk metrics calculated for them by a service provider, albeit, for internal reporting purposes.

2. Amendments to Proposed Form N-PORT

Part C of proposed Form N-PORT would require a fund and its consolidated subsidiaries to disclose its schedule of investments and certain information about the fund's portfolio of investments. We propose to add Item C.11.c.viii to Part C of proposed Form N-PORT, which would require funds that are required to implement a formalized risk management program under proposed rule 18f-4(a)(3) to provide the gamma and vega for options

<http://www.sec.gov/comments/s7-09-15/s70915-28.pdf>, at 3 (recommending that the Commission omit risk metrics from Form N-PORT, and, instead, use the raw data reported in Form N-PORT to perform its own calculation of risk metrics in order to ensure comparable results between funds); BlackRock Modernization Comment Letter, at 3.

⁵⁰⁰ See *supra* section III.D.; see also proposed rule 18f-4(a)(3).

and warrants, including options on a derivative, such as swaptions.⁵⁰¹

As discussed above, gamma measures the sensitivity of delta⁵⁰² in response to price changes in the underlying instrument. Thus, gamma, in concert with delta, facilitates sensitivity analysis, which would provide the Commission and others with a more precise estimate of the effect of underlying price changes on a fund's investments, particularly for large price movements in the underlying reference asset.

Vega, which measures the amount that an option contract's price changes in relation to a one percent change in the volatility of an underlying asset, would assist the Commission and others with measuring an investment's volatility. This would permit the Commission and others to, among other things, estimate changes in a portfolio based on changes in market volatility, as opposed to changes in asset prices. Vega would accordingly give the Commission and others the tools necessary to construct more comprehensive risk analyses as appropriate.

We anticipate that the enhanced reporting proposed in these amendments would help our staff better monitor price and volatility trends and various funds' risk profiles. Risk metrics data reported on Form N-PORT that is made publicly available also would inform investors and assist users in assessing funds' relative price and volatility risks and the overall price and volatility risks of the fund industry—particularly for those funds that use investments in derivatives as an important part of their trading strategy. For example, third-party data analyzers could use the reported information to produce useful metrics for investors about the relative price and volatility risks of different funds with similar strategies. Moreover, gamma, vega, and delta would help the Commission, investors, and others determine the source of a fund's risk and return. We recognize that determining certain of the inputs that go into computing gamma and vega inherently involve some level of judgment and that some commenters expressed concern that this type of information could be confusing to investors.⁵⁰³ Nevertheless, for the reasons discussed above, we believe that the reporting of gamma and vega would provide valuable information to us and market participants about current fund expectations regarding their use of certain derivatives and better

⁵⁰¹ Item C.11.c.viii of proposed Form N-PORT.

⁵⁰² Item C.11.c.vii of proposed Form N-PORT.

⁵⁰³ See *supra* note 499 and accompanying text.

understand the risks that the fund faces as asset prices and volatility change.

3. Amendments to Proposed Form N-CEN

As discussed above, proposed rule 18f-4 would require funds that engage in derivatives transactions to comply with one of two alternative portfolio limitations: The exposure-based portfolio limit under proposed rule 18f-4(a)(1)(i) or the risk-based portfolio limit under proposed rule 18f-4(a)(1)(ii).⁵⁰⁴ We are proposing to amend Item 31 of Part C of proposed Form N-CEN to require a fund to identify the portfolio limitation on which the fund relied during the reporting period.⁵⁰⁵ This information would allow the Commission to identify funds that rely on the exemptions under proposed rule 18f-4.

4. Request for Comment

We seek comment on each of the Commission's proposed amendments to proposed Form N-PORT and proposed Form N-CEN.⁵⁰⁶

- How, if at all, should we modify the scope of the proposed requirements to report gamma or vega? For example, as we discussed above, in the Investment Company Modernization Release, we requested comment on whether we should require all funds to report gamma and vega. Our current proposal would limit the reporting of gamma and vega to funds that are required to implement a derivatives risk management program. Is this appropriate, or should we require all funds that invest in derivatives with optionality to report these metrics? Alternatively, should we require reporting of these risk metrics for funds with a higher or lower exposure than 50%? Additionally, should we require funds that are required to have a risk management program by virtue of the complexity of the derivatives they invest in, as proposed, to report such metrics, even if their exposure falls below 50%?

- We are also proposing to limit the reporting of gamma and vega to options and warrants, including options on a derivative, such as swaptions. Are there other investment products for which we should require disclosure of gamma and vega? If so, which products and why?

⁵⁰⁴ See *supra* Section III.B.

⁵⁰⁵ Items 31(k) and 31(l) of Proposed Form N-CEN. If a fund relied on the exposure based portfolio limit during part of the reporting period, and the risk-based portfolio limit during part of the same reporting period, it would be required to so indicate.

⁵⁰⁶ Comments regarding the proposed amendments to Forms N-PORT and N-CEN should be submitted to the comment file for this Release.

For example, should we require funds to report gamma and vega for convertible bonds? To what extent would the inputs and assumptions underlying the methodology by which funds calculate gamma and vega affect the values reported? Are there potential liability or other concerns associated with the reporting of such measures according to such inputs and assumptions? For example, how would the comparability of information reported between funds be affected if funds used different inputs and assumptions in their methodologies?

- Are there additional or alternative metrics that we should consider requiring to be reported? Would the disclosure of risk metrics such as theta—the change in value of an option with changes in time to expiration—enhance the utility of the derivatives information reported in Form N–PORT? What would be the costs and burdens to funds and benefits to investors and other potential users of requiring funds to report such additional or alternative metrics? How would the comparability of information reported by different funds be affected if funds used different inputs and assumptions in their methodologies, such as different assumptions regarding the values of the funds' portfolios?

- We believe that funds that would be required to implement a derivatives risk management program already track certain derivative risk metrics, such as gamma and vega. Is our assumption correct? To the extent this is correct, what would be the incremental cost and burden of reporting such information to the Commission? As discussed above, in the Investment Company Reporting Modernization Release, we proposed that portfolio-level risk metrics and the delta for relevant investments be disclosed on each report on Form N–PORT that is made public (*i.e.*, quarterly). Likewise, we are proposing that gamma and vega be made publicly available. Should gamma and vega be made public? Are the factors that the Commission should consider when determining whether to make such measures public the same as for the other risk metrics proposed in the Investment Company Modernization Release, or are there additional factors relevant to gamma and vega that we should consider?

- As discussed above, proposed rule 18f–4 would require funds that engage in derivatives transactions to comply with one of two alternative portfolio limitations: The exposure-based portfolio limit or the risk-based portfolio limit. While we are proposing to require that funds maintain certain records

relating to their compliance with the applicable portfolio limitation, we are not proposing that they report to the public or the Commission the funds' aggregate exposure or, for funds that operate under the risk-based portfolio limit, the results of the funds' VaR tests. Would there be a benefit to publicly reporting this information? Should we require funds to report on proposed Form N–CEN or Form N–PORT either or both of the funds' aggregate exposures or their securities' VaRs and full portfolio VaRs (if applicable)? Additionally, as proposed, the derivative risk management program would apply to funds with an aggregate exposure to derivatives transactions that exceeds 50% of net assets. Should funds be required to report on proposed Form N–CEN or Form N–PORT their aggregate exposure to derivatives transactions?

- Form N–PORT also requires funds to report their notional amounts for certain derivatives transactions. Should we define “notional amount” for purposes of Form N–PORT with the same definition as proposed by rule 18f–4?

- Our proposal would require funds to identify in reports on Form N–CEN whether they relied upon the proposed rule by identifying the portfolio limitation(s) on which the fund relied during the reporting period. Do commenters agree that this is appropriate? Should we instead require a fund to only identify if it relied upon rule 18f–4 during the reporting period, rather than requiring the fund to identify the specific portfolio limitation(s) on which the fund relied? Are there other mediums, such as the Statement of Additional Information, that would be more appropriate to report such information?

- Should we provide a compliance period for the proposed amendments to Forms N–PORT and N–CEN? If so, what factors should we consider, if any, when setting the compliance dates for the proposed amendments to Forms N–PORT and N–CEN? How long of a compliance period would be appropriate for the proposed amendments? If we provide a compliance period for the proposed amendments, should we provide a tiered compliance date for entities based on their size?

H. Request for Comments

We request and encourage any interested person to submit comments regarding the proposed rule and the proposed amendments to Form N–PORT and Form N–CEN, specific issues discussed in this Release, and other matters that may have an effect on the

proposed rule and the proposed changes to Form N–PORT and Form N–CEN. With regard to any comments, we note that such comments are of particular assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

I. Proposed Rule 18f–4 and Existing Guidance

If we adopt proposed rule 18f–4, we would rescind Release 10666 and our staff's no-action letters addressing derivatives and financial commitment transactions. Funds would only be permitted to enter into derivatives transactions and financial commitment transactions to the extent permitted by, and consistent with the requirements of, rule 18f–4 or section 18 or 61. At this time, however, we are not rescinding Release 10666 or any no-action letters issued by our staff, and funds may continue to rely on Release 10666, our staff no-action letters, and other guidance from our staff.

A fund would be able to rely on the rule after its effective date as soon as the fund could comply with the rule's conditions. We would, in addition, expect to provide a transition period during which we would permit funds to continue to rely on Release 10666, our staff no-action letters, and other guidance from our staff, including with respect to derivatives transactions and financial commitment transactions entered into by a fund after the rule's effective date but before the end of any transition period.

We request comment on any transition period:

- Do commenters agree that a transition period would be appropriate?
- What would be an appropriate amount of time for us to provide before rescinding Release 10666 and our staff's no-action letters?

- In recently proposed rule 22e–4, we proposed tiered compliance dates for funds that would be required to establish liquidity risk management programs under that rule, generally proposing to provide a compliance period of 18 months for larger entities and an extra 12 (or 30 total months) for smaller entities.⁵⁰⁷ Would these time periods provide sufficient time for funds to transition to proposed rule 18f–4?

⁵⁰⁷ See Liquidity Release, *supra* note 5 (generally categorizing funds that together with other investment companies in the same “group of related investment companies” have net assets of \$1 billion or more as of the end of the most recent fiscal year as larger entities and funds that together with other investment companies in the same “group of related investment companies” have net assets of less than \$1 billion as of the end of the most recent fiscal year as smaller entities).

Would they provide more time than may be necessary or appropriate?

- Would it be appropriate, for purposes of a transition period (rather than setting a compliance date), to provide different periods of time for larger and smaller entities? Would it be appropriate to instead require all funds that engage or seek to engage in derivatives or financial commitment transactions to do so in reliance on proposed rule 18f-4 after a period of time that would be the same for all affected funds, for example 18 months after any adoption of proposed rule 18f-4?

- Should we provide a longer transition period for particular types of funds? If so, which kinds of funds and how much time should we provide? Should we, for example, provide a longer transition period for leveraged ETFs on the basis that they operate pursuant to the terms and conditions of exemptive orders granted by the Commission? In section III.B.1.c, we requested comment as to whether it would be more appropriate to consider these funds' use of derivatives transactions in the exemptive application context, based on the funds' particular facts and circumstances, rather than in rule 18f-4. If commenters believe this would be appropriate, would a longer transition period for these funds also be appropriate in order to provide time for these funds to prepare, and for the Commission to consider, any exemptive applications?

IV. Economic Analysis

A. Introduction and Primary Goals of Proposed Regulation

The Commission is sensitive to the economic effects that could result from proposed rule 18f-4 and the proposed amendments to proposed Forms N-PORT and N-CEN. The economic effects of proposed rule 18f-4 include the benefits and costs of the proposed rule, as well as effects on efficiency, competition, and capital formation. The economic effects of the proposed rule are discussed below in the context of the primary goals of the proposed regulation. We discuss the benefits, costs, and economic effects associated with our proposed amendments to proposed Forms N-PORT and N-CEN in sections IV.D.6 and IV.D.7, below.

In summary, and as discussed in greater detail throughout this Release, the proposed rule would require a fund that enters into derivatives transactions in reliance on the rule to:

- Comply with one of two alternative portfolio limitations designed to impose a limit on the amount of leverage the

fund may obtain through derivatives transactions and other senior securities transactions;⁵⁰⁸

- Manage the risks associated with its derivatives transactions by maintaining qualifying coverage assets in an amount designed to enable the fund to meet its obligations under its derivatives transactions; and
- Establish a formalized derivatives risk management program (unless otherwise exempt based on the extent of its derivatives usage).

The proposed rule would also require a fund that enters into financial commitment transactions in reliance on the rule to maintain qualifying coverage assets equal in value to the fund's full obligations under those transactions.

As discussed above in section II.D.1.a, we have determined to propose a new approach to funds' use of derivatives in order to address the investor protection purposes and concerns underlying section 18 of the Act and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives transactions. The investor protection purposes and concerns include the concern that leveraging an investment company's portfolio through the issuance of senior securities magnifies the potential for gain or loss and therefore results in an increase in the speculative character of the investment company's outstanding securities. In Release 10666, we permitted funds to engage in the transactions described in that release using the segregated account approach, notwithstanding the limitations in section 18, because we believed that the segregated account approach would address the investor protection purposes and concerns underlying section 18 by imposing a practical limit on the amount of leverage a fund may undertake and assuring the availability of adequate assets to meet the fund's obligations arising from such transactions.

As we discussed above, the current regulatory framework, including application of the segregated account approach enunciated in Release 10666 to derivatives transactions, has developed over the years since we issued Release 10666 as funds and our staff sought to apply our statements in Release 10666 to various types of

⁵⁰⁸ As discussed above, the proposed rule would limit indebtedness leverage created through derivatives transactions that involve the issuance of senior securities (*i.e.*, because these transactions involve a payment obligation). The proposed rule would not limit economic leverage created through derivatives (*e.g.*, purchased options) that would generally not be considered to involve the issuance of senior securities (*i.e.*, because these transactions do not involve a payment obligation).

derivatives and other transactions on an instrument-by-instrument basis. One significant result of this process has been funds' expanded use of the mark-to-market segregation approach with respect to various types of derivatives, together with the segregation of a variety of liquid assets. Funds' use of the mark-to-market segregation approach with respect to various types of derivatives, plus the segregation of any liquid asset, enables funds to obtain leverage in amounts that may not be consistent with the concerns underlying section 18 of the Act. As we noted above, segregating only a fund's daily mark-to-market liability—and using any liquid asset—enables the fund, using derivatives, to obtain exposures substantially in excess of the fund's net assets. In addition, a fund's segregation of any asset that the fund deems sufficiently liquid to cover a derivative's daily mark-to-market liability may not effectively result in the fund having sufficient liquid assets to meet its future obligations under the derivative.

The proposed rule is designed to address the investor protection purposes and concerns underlying section 18 and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives transactions in light of the dramatic growth in the volume and complexity of the derivatives markets over the past two decades and the increased use of derivatives by certain funds. Under the proposed rule, funds would be permitted to enter into derivatives transactions and financial commitment transactions in reliance on the rule, subject to its conditions.

The proposed rule provides both for an outside limit on the magnitude of funds' derivatives exposures designed primarily to address concerns about excessive leverage and undue speculation and a requirement to manage risks associated with its derivatives transactions by maintaining qualifying coverage assets that is designed primarily to address concerns about a fund's ability to meet its obligations in connection with its derivatives and financial commitment transactions. The proposed rule also seeks to provide a balanced and flexible approach by permitting funds to obtain additional derivatives exposure (under the risk-based portfolio limit) where the fund's derivatives, in the aggregate, have a risk-mitigating effect on the fund's overall portfolio.

As noted above, the proposed rule includes asset segregation requirements for both derivatives transactions and financial commitment transactions. With regard to derivatives, a fund would

be required to assess both the current and future payment obligations (and therefore, potential losses) arising from its derivatives transactions. With regard to financial commitment transactions, a fund would be required to maintain qualifying coverage assets equal in value to the fund's full obligations under those transactions.

Finally, except for funds that engage in only a limited amount of derivatives transactions and that do not use certain complex derivatives transactions, the fund would be required to establish a derivatives risk management program, including the appointment of a derivatives risk manager. The derivatives risk management program requirement is designed to complement the portfolio limitations and asset coverage requirements by requiring a fund subject to the requirement to assess and manage the particular risks presented by the fund's use of derivatives.

B. Economic Baseline

The proposed rule would affect funds and their investors, investment advisers, and market participants engaged in the issuance, trading, and servicing of derivatives, financial commitment transactions, and securities. Market participants include fund counterparties and other third-party service providers such as fund custodians and administrators.⁵⁰⁹ The effects on all of these parties are discussed below in the discussion of the costs and benefits of the proposed rule.

The economic baseline of the proposed rule is the current industry practice established in light of Commission and staff positions that funds rely upon when determining whether they are permitted under the Act to engage in derivatives transactions and financial commitment transactions. As discussed above in section II.B.3, funds that engage in these types of transactions typically segregate "liquid" assets using one of two general practices: Notional amount segregation or mark-to-market segregation. The current approach has developed over the years since we issued Release 10666

⁵⁰⁹ Throughout the economic analysis we discuss the potential effects of the proposed rule and estimate the costs to funds to perform the enumerated types of activities that we anticipate would be required to comply with the proposed rule's specific requirement(s). We note that these costs may be incurred, in whole, or in part, by a fund, its investment adviser, or one of its service providers (e.g., fund custodian, or fund administrator). Except where addressed specifically below, we do not, however, have information available to us to reasonably estimate how the costs for such activities may be allocated among these parties.

as funds and our staff sought to apply our statements in Release 10666 to various types of derivatives and other transactions. We understand that, in determining how they will comply with section 18, funds consider various no-action letters issued by our staff. These staff letters, issued primarily in the 1970s through 1990s, addressed particular questions presented to the staff concerning the application of the approach enunciated in Release 10666 to various types of derivatives on an instrument-by-instrument basis. We understand that funds also consider, in addition to these letters, other guidance they may have received from our staff and the practices that other funds disclose in their registration statements. The current approach's development on an instrument-by-instrument basis, together with the dramatic growth in the volume and complexity of the derivatives markets over the past two decades, has resulted in situations for which there is no specific guidance from us or our staff with respect to various types of derivatives.

Our staff economists have analyzed recent industry-wide trends and certain funds' portfolio holdings in order to provide information about funds' use of derivatives and to inform our consideration of the proposed rule and assess its economic effects.⁵¹⁰ Below we discuss the size and recent growth of the U.S. fund industry generally, as well as the growth of specific fund types within the industry. As discussed below, the fund industry has grown significantly since 2010 and certain funds that make greater use of derivatives have received a disproportionately large share of fund inflows. This information highlights the importance of a new approach to regulating derivatives transactions under section 18 and, together with the information we discuss below concerning the extent to which certain funds use derivatives, has helped to shape the scope and substance of the proposed rule, as well as identify the benefits, costs, and effects on efficiency, competition, and capital formation.

According to Morningstar, at the end of June 2015, there were 9,707 registered open-end funds, 560 closed-end funds, and 1,706 ETFs (11,973 total funds) with a total reported AUM of \$17.9 trillion.⁵¹¹ Of that total, open-end funds

⁵¹⁰ This analysis is included in the DERA White Paper, *supra* note 73. See text surrounding *supra* note 87.

⁵¹¹ DERA White Paper, *supra* note 73, Table 1. These figures do not include money market funds or BDCs. Under rule 2a-7 of the Act, money market funds are required to limit their investments to short-term, high-quality debt securities that fluctuate very little in value under normal market

held \$15.9 trillion, closed-end funds held \$250 billion, and ETFs held \$1.8 trillion. In terms of fund categories, 3,361 US equity funds held the largest percentage (38%) of industry AUM, followed by 2,073 taxable bond funds (19%), 1,914 allocation funds (17%), and 1,877 international equity funds (15%). As of June 2015, there were 537 money market funds with an estimated \$3.0 trillion in AUM.⁵¹² In addition, based on Commission records (Form 10-Ks and 10-Q's), at the end of June 2015, there were 88 active business development companies ("BDCs") with an estimated \$52.3 billion in AUM.

Although not large in terms of industry AUM (less than 3% as of June 2015⁵¹³), the growth in AUM of alternative strategy funds, which tend to be greater users of derivatives, is notable. In 2010, there were a total of 591 alternative strategy funds with a total AUM of \$320 billion.⁵¹⁴ By the end of 2014 those numbers had risen to 1,125 funds with a total AUM of \$469 billion. The annual growth rate in the AUM of alternative strategy funds from the end of 2010 through the end of 2014 was 10%.⁵¹⁵ Excluding commodity funds (which had a negative growth rate during this period), alternative strategy funds had an annual growth rate of 22%. During this four-year period, alternative strategy funds received the largest net inflows (14% annually) relative to their total asset base. Excluding commodity funds, alternative strategy funds had an annual net inflow of 28%.⁵¹⁶ Over the four-year period

conditions. Money market funds thus do not engage in derivatives transactions, but may enter into certain financial commitment transactions to the extent permitted by rule 2a-7. See *supra* note 472. Similarly, BDCs, based on the DERA sample, do not appear to enter into derivatives transactions to a material extent (no sampled BDC reported any derivatives transactions in its then-most recent annual report). BDCs do, however, appear to enter into financial commitment transactions as defined in the proposed rule based on the DERA sample. We provide aggregate figures for money market funds and BDCs separately. See *infra* note 578.

⁵¹² Data taken from reports filed on Form N-MFP for June 2015.

⁵¹³ DERA White Paper, *supra* note 73, Table 1. We refer to alternative strategy funds in the same manner as the staff classified "Alt Strategies" funds in the DERA White Paper as including the Morningstar categories of "alternative," "nontraditional bond" and "commodity" funds.

⁵¹⁴ DERA White Paper, *supra* note 73, Table 2.

⁵¹⁵ During the 2010-2014 time period, the annual growth rate of US equity funds was 14%, the sector equity funds growth rate was 18%, the international equity fund growth rate was 9%, the allocation fund growth rate was 16%, the taxable bond fund growth rate was 10%, and the municipal bond fund growth rate was 6%.

⁵¹⁶ During the 2010-2014 time period, annual net flows as a percent of fund AUM were 0% for US equity funds, 10% for sector equity funds, 6% for international equity funds, 7% for allocation funds,

Continued

since 2010, alternative strategy funds also received a disproportionate share of net fund flows. These funds received 10% of all industry net inflows while comprising only 3% of industry AUM as of 2010. Excluding commodity funds, alternative strategy funds received 11% of all industry net inflows while comprising only 1.6% of industry AUM as of 2010.

DERA staff manually collected data regarding derivatives, financial commitment transactions, and other senior security transactions from the then-latest fund annual reports of a 10% random sample of all registered management investment companies as well as business development companies as of June, 2015.⁵¹⁷ As discussed above, we recognize that the review by DERA staff evaluated funds' investments as reported in the funds' then-most recent annual reports. DERA staff, however, is not aware of any information that would provide any different data analysis of the current use of senior securities transactions by registered funds and business development companies. DERA staff prepared an analysis of each sampled fund's aggregate exposure by aggregating, for each fund: (1) The notional amounts of the fund's derivatives transactions, as defined in the proposed rule; (2) the financial commitment obligations associated with the fund's financial commitment transactions, as defined in the proposed rule; and (3) the indebtedness associated with any other senior securities transactions.⁵¹⁸

In the resulting sample of 1,188 funds, 68% (53% in AUM) had zero exposure to derivatives and approximately 89%

7% for taxable bond funds, 1% for municipal bond funds, and – 2% for commodity funds.

⁵¹⁷ DERA staff included in its sample open-end funds (including ETFs), closed-end funds, and BDCs, but excluded money market funds (because these funds do not invest in derivatives transactions). For the alternative strategy funds, DERA staff required in its sample a minimum of three funds selected from each Morningstar subcategory. Morningstar subcategories include, among others, managed futures, multicurrency, bear market, multialternative, market neutral, long/short equity, trading inverse and trading leveraged.

⁵¹⁸ The aggregate notional amount for derivatives in the DERA random sample is approximately \$350 billion. The Bank for International Settlements reports that the aggregate notional amount for derivatives worldwide at the end of 2014 was approximately \$688 trillion (\$58 trillion exchange traded and \$630 trillion over-the-counter). See http://www.bis.org/statistics/about_derivatives_stats.htm?m=6\32. BIS data on exchange-traded derivatives is collected from over 50 organized exchanges and includes information on interest rate and foreign exchange derivatives only. BIS data on OTC derivatives is from large dealers in 13 countries and includes forwards, swaps, and options on foreign exchange, interest rates, and equities.

(90% in AUM) had less than 50% exposure as a percentage of NAV.⁵¹⁹ Approximately 96% (95% in AUM) of the funds had aggregate exposures below 150%.⁵²⁰ As a result, we expect that a majority of funds would not be required to modify their portfolios in order to comply with the proposed rule because a substantial majority of funds do not appear (based on the DERA sample) to engage in derivatives transactions or financial commitment transactions and thus may not need to rely on the exemption the proposed rule would provide, or do not appear to engage in those transactions at a level that would exceed the proposed rule's exposure limitations.⁵²¹ Funds that do engage in derivatives transactions and financial commitment transactions would, however, need to rely on the proposed rule to continue to engage in these transactions.

DERA examined the detailed holdings for every fund in its sample and found that alternative strategy funds hold the most derivatives and have the highest exposure (expressed as aggregate notional amounts relative to fund net asset value). Among alternative strategy funds, 73% had at least some exposure to derivatives and 52% had greater than 50% exposure to derivatives.⁵²² For traditional mutual funds, 29% had at least some exposure to derivatives and 6% had greater than 50% exposure to derivatives. Not only did alternative strategy funds have greater derivatives exposures, but their holdings also were larger (as measured in terms of notional amount relative to fund net asset value). For alternative strategy funds with derivatives, mean and median notional values of derivatives were 167% and 99% of net assets, respectively.⁵²³ As a point of comparison, for traditional mutual funds, the comparable numbers were 36% and 10%, respectively. Approximately 27% of alternative strategy funds had 150% or greater

⁵¹⁹ DERA White Paper, *supra* note 73, Figures 11.1, 12.1.

⁵²⁰ DERA White Paper, *supra* note 73, Figures 9.1, 10.1.

⁵²¹ See *supra* note 212 and accompanying text. We recognize that some of the funds in DERA's sample that had no exposure to derivatives or financial commitment transactions in their then-most recent annual reports also may engage in these transactions to some extent. As discussed above, DERA staff is not aware of any information that would provide any different data analysis of the current use of senior securities transactions by registered funds and business development companies.

⁵²² DERA White Paper, *supra* note 73, Figure 11.4.

⁵²³ DERA White Paper, *supra* note 73, Table 6, Panel D.

aggregate exposure, compared to less than 2% for traditional mutual funds.⁵²⁴

As noted above, as of June 2015, there were 560 closed-end funds with total AUM of \$250 billion. In DERA's random sample of the funds, 47% of closed-end funds had some exposure to derivatives.⁵²⁵ Nine percent of closed-end funds had at least a 50% exposure to derivatives. No closed-end fund had aggregate exposure over 150% of net assets.⁵²⁶

Also as noted above, as of June 2015, there were 1,706 ETFs and 88 BDCs with total AUM of \$1.8 trillion and \$52.3 billion, respectively. In DERA's random sample of the funds, 29% of ETFs and zero BDCs had some exposure to derivatives.⁵²⁷ Eighteen percent of ETFs had exposure to derivatives of 50% or more (86% among alternative strategy ETFs). Eight percent of ETFs had aggregate exposure over 150% of net assets.⁵²⁸

Our staff also analyzed, through a review of recent N-SAR filings, the extent to which funds are permitted (as stated in fund disclosure documents) to use certain derivatives as part of their investment objective or strategy.⁵²⁹ In each case, more alternative funds⁵³⁰ were authorized to invest in derivatives than other funds.⁵³¹ For example, the number of alternative funds permitted to invest in options on equities, options on stock indices, stock index futures, and options on index futures was 20% greater than the number of traditional mutual funds.⁵³² Although not all of

⁵²⁴ DERA White Paper, *supra* note 73, Figures 9.4, 9.5.

⁵²⁵ DERA White Paper, *supra* note 73, Figure 11.7.

⁵²⁶ DERA White Paper, *supra* note 73, Figure 9.7.

⁵²⁷ DERA White Paper, *supra* note 73, Figures 11.10, 11.11.

⁵²⁸ DERA White Paper, *supra* note 73, Figure 9.10.

⁵²⁹ DERA White Paper, *supra* note 73. This portion of the DERA analysis used a sample consisting of all funds filing form N-SAR for 2014 (12,360 in total). Form N-SAR, filed with the Commission and made publicly available, is filed semi-annually by all registered investment companies and provides census-type data about the registrant (recently, the Commission proposed new rules that would rescind Form N-SAR and replace it with a more modernized and updated census form, proposed Form N-CEN). See Investment Company Reporting Modernization Release, *supra* note 138. Form N-SAR requires funds to answer questions with respect to whether they are allowed to invest in the following derivatives: Options on equities, options on debt securities, options on stock indices, interest rate futures, stock index futures, options on futures, options on index futures, and other commodity futures.

⁵³⁰ Morningstar U.S. category "Alternative funds."

⁵³¹ DERA White Paper, *supra* note 73, Table 3, Panel A.

⁵³² DERA White Paper, *supra* note 73, Table 3, Panel A. The comparable differences for options on debt securities, interest rates futures, options on futures, and other commodity options are 8%, 12%, 16%, and 21%, respectively.

these instruments would be deemed a “derivatives transaction” under the proposed rule (e.g., a purchased option), information about the extent to which funds are permitted to invest in these instruments may provide an indication of the extent to which funds engage in strategies that would involve the use of derivatives transactions subject to the proposed rule.

Under the current regulatory framework, funds that invest in derivatives and other senior securities generally segregate certain assets with respect to those transactions. While our staff has observed that some funds have interpreted the guidance differently in certain cases, we assume for purposes of establishing the baseline that funds generally segregate sufficient assets to cover at least any mark-to-market liabilities on the funds’ derivatives transactions, with some funds segregating more assets for certain types of derivatives and transactions (sufficient to cover the full notional amount of the transaction or an amount in between the transaction’s full notional amount and any mark-to-market liability).

There is currently no requirement for funds that invest in derivatives to have a risk management program with respect to their derivatives transactions, although we understand that the advisers to many funds whose investment strategies could entail derivatives already assess and manage the risks associated with derivatives transactions. Funds’ current risk management practices may not meet the proposed rule’s specific risk-management program requirements, however, and therefore we believe that the baseline for the derivatives risk management program requirement would be that all funds that would be subject to the requirement would need to establish such a program or conform their current practices to satisfy the requirements in the proposed rule.

C. Economic Impacts, Including Effects on Efficiency, Competition, and Capital Formation

Below, we discuss anticipated economic impacts, including effects on efficiency, competition, and capital formation that may result from our proposals. Where possible, we have attempted to quantify the costs, benefits, and effects of the proposed rule and amendments to Forms N-PORT and N-CEN. In many cases, however, we are unable to quantify the economic effects because we lack the information necessary to provide a reasonable estimate.

As discussed above, there is substantial diversity in the types and strategies of funds and how and to what extent funds use derivatives. Moreover, for those funds that do use derivatives, there is substantial variability in how they comply with current Commission positions and staff guidance on compliance with section 18 (including asset segregation). There is also substantial variability in how any given fund may react to the proposed rule, if adopted, and how the market may react in turn. A fund that uses a moderate amount of derivatives may increase or decrease its derivative usage, or shift within types of derivatives (e.g., from cash-settled to physically-settled). A fund may alter its investment strategy in order to comply with one of the proposed rule’s portfolio exposure limitations by reducing use of derivatives and not substituting other instruments to achieve equivalent exposures. To the extent that a fund alters its investment strategy, this change may represent an opportunity cost to investors. Such opportunity costs depend on investors’ individual preferences and are, as a result, difficult to quantify. Alternatively, a fund may shift the composition of its portfolio away from derivatives covered by the proposed rule, either by using derivatives not covered by the proposed rule, or by substituting the purchase of derivatives with a purchase of the underlying assets (or similar assets). Such a shift in portfolio composition would involve transactions costs. Those transactions costs would depend on both the amount of the portfolio to be traded, as well as the liquidity of the assets to be traded, both of which are likely to vary widely from fund to fund (and thus are difficult to quantify). Finally, a fund may seek to operate in a structure not subject to the limitations of section 18.⁵³³ We discuss these potential economic impacts in more detail below. Although much of the following discussion is qualitative in nature, we have sought to quantify certain costs, benefits, and effects of the proposed rule, where possible.⁵³⁴

⁵³³ We quantify estimated costs related to a fund that chooses to deregister under the Investment Company Act and liquidate and/or offer the fund’s strategy as a private fund or commodity pool. See *infra* note 554 and accompanying text.

⁵³⁴ We discuss below in section IV.D, other potential benefits and quantified costs that we anticipate may result from certain core aspects of the proposed rule, including the exposure-based and risk-based portfolio limitations, the asset segregation requirements, the derivatives risk management program, requirements for financial commitment transactions, and amendments to proposed Forms N-PORT and N-CEN.

We believe that the proposed rule is likely to strengthen investor protection. First, the proposed rule would limit the amount of leverage that a fund may obtain through derivatives transactions and other senior securities transactions. Under the proposed rule, a fund that seeks to comply with the exposure-based portfolio limit would be required to limit its aggregate exposure to 150% of the fund’s net assets, and a fund that seeks to comply with the risk-based portfolio limit would be required to demonstrate, through a value-at-risk-based test,⁵³⁵ that its use of derivatives reduces the fund’s exposure to market risk, and limit its aggregate exposure to 300% of the fund’s net assets. The proposed aggregate exposure limitations are likely to reduce, but not eliminate, the risk that investors will experience losses associated with leveraged investment exposures that significantly exceed a fund’s net assets. Second, the proposed rule would require that a fund manage risks associated with its derivatives transactions by maintaining an amount of certain assets, defined in the proposed rule as “qualifying coverage assets,” designed to enable the fund to meet its obligations under its derivatives transactions (and financial commitment transactions). We expect that, to the extent the proposed rule strengthens investor protection, the proposed rule should also both sustain and promote investors’ willingness to participate in the market. This could lead to increased investment in funds, which in turn could lead to increased demand for securities which could, in turn, promote capital formation.

As we have discussed above, leverage magnifies losses that may result from adverse market movements. As a result, a fund that obtains leverage through derivatives and other senior securities transactions may suffer those magnified losses and, because losses on a fund’s derivatives transactions can create payment obligations for the fund, the losses can force a fund’s adviser to sell the fund’s investments to generate liquid assets in order for the fund to meet its obligations. This could force the fund to enter into forced sales in stressed market conditions, resulting in

⁵³⁵ The proposed rule would require that a fund seeking to comply with the risk-based portfolio limit satisfy the VaR test included in that portfolio limit, that is, limit its use of derivatives transactions so that, immediately after entering into any senior securities transaction, the fund’s “full portfolio VaR” is less than the fund’s “securities VaR,” as those terms are defined in the proposed rule. A fund would also be required to limit its aggregate exposure to 300% of the fund’s net assets.

large losses or even liquidation.⁵³⁶ The proposed rule, by effectively imposing a limit on the amount of leverage a fund may obtain through derivatives, should reduce the possibility of fund losses attributable to leverage. This can have investor protection benefits as well as reduce the risk of adverse effects on fund counterparties. More robust asset segregation requirements also may have the effect of increasing a fund's liquidity, decreasing default risk, and decreasing the risk that a fund may be forced to sell securities in a falling market to meet its obligations under its derivatives transactions (e.g., to meet margin calls). For these reasons, we believe that the proposed rule should encourage capital formation by promoting investors' willingness to invest in funds (or to remain invested in them even in a falling market) and market stability.

The proposed rule may reduce costs and promote efficiency with respect to certain uses of derivatives by replacing the current regulatory framework that depends upon interpretation of Commission and staff guidance with a more transparent and comprehensive regulatory framework that addresses more effectively the purposes underlying section 18. The proposed rule would eliminate disparities under the current regulatory framework, where funds segregate the full notional amount for certain derivatives and segregate only the mark-to-market liability for other types of derivatives. For example, current staff guidance generally calls for a fund to segregate liquid assets equal in value to the full notional amount of a physically settled futures contract. A fund that wishes to avoid encumbering a large portion of its liquid assets might be incentivized to instead enter into a cash settled OTC swap on the same futures contract and segregate only its

mark-to-market liability (if any) under the swap, even if the swap entails higher transaction costs, is less liquid, and/or poses greater counterparty risk. The risk may be compounded further because the mark-to-market segregation approach potentially enables the fund to obtain a level of leverage that is many times greater than its net assets. By contrast, under the proposed rule's portfolio limitations, a physically settled futures contract and a cash-settled swap on the futures contract, both of which have the same notional amount, would be subject to the same treatment. This approach should serve to reduce the likelihood that a fund would choose a less efficient instrument to obtain its investment exposures and also reduce the uncertainty that exists regarding treatment of new products that are not addressed specifically in existing Commission or staff guidance. By providing consistency in how funds treat different derivatives transactions, we believe that the proposed rule should reduce opportunities for regulatory arbitrage where a fund prefers "cheap-to-cover" derivatives—those for which a fund applies the mark-to-market segregation approach—and therefore promote a more efficient use of derivatives instruments by funds when implementing their portfolio strategies.

As discussed above in section III.C.1, the proposed rule would require that a fund maintain qualifying coverage assets, for each derivatives transaction, in an amount equal to the sum of (1) the amount that would be payable by the fund if the fund were to exit the derivatives transaction at the time of the determination (the "mark-to-market coverage amount"), and (2) an amount that represents an estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions (the "risk-based coverage amount"). The proposed rule is designed to be flexible enough to allow a fund to determine these amounts both for existing types of derivatives transactions and for new derivatives instruments that are created in the future. For example, the proposed rule provides that a derivatives transaction's risk-based coverage amount would be an amount that represents an estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions, determined in accordance with policies and procedures that address certain considerations specified in the rule. The proposed rule thus does not prescribe the particular methodology that a fund must use to calculate its risk-based

coverage amount when segregating assets on its derivatives transactions. Instead, the proposed rule permits a fund to make such determinations in accordance with policies and procedures approved by the fund's board, based on a fund's particular facts and circumstances. We believe that this flexible approach would permit, and may promote, appropriate innovation in the development and use of new derivative instruments that may be beneficial for funds and investors. We also believe that this may increase investor protection by requiring that funds assess the risk of their derivatives transactions and segregate assets to cover an amount in addition to the mark-to-market liability.

Many of the impacts of the proposed rule will depend on how funds react to the conditions it imposes. As an initial matter, based on the DERA staff analysis, which shows that a substantial majority of funds in the DERA sample did not use derivatives or used derivatives to a limited extent, the portfolio limits under the proposed rule are not expected to affect the investment activities of a majority of funds.⁵³⁷ Funds that react to the rule, however, may do so in several different ways.

Some funds will not be compelled by the proposed rule to modify their derivatives exposure, but they might nonetheless respond to the proposed rule's treatment of derivatives by modifying their derivatives holdings. For example, because funds today apply the notional amount segregation approach to certain derivatives, such as physically settled Treasury futures or CDS, there exists, as discussed above, an incentive for funds to invest in derivatives for which funds apply the mark-to-market segregation approach. Because the proposed rule would remove the disparate treatment for different derivatives with the same notional amounts, it is possible that the proposed rule may result in greater use of the types of derivatives that funds today may use less extensively because of the need to apply the notional amount segregation approach. By contrast, funds that today only segregate the mark-to-market liability for their derivatives would need to segregate a greater quantity of assets and, if the fund had not been segregating cash and cash equivalents, would generally be required to segregate assets that are more liquid. Such a fund could determine to reduce its derivatives exposure to avoid segregating a greater quantity of assets that are cash and cash equivalents. Similarly, funds that use

⁵³⁶ See Thurner, Farmer & Geanakoplos, *Leverage Causes Fat Tails and Clustered Volatility* (May 2012) (discussing investments collateralized by margin and noting that "[t]he nature of the collateralized loan contract thus sometimes turns buyers of the collateral into sellers, even when they might think it is the best time to buy. . . . When the funds are unleveraged, they will always buy into a falling market, i.e. when the price is dropping they are guaranteed to be buyers, thus damping price movements away from the fundamental value. When they are sufficiently leveraged, however, this situation is reversed they sell into a falling market, thus amplifying the deviation of price movements away from fundamental value."). See also Off-Balance-Sheet Leverage IMF Working Paper, *supra* note 79 ("[A] more leveraged investor facing a given adverse price movement may be forced by collateral requirements (i.e. margin calls) to unwind the position sooner than if the position were not leveraged. The unwinding decision of an unleveraged investor depends merely on the investor's risk preferences and not on potentially more restrictive margin requirements.").

⁵³⁷ DERA White Paper, *supra* note 73, Table 6.

derivatives in an amount that minimally exceeds the threshold for implementing a risk management program may reduce derivatives use below that threshold in order to avoid that cost. To the extent that any funds were hesitant to use derivatives (or any particular type of derivative) given the lack of specific Commission or staff guidance addressing certain derivatives, these funds might become more willing to use those derivatives under the proposed rule. Thus, the proposed rule may lead to an increase or decrease in the use of particular derivatives or an increase or decrease in derivatives use by particular funds.

Because we do not know to what extent the current regulatory framework for derivatives may have been influencing funds' use of derivatives—for example, the extent to which differences in the two approaches to asset segregation may have been distorting funds' choices of products in the current market—we do not know to what extent funds would change existing positions, or would enter into different positions going forward, under the proposed rule. Accordingly, we cannot quantify this potential effect. We discuss the potential effects of each directional option (decreasing derivatives use, shifting portfolio composition, or increasing derivatives use) below.

A fund may incur costs to reduce derivatives use if it pays a penalty or other amount to a counterparty to unwind a position, or if the fund sells its position to a third party (or the fund enters into a directly offsetting position to make use of the netting provision in the proposed rule.) To the extent that a fund uses derivatives for directional exposure, reducing the use of derivatives could reduce returns to the fund's shareholders. This could potentially make the fund (1) less attractive to existing shareholders who desire greater market exposure; or (2) more attractive to new shareholders who prefer lower levels of exposure (or encourage current shareholders to increase their investment in the fund because of the lower derivatives exposure). To the extent that a fund uses derivatives for hedging, reducing derivatives use could change the risk profile of the fund's portfolio, depending on the derivative position that the fund determines to close as well as other related changes the fund determines to make to its portfolio.⁵³⁸

⁵³⁸ We discuss below potential limitations on a fund's ability to use derivatives for hedging purposes.

A fund that determines to shift the composition of derivatives used, for example toward physically-settled derivatives, would incur transaction costs in modifying the portfolio—the costs to exit prior positions and to enter into new ones. But the benefits to the fund of holding a more “optimal” (from its perspective) composition of derivatives—*i.e.*, one that is not influenced by the differential regulatory treatment of certain derivatives—could offset in whole or in part, or even exceed, those costs.

A fund that determines to increase its use of derivatives would incur transaction costs to enter into the new positions and, if those new positions were to cause the fund's exposure to exceed 50% of net asset value, the fund would be required to adopt and implement a formalized derivatives risk management program under the proposed rule and incur the associated costs. The impacts to the funds' investors would be different from those experienced by investors in funds that determine to reduce derivatives exposure. If the derivatives are used for directional exposure, the increase in leverage increases the potential for increased returns but also increases risk of loss, which some investors might prefer and others might not. If the derivatives are used for hedging, the increase in derivatives could increase or decrease the level of risk (and thus potential return) that the fund assumes, depending on the particular derivatives entered into.

With respect to each of the possibilities listed above, and for several additional options discussed in greater detail below, we describe the existence of transaction costs for the fund to terminate or transfer existing obligations, and to enter into new ones. These costs include fees, and operational and administrative costs, as well as the spread paid to intermediaries and the market impact on prices, if any. The degree of mark-ups and market impact can turn on the transparency and liquidity of the market, as well as the size of other market participants (*i.e.*, counterparties) and competitiveness in the market. There may also be tax costs. We lack the data to quantify these potential transaction costs. While some of the derivatives instruments are exchange-traded, many of these instruments are bilaterally negotiated. We believe costs would generally be lower for more liquid, exchange-traded derivatives when compared with more complicated, bespoke, or OTC-traded derivatives. We also believe costs would generally be lower for larger market participants that

actively transact in derivatives versus smaller market participants.⁵³⁹

Some types of funds use derivatives more extensively. Alternative strategy funds, in particular, have experienced significant growth and have been shown to be heavier users of derivatives. Four managed futures funds in DERA's sample, for example, exhibited aggregate notional exposures ranging from approximately 500% to 950% of net assets, far greater than the exposure limits we are proposing today. Some ETFs (or other funds) expressly use derivatives to obtain a leveraged multiple of two or three times the daily performance (or inverse performance) of an index. Some of these funds had derivatives exposures exceeding 150% of net assets.⁵⁴⁰ A limited number of other types of funds in DERA's sample also had aggregate exposures exceeding 150% of net assets. Funds that today operate with aggregate exposure far in excess of 150% of net assets (or, for certain leveraged ETFs or mutual funds, that seek to maintain a constant level of leveraged investments that require exposure in excess of 150%) could not continue operating as they do today under the proposed rule's 150% exposure limit. Furthermore, we do not expect that funds that use derivatives extensively in order to obtain market exposure generally would be able to satisfy the VaR test included in the risk-based limit.⁵⁴¹ These types of funds thus appear most likely to be affected by the proposed rule.

Some funds within this category of heavier derivatives users might be limited under the proposed rule from achieving high leverage through derivatives, and they might choose to modify their investment activities or portfolio composition in order to comply with the proposed rule. They could do so in three principal ways. First, a fund could react to the proposed rule's conditions (*e.g.*, the restrictions on the amount of aggregate exposure a fund may obtain under the 150% and 300% exposure limits) by reducing its

⁵³⁹ See, *e.g.*, O'Hara, Wang & Zhou, *The Best Execution of Corporate Bonds*, Working Paper (Oct. 26, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2680480 (finding that insurance companies trading in corporate bonds receive better execution prices if they are more active in the market, and that trading with a dominant dealer or underwriter worsens those differentials).

⁵⁴⁰ As discussed above, these funds are sometimes referred to as trading tools since they seek to provide a specific level of leveraged exposure to a market index over a fixed period of time.

⁵⁴¹ See *supra* note 314 (explaining that a fund that holds only cash and cash equivalents and derivatives would not be able to satisfy the VaR test).

derivatives use below the relevant limit, or by declining to enter into transactions going forward that would exceed these limits. A fund that is compelled to react to the proposed rule and that does so by reducing its derivatives exposure would experience effects, including transactions costs, similar to those discussed above for a fund that reduces its derivatives exposure voluntarily.

Second, a fund that is limited by the proposed rule from achieving high leverage through derivatives might modify its investment activities by engaging in transactions that might involve leverage but not the issuance of a senior security that would be restricted by section 18 (e.g., a purchased option). Some funds may also use fund of funds investment structures to seek leverage through investments in other funds, although the underlying funds in these arrangements also would be subject to the limitations in section 18 and the requirements of the proposed rule if those underlying funds are registered funds.⁵⁴² A fund may use these types of transactions to help it remain in compliance with the proposed rule, or avoid reliance on the proposed rule altogether. To the extent that a fund pursues leverage other than through a derivative that is subject to the proposed rule, the fund could incur transaction costs to close out positions covered by the proposed rule, and enter into new positions not covered by the proposed rule. These transaction costs are of the same nature as those discussed above for funds that reduce their derivatives exposure in response to the new rule. Further costs for this option are the opposite of the discussion above with respect to shifting from cash-settled to physically-settled instruments: Whereas there, investors could benefit from a more optimally-designed portfolio not subjected to regulatory arbitrage, here, investors may find it detrimental if the transactions entered into by funds to avoid the proposed rule were less efficient, or less calibrated to the fund's disclosed investment approach or risk/reward profile, than would otherwise be the case.

Third, a fund that is limited by the proposed rule from achieving high leverage through derivatives might modify its investment activities and

reduce its use of derivatives by purchasing the securities underlying a derivative instrument (e.g., purchasing the securities underlying an index future, rather than the index future itself). Derivatives can provide a lower-cost method of achieving desired exposures than purchasing the underlying reference asset directly. For example, a fund may use index futures as a cheaper means to gain exposure to certain markets or equitize cash, rather than purchasing the underlying equities included in the index.⁵⁴³ Funds responding to the proposed rule in this manner would incur the incremental costs of trading constituent stocks of the index. As another example, a fund might also gain exposure to (or hedge) credit risk more cheaply through a credit default swap on an individual name or on a CDS index rather than by purchasing or shorting bonds in the cash market.⁵⁴⁴ To the extent that certain funds may be required to reduce their use of derivatives, these funds may experience higher trading costs. The transaction costs for exiting existing derivatives instruments are described in greater detail above. The costs of purchasing the underlying instruments can vary widely based on factors relating to the number and liquidity of the underlying instruments, in addition to the trading costs that various types of funds may incur in order to transact in the underlying instruments.⁵⁴⁵ For example, transaction costs might make it more expensive to replace a total return swap on the S&P 500 by purchasing each of the underlying instruments, or even a sampling thereof, but a total return swap based on a

⁵⁴³ See 2010 ABA Derivatives Report, *supra* note 70, at 8 (“[W]hen a fund has a large cash position for a short amount of time, the fund can acquire long futures contracts to retain (or gain) exposure to the relevant equity market. When the futures contracts are liquid (as is typically the case for broad market indices), the fund can eliminate the position quickly and frequently at lower costs than had the fund actually purchased the reference equity securities.”) For example, See Biswas, et al., *The Transaction Costs of Trading Corporate Credit*, Working Paper (Mar. 1, 2015) (“Transaction Costs of Trading Corporate Credit”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532805 (“For institutional-size trades up to \$500K, bonds are up three times as expensive as the corresponding position using credit default swaps”).

⁵⁴⁴ The 2010 ABA Derivatives Report, *supra* note 70, at 8, also observes that “a fund could write a CDS, offering credit protection to its counterparty. In doing so the fund gains the economic equivalent of owning the security on which it wrote the CDS, while avoiding the transaction costs that would have been associated with the purchase of the security.”

⁵⁴⁵ See *supra* note 539.

narrower index might be more readily replaced.⁵⁴⁶

In addition to the direct effects on the fund of transacting in the derivatives rather than in the underlying assets, there are indirect effects. A fund that reduces its use of derivatives or replaces them with underlying assets may affect the fund's liquidity. We recognize that certain derivatives can be more liquid than their underlying reference assets. For example, it is cheaper to trade certain CDS contracts than to trade the underlying bonds.⁵⁴⁷ In addition, some derivatives instruments may continue to trade during a broader stock market halt or during the halt in the trading of a particular security. On the other hand, some derivatives may be less liquid than the underlying assets. For example, OTC swaps are tied to a specific counterparty and may be more customized; an OTC swap therefore may be less liquid than the underlying securities (which may be exchange traded and centrally cleared). Because the staff's data show that most funds in DERA's sample were below the 150% proposed exposure limitation, however, we expect that the proposed rule would not have a material effect on the way in which the majority of funds operate today, including how these funds manage their liquidity. Finally, if a number of funds were to respond to the proposed rule by shifting to purchasing the underlying assets, it is possible that demand for, and thus liquidity of, certain derivatives might be reduced while demand for, and liquidity of, the related underlying assets might be increased.

These three approaches all involve a fund changing its investment strategy in order to comply with the rule and are likely to have similar impacts on capital formation. A fund might seek to reduce its aggregate exposure by replacing a derivative with the underlying security. As a result, the overall demand for the underlying securities may increase and therefore promote capital formation, assuming that those underlying securities would not themselves have been held by the counterparty to the fund's derivative contract to hedge that exposure.⁵⁴⁸ On the other hand, if a

⁵⁴⁶ In many cases, it is possible to obtain a proxy for an index return with only a subsample of the index constituents. While this option reduces the replication transaction cost, it introduces a tracking error and is unlikely to be as cost efficient as transacting in the total return swap. See generally, e.g., Joel M. Dickson et al., *Understanding Synthetic ETFs* Vanguard (June 2013), available at https://pressroom.vanguard.com/content/nonindexed/6.14.2013_Understanding_Synthetic ETFs.pdf, at 9.

⁵⁴⁷ See *The Transaction Costs of Trading Corporate Credit*, *supra* note 543.

⁵⁴⁸ For example, a fund that obtains synthetic long exposure to a corporate debt instrument by

⁵⁴² The Investment Company Act also imposes limitations on fund of funds investments. See, e.g., sections 12(d)(1)(A), (B) and (C) of the Investment Company Act. In addition, we understand that funds generally elect federal income tax treatment as a “regulated investment company” under Subchapter M of the Internal Revenue Code and that diversification requirements under Subchapter M may also limit certain fund of funds investments.

fund is unable to use derivatives to mitigate or eliminate certain risks posed by its portfolio securities, a fund may find it less desirable to hold such securities, adversely affecting capital formation by potentially reducing demand for debt and equity securities.⁵⁴⁹ A reduction in the use of derivatives may adversely affect the pricing efficiency of underlying reference securities,⁵⁵⁰ thereby adversely affecting capital formation. In addition, to the extent that a reduction in the use of derivatives adversely affects pricing efficiency or transparency, it may become more difficult for a fund (or its third-party pricing service) and its board of directors to determine fair values where necessary. As we discuss below, however, we believe that the proposed rule would affect only the small percentage of funds that use derivatives to a much greater extent than funds generally, and thus, any such aggregate effects are not likely to be significant.⁵⁵¹

Other funds that use derivatives extensively, including the types of funds discussed above (as those most likely to be impacted by the proposed rule), may be unable to scale down their aggregate exposures or otherwise de-lever their funds in a way that allows the fund to maintain its investment objectives or provide a product that has sufficient investor demand. Such a fund may choose to deregister under the Act and liquidate, and/or the fund's sponsor may choose to offer the fund's strategy as a private fund or (public or private) commodity pool.

For example, a fund that must reduce its aggregate exposure may not be able to offer the returns (and risks) that some investors demand. ETFs (or other funds) that use derivatives to obtain a leveraged multiple of the performance (or inverse performance) of an index and that require exposures in excess of

150% of net assets could not operate in their current form under the proposed rule, and may not have sufficient demand at lower exposure levels. Some of these funds therefore may be liquidated or merged into other funds.

As discussed above, however, alternative strategy funds and certain leveraged ETFs (the types of fund most likely to be particularly affected by the proposed rule) represent a very small percentage of fund assets under management—approximately 3% of all fund assets.⁵⁵² Only a small subset of funds—primarily managed futures funds and leveraged ETFs—would appear to be unable to operate as they do today while complying with the proposed rule's aggregate exposure limits.⁵⁵³ Therefore, we believe that the number of funds that may be unable to scale down their aggregate exposures or otherwise de-lever their funds in a way that allows the funds to maintain their investment objectives or provide a product that has sufficient investor demand—*i.e.*, those that may have to pursue deregistration and liquidation—would be limited in many instances to the small percentage of funds that use derivatives to a much greater extent than funds generally, and would not be significant to the industry as a whole.

In the event that a fund is unable to operate under the proposed rule's aggregate exposure limit, the fund's sponsor and/or investment adviser may choose to: (1) Offer the fund as a private fund or (public or private) commodity pool; (2) liquidate the fund's assets and deregister the fund under the Act; or (3) merge the fund into another fund. We estimate that the average cost associated with such actions would range from \$30,000 to \$150,000, per fund, depending on the particular actions taken by the fund (or its sponsor or investment adviser).⁵⁵⁴ These costs are

the direct costs to the fund. There are also indirect costs associated with a fund's decision to deregister and for the fund's sponsor to offer the fund's strategy as a private fund or public or private commodity pool. To the extent that a fund becomes unavailable to investors, or available only at a higher cost, investors and competition will be adversely affected. For example, non-accredited investors generally would not be able to purchase interests in equivalent unregistered funds. However, accredited investors who prefer unregistered funds, or who are agnostic about the form, could have the same or greater choice of funds, and competition among funds offering similar investment objectives or risk/return profiles as private funds may increase. Similarly, registered funds that choose to operate as public commodity pool investment partnerships, rather than SEC-registered funds, would be accessible to a broad population of investors. In addition, investment advisers, counterparties, and other market participants whose business is concentrated on offering, managing, or servicing these type of funds may similarly be adversely affected.⁵⁵⁵ For example, it could mean substantially lower management fees for advisers whose advisory business primarily involves funds that would be unable to operate under the proposed rule's exposure limits. It also could mean higher management and/or performance fees if the new investment vehicle is a private fund. To the extent that these parties are adversely affected, competition also could be negatively affected. We are unable to quantify these indirect costs because we cannot determine the extent to which adequate substitutes would exist in the market.

The proposed rule's aggregate exposure limits may, in certain situations, constrain a fund's ability to use derivatives as a hedge in connection with its investment strategies. Although the analysis conducted by DERA staff indicates that most funds do not today have aggregate exposure in excess of the proposed rule's 150% and 300% exposure limitations, it is possible that a fund that uses a substantial amount of

to consult with appropriate personnel of the investment adviser (*e.g.*, portfolio managers and other senior management) and prepare the necessary documentation (*e.g.*, documents related to fund liquidation, fund formation, fund registration (general counsel and chief compliance officer); time costs to obtain required fund board approvals; internal and external costs related to required shareholder approvals; and external costs for a fund's and/or fund board's outside legal counsel. We note that a fund may incur costs substantially higher or lower than our estimates, based on the size and complexity of the fund.

⁵⁵⁵ See *supra* note 551.

writing a credit default swap may decide, instead, to hold the debt instrument directly.

⁵⁴⁹ For example, if a fund can no longer use a credit default swap to help mitigate credit risk, the fund might be less willing to hold a high-yield bond, which may affect the issuance of high-yield bonds.

⁵⁵⁰ For example, option listings may incentivize market analysts to research the underlying securities. Options trading may also facilitate market pricing of the underlying securities. See Arrata William, Alejandro Bernales & Virginie Coudert, *The Effects of Derivatives on Underlying Financial Markets: Equity Options, Commodity Derivatives and Credit Default Swaps*, SUERF 50th Anniversary Volume 445 (2013).

⁵⁵¹ To the extent that aggregate derivatives usage by funds is small compared to the world-wide derivatives market (*see supra* note 518), and to the extent that only some fraction of derivatives usage by funds would potentially be affected, the expected effect on the world-wide derivatives market would be negligible.

⁵⁵² See DERA White Paper, *supra* note 73, Table 1.

⁵⁵³ Based on our staff's review of fund filings with the Commission and Morningstar data, we estimate that there are approximately 60 managed futures funds. Based on information from ETF.com, we estimate that there are 43 2x leveraged ETFs and 36 2x inverse ETFs (79 total), and 36 3x leveraged ETFs and 28 3x inverse ETFs (64 total). We note that some funds that seek to deliver two times the performance of an index may be able to achieve this level of exposure in compliance with the proposed rule's 150% exposure limit by investing in securities included in the benchmark index and obtaining additional exposure through derivatives transactions. Although we understand that most of the funds that seek to achieve performance results, over a specified period of time, that are a multiple of or inverse multiple of the performance of an index or benchmark are ETFs, some mutual funds also pursue these strategies. These mutual funds would be affected to same extent by the proposed rule as leveraged ETFs.

⁵⁵⁴ This estimate is based on staff outreach and experience and includes, for example: Time costs

derivatives could be in a position where it could not engage in additional derivatives transactions, including as a portfolio hedge in certain circumstances. A fund that reaches the proposed aggregate exposure limits would not be permitted to enter into additional derivatives transactions unless the fund would be in compliance with the applicable exposure limitation immediately after entering into each transaction. As a consequence, it is possible that a fund may need to limit its derivatives transactions, or close out existing derivatives positions, in order to retain flexibility to enter into risk mitigating derivatives transactions at a later date. Alternatively, a fund may, in certain circumstances, refrain from derivatives transactions that it expects would be risk mitigating, which could potentially have the effect of increasing a fund's risks.

For example, it is possible that a fund that complies with the risk-based portfolio limit's VaR test could be precluded from entering into additional derivatives to protect against a particular risk if the fund had reached the risk-based portfolio limit's 300% limit on aggregate exposure. Such a limitation would appear to apply only if the fund engages in extensive use of derivatives. For example, a bond fund could seek to protect its portfolio against 100% of its interest rate risk and currency risk through derivatives transactions and also seek to hedge a substantial amount of its credit risk while still having room under the 300% limit to seek to hedge other risks such as inflation risk.⁵⁵⁶ We acknowledge that any limitation, such as the 300% exposure limit in the risk-based portfolio limit, may constrain a fund's ability to implement its strategy, and in particular circumstances, may require a fund to take actions other than adding additional derivatives to manage and reduce portfolio risks. In such a circumstance, a fund may experience greater returns, albeit with greater risk, if the fund is unable to enter into additional hedging transactions because it has reached the 300% limit. A fund may decide to maintain the riskier

⁵⁵⁶ For example, the fund could enter into interest rate derivatives with a notional amount of 100% of the fund's net assets in order to seek to hedge interest rate risk; enter into currency derivatives with a notional amount of 100% of the fund's net assets in order to seek to hedge currency risk; and enter into credit derivatives with a notional value that is less than 100% of the fund's net assets to seek to hedge credit risk. The fund in this example would have aggregate exposure of something less than 300% and thus could obtain some additional derivatives exposure—up to the 300% aggregate limit—provided the fund complied with the VaR test under the risk-based portfolio limit and the proposed rule's other conditions.

position, shift away from the underlying assets that it had previously sought to hedge (so as to maintain its previous level of risk), or hedge against the risk using instruments not within the scope of this rule. Because we are unable to reasonably anticipate the ways in which a fund is likely to respond to the 300% limitation, we are unable to quantify the expected impact of the portfolio limitation on a fund's returns.⁵⁵⁷

Proposed rule 18f-4 would also require a fund that engages in financial commitment transactions in reliance on the rule to maintain qualifying coverage assets equal in value to the fund's full obligations under those transactions. The proposed rule generally would take the same approach to financial commitment transactions that we applied in Release 10666, with some modifications discussed above in III.E. The proposed rule's requirements for financial commitment transactions, similar to the approach we applied in Release 10666, would limit the extent to which a fund could engage in financial commitment transactions, in that the fund could not incur obligations under those transactions in excess of the fund's qualifying coverage assets. This would limit a fund's ability to incur obligations under financial commitment transactions to 100% of the fund's net assets, as discussed above in III.E. We believe that the proposed rule is not likely to impose any significant additional limitation on the extent to which a fund can incur obligations under financial commitment transactions (as compared with the current economic baseline) because, as noted above, funds that enter into these transactions today do so in reliance on Release 10666, which generally would limit the fund's obligations under these transactions to the fund's net assets.⁵⁵⁸ This is consistent with DERA staff's analysis, which showed that no fund in the DERA sample had greater than 100% aggregate exposure resulting from financial commitment transactions (the current economic baseline for such transactions).⁵⁵⁹ Accordingly, we believe that the proposed rule's asset segregation requirements for financial commitment transactions would have no measurable effect on efficiency, competition, or capital formation.

We also note that the proposed asset segregation requirements, to the extent that a fund is required to increase its holdings of cash and cash equivalents (for derivatives transactions) or assets convertible to cash or that can generate

cash (for financial commitment transactions), may adversely affect efficiency, competition, and capital formation. For example, holding higher levels of these assets may reduce efficiency by requiring a fund's investment adviser to invest the fund's assets in cash and cash equivalents or assets convertible to cash or that can generate cash to a greater extent than the adviser otherwise would invest the fund's assets, given the fund's investment strategy and investor base. This, in turn, could adversely affect investors by reducing a fund's investment returns, and reduce competition by decreasing a fund's investment opportunities to generate higher returns. In addition, a fund that holds greater amounts of cash and cash equivalents (all other things, such as fund flows, being equal) necessarily holds a smaller amount of securities in its portfolio, which may adversely affect capital formation. As discussed in Section III.C.2 above, however, we understand that cash and cash equivalents are commonly used for posting collateral or margin for derivatives transactions.⁵⁶⁰ Also, given that the margin posted is permitted to be offset against the assets that would be required to be segregated under the proposed rule, the magnitude of funds' shift into cash and cash equivalents under the proposed rule may not be as significant as it would be otherwise, thereby mitigating the negative impact on capital formation that the asset segregation requirements of the proposed rule may cause.

Finally, we note that the size of a fund, or the complex of funds to which a fund belongs, could have certain competitive effects with respect to a fund's compliance with proposed rule 18f-4, including the implementation of its derivatives risk management program, where applicable. For example, if there are economies of scale in creating and administering multiple derivatives risk management programs, a fund that is part of a large fund complex would have a competitive advantage. A fund in a smaller complex, on the other hand, may use a greater portion of its resources to create and administer a derivatives risk management program, which may increase barriers to entry in the fund industry, and lead to an adverse effect on competition. The size of a fund complex also could produce competitive advantages or disadvantages with respect to a fund's use of products developed by third parties to assist a fund in calculating

⁵⁵⁷ See text surrounding *supra* note 534.

⁵⁵⁸ See *supra* note 93 and accompanying text.

⁵⁵⁹ DERA White Paper, *supra* note 73, Table 6.

⁵⁶⁰ See *supra* note 370 and accompanying text.

and monitoring its compliance with the proposed rule's portfolio limitations and asset segregation requirements. For example, a fund in a large complex could receive relatively more favorable pricing for third-party risk management tools, if the fund complex were to purchase discounted bulk services from the tool developer or receive relationship-based pricing discounts. Regardless of the extent to which a third-party provides its product at a discounted rate, the proposed rule may positively impact third-party service providers by increasing sales. We note that the competitive effects discussed above in the context of funds and/or fund families may, instead, apply to a fund's investment adviser. This may occur where the investment adviser (rather than the fund) incurs the costs associated with implementing the proposed rule's requirements, and does not, or is unable to, pass such costs along to the fund (for example, through increases in its advisory fees).

D. Specific Benefits and Quantifiable Costs

We have discussed above a number of general benefits and costs, including effects on efficiency, competition, and capital formation that we believe would generally result from the proposed rule. Taking into account the goals of the proposed rule and the economic baseline, as discussed above, this section explores specific benefits and quantified costs, in the context of each core element of the proposed rule.

We note that the following analyses and estimates are made on a per fund basis, and are not made on a fund complex basis. We have made these estimates on a per fund basis because the DERA sample analysis upon which we rely in our economic analysis was performed at a fund level. In addition, we believe that the extent of derivatives use varies widely between funds. Accordingly, we believe that estimating costs on a per fund basis is likely to provide more meaningful estimates, consistent with the approach taken in the DERA sample. We recognize, however, that many funds are part of a fund complex, and thus may realize economies of scale in complying with the proposed rule.⁵⁶¹ As discussed below, our estimated ranges of per fund costs take this into account. The low end of our range of costs reflects the estimated costs for a fund that is part of a fund complex (which is likely to

⁵⁶¹ The extent of the economies of scale may depend, in part, on the extent to which multiple funds in the same fund complex use derivatives transactions and financial commitment transactions in similar ways.

experience economies of scale), while the high end of our range of costs reflects the estimated costs likely borne by a stand-alone fund that is not part of a fund complex or that is the only fund in a complex that relies on the rule.

1. Exposure-Based Portfolio Limit

a. Requirements

As discussed above in section III.B.1, the proposed rule would require that a fund that engages in derivatives transactions in reliance on the rule comply with one of two alternative portfolio limitations. The first portfolio limitation—the exposure-based portfolio limit—would place an overall limit on the amount of exposure to underlying reference assets, and potential leverage, that a fund would be able to obtain from derivatives transactions covered by the proposed rule by limiting the fund's exposure under these derivatives transactions and other senior securities transactions to 150% of the fund's net assets.

b. Benefits

The 150% aggregate exposure limit in the exposure-based portfolio limit (as well as the 300% exposure limit in the risk-based portfolio limit discussed below) is designed primarily to impose an overall limit on the amount of exposure to underlying reference assets, and potential leverage, that a fund would be able to obtain through derivatives subject to the rule and other senior securities transactions, while also providing flexibility for a fund to use derivatives for a variety of purposes.⁵⁶² An outer limit on aggregate exposure would prevent funds from obtaining extremely high leverage that we believe may be inconsistent with the Act's stated concern about senior securities that increase unduly the speculative nature of a fund's outstanding securities. The proposed rule, therefore, is expected to benefit investors by providing a clear and workable framework in which funds may continue to use derivatives covered by the proposed rule for a variety of purposes, but subject to a limit on the potential leverage (and leverage-related risks) that could be obtained through these covered instruments. By explicitly limiting a fund's aggregate exposure from derivatives and other senior securities transactions, the proposed rule also may reduce the likelihood of extreme fund losses associated with

⁵⁶² The proposed rule's portfolio limitations, although designed to impose a limit on potential leverage, also could help to address concerns about a fund's ability to meet its obligations, as noted above. See *supra* note 152.

leveraged portfolios under stressed market conditions. As a result, the proposed rule may reduce the possibility of a fund needing to liquidate and the associated adverse impacts on market participants and thus may promote market stability.⁵⁶³ As we discussed above, the DERA staff analysis also indicates that most funds and their advisers would be able to continue to operate and to pursue a variety of investment strategies, including alternative strategies (under the 150% exposure limitation).⁵⁶⁴

The proposed rule's definition of exposure for derivatives transactions would require that a fund aggregate the notional amounts of those derivatives (with certain adjustments specified in the proposed rule).⁵⁶⁵ For most types of derivatives, the notional amount can serve as a measure of the fund's investment exposure to the derivative's underlying reference asset or metric. While there are other measures that could be used, the notional amount is a measure that is well-understood and recognized, and readily determinable by funds.⁵⁶⁶ In addition, the notional amount is a measure for determining

⁵⁶³ While we lack empirical evidence that a registered fund's liquidation under stressed market conditions, including the potential forced sale of assets, could have adverse effects on market participants, we believe that the avoidance of potential negative externalities from a fund's liquidation into a stressed market broadly promotes market resiliency and stability.

⁵⁶⁴ See *supra* note 210 and accompanying text.

⁵⁶⁵ The proposed rule includes certain adjustments to the way in which a fund would generally be required to determine the "notional amount" with respect to its derivatives transactions. For any derivatives transaction that provides a return based on the leveraged performance of a reference asset, the notional amount must be multiplied by the leverage factor; for any derivatives transaction for which the reference asset is a managed account or entity formed primarily for the purpose of investing in derivatives transaction, or an index that reflects the performance of such a managed account or entity, the notional amount must be determined by reference to the fund's pro rata share of the notional amounts of the derivatives transactions of such account or entity ("look-through provision"); and for any "complex derivatives transaction," (defined in rule 18f-4(c)(1) and discussed above in section III.B), the notional amount must be an amount equal to the aggregate notional amount of derivatives instruments, excluding other complex derivatives transactions, reasonably estimated to offset substantially all of the market risk of the complex derivatives transaction. See proposed rule 18f-4(c)(7)(iii)(C). The estimated operational costs associated with these aspects of the proposed rule are included in our cost estimates discussed below in section IV.D.1.c.

⁵⁶⁶ See, e.g., Michael Chui, *Derivatives markets, products and participants: an overview* (Bank of International Settlements, IFC Bulletin No. 35 (Feb. 2012), available at <http://www.bis.org/ifc/publ/ifcb35a.pdf> ("Notional amount is the total principal of the underlying security around which the transaction is structured. It is easy to collect and understand.")).

exposure that is adaptable to different types of fund strategies or different uses of derivatives, including types of fund strategies and derivatives that may be developed in the future. Funds, particularly smaller or less sophisticated funds, may benefit from the ease of application of a bright-line, straightforward metric such as this one, as compared to a test that would require consideration of the manner in which a fund uses derivatives in its portfolio (e.g., whether particular derivatives are used for hedging).

c. Quantified Costs

Funds that elect to rely on the rule would incur one-time and ongoing operational costs to establish and implement a 150% exposure-based portfolio limitation.⁵⁶⁷ As discussed above, funds today employ a range of different practices, with varying levels of comprehensiveness, for complying with section 18's prohibitions, Commission positions, and staff guidance. Although the 150% exposure-based portfolio limit would be new for all funds that seek to comply with the proposed rule, we anticipate that the relative costs to a particular fund are likely to vary, depending on the extent to which a fund enters into derivatives transactions, and, for example, the level of sophistication of a fund's current risk management processes surrounding its use of derivatives.

The extent to which a fund currently engages in derivatives transactions may affect the costs the fund would incur. For example, funds that today use derivatives more extensively may already have systems that can be used to determine a fund's exposure or that could more readily be updated to include that functionality. Proposed Form N-PORT would require funds to report the notional amounts of certain derivatives on the form and, if we adopt Form N-PORT, the systems or enhancements put in place by funds in connection with Form N-PORT's reporting requirements may provide an efficient means to calculate notional amounts for proposed rule 18f-4. Conversely, a fund that uses derivatives

only modestly may not have existing systems that can be as readily used to determine a fund's exposure, but a fund that uses derivatives modestly may be able to determine its exposure without the need to establish the kinds of more extensive systems that might be required or desired by funds that use derivatives more extensively.

The types of derivatives a fund uses also may affect the costs the fund would incur. Funds that enter into complex derivatives transactions, as defined in the proposed rule, would be required to determine the notional amounts of those transactions using the alternative approach specified in the proposed rule for complex derivatives transactions. Under this approach, the notional amount of a complex derivatives transaction would be equal to the aggregate notional amount(s) of derivatives instruments, excluding other complex derivatives transactions, reasonably estimated to offset substantially all of the market risk of the complex derivatives transaction at the time the fund enters into the transaction.⁵⁶⁸ It may require additional resources or analysis to determine a complex derivative's notional amount than, for example, a non-complex derivatives transaction with a stated notional amount that can be used for purposes of the proposed rule's exposure limitations. It may similarly require additional resources or analysis to determine the notional amount of a derivatives transaction for which the reference asset is a managed account or entity formed or operated primarily for the purpose of investing in or trading derivatives transactions, or an index that reflects the performance of such a managed account or entity, because the notional amount of such a derivatives transaction under the proposed rule would be determined by reference to the fund's pro rata share of the notional amounts of the derivatives transactions of such account or entity.⁵⁶⁹ In any case, the costs associated with the exposure-based portfolio limit would directly impact funds (and may indirectly impact fund investors if a fund's adviser incurs costs and passes along its costs to investors through increased fees).

Our staff estimates that the one-time operational costs necessary to establish and implement an exposure-based portfolio limitation would range from \$20,000 to \$150,000⁵⁷⁰ per fund,

depending on the particular facts and circumstances and current derivatives risk management practices of the fund.⁵⁷¹ These estimated costs are attributable to the following activities: (1) Developing and implementing policies and procedures⁵⁷² to comply with the proposed rule's 150% exposure-based portfolio limit; (2) planning, coding, testing, and installing any system modifications relating to the 150% exposure-based portfolio limitation;⁵⁷³ and (3) preparing training materials and administering training sessions for staff in affected areas.

Our staff estimates that a fund that is part of a fund complex will likely benefit from economies of scale and incur costs closer to the low-end of the estimated range of costs, while a standalone fund is more likely to incur costs closer to the higher-end of the

one-time and ongoing systems costs associated with other Commission rulemakings. See, e.g., 2014 Money Market Fund Reform Adopting Release, *supra* note 367, at sections III.A.5 and III.B.8 (estimating the one-time and ongoing operational costs to money market funds and others in the distribution chain to modify systems and implement certain reforms including liquidity fees and gates and/or a floating NAV); Liquidity Release, *supra* note 5, at section IV.C.1 (estimating the one-time and ongoing operational costs to most registered open-end funds to modify systems and implement new proposed rule 22e-4, requiring a liquidity risk management program). Although the substance and content of systems associated with establishing and implementing policies and procedures to comply with proposed rule 18f-4 would be different from the substance and content of systems associated with, for example, implementing the money market fund reforms or a new proposed liquidity risk management program, the costs associated with the core requirements of proposed rule 18f-4, like the 2014 adopted money market fund reforms and the 2015 proposed liquidity risk management program reforms, would entail: Developing and implementing policies and procedures; planning, coding, testing, and installing any relevant system modifications; and preparing training materials and administering training sessions for staff in affected areas.

⁵⁷¹ We estimate that the costs discussed throughout this section would apply equally across affected fund types, including open-end funds, closed-end funds, ETFs, and BDCs.

⁵⁷² Throughout this economic analysis, we include in "developing and implementing policies and procedures" cost estimates (both for initial and ongoing costs) associated with internal and external costs (e.g., compliance consultants, outside legal counsel), as well as staff costs (e.g., legal, compliance, portfolio management, risk management, and other administration personnel).

⁵⁷³ Throughout this economic analysis, these cost estimates assume that affected funds would incur systems costs (i.e., computer-based systems costs) to assist them in complying with the requirements of proposed rule 18f-4. As discussed below, some funds may determine that computer-based systems are not required (e.g., the fund engages only in limited amounts of derivatives transactions for which notional exposures are easily determinable) and choose to implement a less automated system for complying with the proposed rule's requirements. We expect that such a fund would not incur costs related to this particular activity, and more likely, would incur total costs closer to the lower-end of the estimated range of costs.

⁵⁶⁷ As discussed below in section IV.D.4, a fund that seeks to rely on the proposed rule would not be required to have a derivatives risk management program provided the fund limits its aggregate exposure from derivatives transactions to no greater than 50% of the fund's net assets (and does not use complex derivatives transactions). The costs that we estimate here for a fund to comply with the 150% exposure-based portfolio limit would include the costs for a fund to determine and monitor its compliance with the proposed 50% exposure-based test (and complex derivatives transaction limitation) for establishing a derivatives risk management program.

⁵⁶⁸ Proposed rule 18f-4(c)(7)(iii)(C).

⁵⁶⁹ Proposed rule 18f-4(c)(7)(iii)(B).

⁵⁷⁰ These cost estimates, and the other quantified costs discussed below, are based, in part (adjusting such estimates to reflect specific provisions of the proposed rule), on staff experience and outreach, as well as consideration of recent staff estimates of the

estimated range of costs. Our staff also estimates that a standalone fund that is a light or moderate user of derivatives may choose to comply with the proposed rule by implementing a less automated system, and thus be more likely to incur costs closer to the low-end of the estimated range of costs. We anticipate that if there is demand to develop systems and tools related to the exposure-based portfolio limitation, market participants (or other third parties) may develop programs and applications that a fund could purchase at a cost likely less than our estimated cost to develop the programs and applications internally. In addition, the proposed rule may increase the demand for information services relating to derivatives to the extent that funds and advisers use third-party providers of such information services, such as risk management tools (e.g., VaR measures) and pricing data, and thus could potentially affect these third-party providers as well.

Staff also estimates that each fund would incur ongoing costs related to implementing a 150% exposure-based portfolio limitation under proposed rule 18f-4. Staff estimates that such costs would range from 20% to 30% of the one-time costs discussed above.⁵⁷⁴ Thus, staff estimates that a fund would incur ongoing annual costs associated with the 150% exposure-based portfolio limit that would range from \$4,000 to \$45,000.⁵⁷⁵ These costs are attributable to the following activities: (1) Complying with the proposed rule's 150% aggregate exposure limit; (2) systems maintenance; and (3) additional staff training.

In the DERA staff analysis, 68% of all of the sampled funds did not have any exposure to derivatives transactions.⁵⁷⁶ These funds thus do not appear to use derivatives transactions or, if they do

use them, do not appear to do so to a material extent. We therefore estimate that approximately 32% of funds—the percentage of funds that did have derivatives exposure in the DERA sample—are more likely to enter into derivatives transactions and therefore are more likely to incur costs associated with either the exposure-based portfolio limit or the risk-based portfolio limit. Excluding approximately 4% of all funds (corresponding to the percentage of sampled funds that had aggregate exposure of 150% or more of net assets and for which we have estimated costs for the risk-based limit),⁵⁷⁷ we estimate that 28% of funds (3,352 funds⁵⁷⁸) would incur the costs associated with the exposure-based portfolio limit.

As discussed above, we have not aggregated the estimated range of costs across the entire fund industry. We note, however, that the vast majority of funds operate as part of a fund complex, and therefore we expect that many funds would achieve economies of scale in implementing the proposed rule. Accordingly, we believe that the lower-end of the estimated range of costs (\$20,000 in one-time costs; \$4,000 in annual costs) better reflects the total costs likely to be incurred by many funds.

As noted above, based on the DERA sample, 68% of all sampled funds (8,142 funds⁵⁷⁹) do not appear to use derivatives transactions (or if they do, do not appear to use them to a material extent). We do, however, recognize that although we do not estimate costs for these funds to comply with the proposed rule, some of these funds may wish to preserve the flexibility to do so in the future. Accordingly, we estimate that a fund that would otherwise not comply with proposed rule 18f-4 would incur approximately \$10,000 to evaluate

the proposed rule and for the fund's board to consider approving the fund's use of the exemption provided by the rule (and therefore preserve the flexibility to comply in the future).⁵⁸⁰

2. Risk-Based Portfolio Limit

a. Requirements

As discussed above in section III.B.2, the proposed rule would require that a fund that engages in derivatives transactions in reliance on the rule comply with one of two alternative portfolio limitations. The second portfolio limitation is the risk-based portfolio limit, which would focus primarily on a risk assessment of the fund's use of derivatives, and would permit a fund to obtain exposure in excess of that permitted under the first portfolio limitation where the fund's derivatives transactions, in the aggregate, result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives, evaluated using a VaR-based test.

b. Benefits

The principal benefit of the risk-based portfolio limit is that it recognizes that funds may use derivatives to not only seek higher returns through increased investment exposures, but importantly, also as a low-cost and efficient means to reduce and/or mitigate risks associated with the fund's portfolio. Some funds may have or develop investment strategies that include the use of derivatives that, in the aggregate, have relatively high notional amounts, but that are used in a manner that could be expected to reduce the fund's exposure to market risk rather than to increase exposure to market risk through the use of leverage. We expect that investors, and the markets in general, would benefit from an alternative portfolio limitation that focuses primarily on a risk assessment of a fund's use of derivatives, in contrast to the exposure-based portfolio limit, which focuses solely on the level of a fund's exposure. We also expect that funds should benefit from having the flexibility to select a VaR model that best addresses the funds' particular investment strategy and the nature of its portfolio investments, while also specifying certain minimum requirements in the proposed rule.⁵⁸¹

⁵⁷⁴ See *supra* note 570. In estimating the total quantified costs of our proposed rule, we estimate that the portfolio limitation requirements would likely impose initial costs that are proportionately larger than ongoing costs. Accordingly, and based on staff experience and outreach, we estimate that the ongoing costs would range from 20% to 30% of the initial costs.

⁵⁷⁵ This estimate is based on the following calculations: $0.20 \times \$20,000 = \$4,000$; $0.30 \times \$150,000 = \$45,000$.

⁵⁷⁶ DERA White Paper, *supra* note 73, Figure 11.1. As discussed above, we recognize that the DERA staff analysis used a sample of funds and reviewed the funds' then-most recent annual reports. The number of funds that may enter into senior securities transactions may be higher or lower than our estimate. We believe, however, that the results of the DERA staff analysis provide a reasonable basis to estimate the extent to which funds engage in derivatives and other senior securities transactions, and thus provide a reasonable basis to estimate the potential costs of the proposed rule to funds.

⁵⁷⁷ DERA White Paper, *supra* note 73, Figure 9.1.

⁵⁷⁸ This estimate is based on the following calculation: $11,973 \text{ funds} \times 28\% = 3,352 \text{ funds}$. The number of funds is based on the following calculation, as of June 2015: (9,707 open-end funds + 560 closed-end funds + 1,706 ETFs = 11,973). See *supra* note 511 and accompanying text. In estimating the potential costs to funds related to their use of derivatives (both here and throughout this Release), we have estimated the total fund universe excluding money market funds and BDCs because money market funds do not enter into derivatives transactions and because we understand, and the DERA staff analysis shows, that BDCs do not use derivatives to a material extent (no BDC in the DERA staff sample had exposures to derivatives transactions). We have considered, however, the potential costs on these funds to the extent that such funds use financial commitment transactions (see *supra* section IV.D.5), and if a BDC were to engage in derivatives transactions, we expect that the BDC would incur the costs estimated here and throughout this Release for funds that engage in derivatives transactions.

⁵⁷⁹ This estimate is based on the following calculation: $11,973 \text{ funds} \times 68\% = 8,142 \text{ funds}$.

⁵⁸⁰ This estimate is based on staff outreach and experience and includes estimates for time spent by a fund's chief compliance officer, consultation with portfolio managers and other senior management of the fund's adviser, as well as the fund's board of directors.

⁵⁸¹ See *supra* sections III.b.2.a, b.

In addition to the VaR test, the risk-based portfolio limit also includes an outer limit on aggregate exposure. Investors should also benefit from a flexible approach that allows for greater aggregate exposure (as compared with the 150% exposure-based portfolio limitation), and thus may promote the use of derivatives when, in aggregate, the result is an investment portfolio that is subject to less market risk than if the fund did not use such derivatives. Including an outer exposure limit, in addition to the VaR test, should provide benefits similar to those discussed above in section IV.D.1. Those benefits include improved investor protection, increased market stability through explicit limitations on potential leverage, and an exposure calculation that uses notional amounts that are widely available and adaptable to the varied types of derivatives instruments used by funds. We also believe that increasing the aggregate exposure limit from 150% (under the exposure-based portfolio limitation) to 300% of net assets when a fund's use of derivatives, in aggregate, has the effect of reducing the fund's exposure to market risk, should benefit investors by permitting funds to engage in increased use of derivatives to mitigate risks in the fund's portfolio.⁵⁸² Setting the exposure limit at 300% as part of the risk-based portfolio limit would provide a limit for funds that could seek to operate under the risk-based portfolio limit that permits additional capacity for hedging transactions while still setting an overall limit on the amount of leverage that can be obtained through derivatives that are subject to the rule. Moreover, based on the DERA staff analysis, many of the funds with aggregate exposure in excess of 300% of net assets appear to use derivatives primarily to obtain market exposure (rather than to reduce the fund's exposure to market risk).⁵⁸³

c. Quantified Costs

As with the quantified costs we discuss above regarding the exposure-based portfolio limit (section IV.D.1), we expect that funds would incur one-time and ongoing operational costs to establish and implement a risk-based exposure limit, including the VaR test. We expect that a fund that seeks to comply with the 300% aggregate exposure limit would incur the same costs as those that we estimated above in order to establish and implement the

150% exposure-based portfolio limit.⁵⁸⁴ Accordingly, we estimate below the costs we believe a fund would incur to comply with the VaR test. Although the VaR test and outer limit on aggregate exposure would be new for all funds that seek to comply with the proposed rule's risk-based exposure limit, we anticipate that the costs to a particular fund are likely to vary, depending on the extent to which a fund enters into derivatives transactions and the level of sophistication of a fund's existing risk management processes surrounding its use of derivatives. For example, funds that use derivatives extensively may already use a VaR model to evaluate and monitor the risks associated with derivatives transactions. As a result, these funds may incur lower costs as compared with other funds that do not already have sophisticated tools in place to monitor the risks associated with derivatives. In this regard, we note that funds that would seek to comply with the risk-based portfolio limit, rather than the exposure-based portfolio limit, may be more likely to be more extensive users of derivatives because we expect that less extensive derivatives users generally would choose to operate under the exposure-based portfolio limit. These costs would directly impact funds (and may indirectly impact fund investors if a fund's adviser incurs costs and passes along its costs to investors through increased fees).

Our staff estimates that the one-time operational costs necessary to establish and implement a VaR test would range from \$60,000 to \$180,000⁵⁸⁵ per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund. These estimated costs are attributable to the following activities: (1) Developing and implementing policies and procedures to comply with the proposed rule's requirement that the fund's full portfolio VaR is less than the fund's securities VaR; (2) planning, coding, testing, and installing any system modifications relating to the VaR test; and (3) preparing training materials and administering training sessions for staff in affected areas.

Our staff estimates that a fund that is part of a fund complex would likely benefit from economies of scale and incur costs closer to the low-end of the estimated range of costs, while a standalone fund is more likely to incur costs closer to the higher-end of the estimated range of costs. Our staff also

estimates that a standalone fund that is a light or moderate user of derivatives may choose to comply with the proposed rule by implementing a less automated system, and thus be more likely to incur costs closer to the low-end of the estimated range of costs. We anticipate that if there is demand to develop systems and tools related to the risk-based portfolio limitation, market participants (or other third parties) may develop programs and applications that a fund could purchase at a cost likely less than our estimated cost to develop the programs and applications internally.

Staff also estimates that each fund would incur ongoing costs related to implementing a VaR test under proposed rule 18f-4. Staff estimates that such costs would range from 20% to 30% of the one-time costs discussed above.⁵⁸⁶ Thus, staff estimates that a fund would incur ongoing annual costs associated with the VaR test aspect of the risk-based exposure limit that would range from \$12,000 to \$54,000.⁵⁸⁷ These costs are attributable to the following activities, as applicable to each fund: (1) Complying with the VaR test (*i.e.*, that, immediately after entering into any senior securities transaction, the fund's full portfolio VaR is less than the fund's securities VaR); (2) systems maintenance; and (3) additional staff training.

DERA staff analysis shows that approximately 4% of all funds sampled had aggregate exposure of 150% or more of net assets.⁵⁸⁸ We estimate, therefore, that 4% of funds (479 funds⁵⁸⁹) may seek to comply with the risk-based portfolio limit.⁵⁹⁰ As with the other quantified costs we discuss in this Release, we believe that many funds belong to a fund complex and are likely to experience economies of scale. We therefore expect that the lower-end of the estimated range of costs (\$60,000 in one-time costs; \$12,000 in annual costs) better reflects the total costs likely to be incurred by many funds.

⁵⁸⁶ See *supra* notes 570 and 574.

⁵⁸⁷ This estimate is based on the following calculations: $0.20 \times \$60,000 = \$12,000$; $0.30 \times \$180,000 = \$54,000$.

⁵⁸⁸ DERA White Paper, *supra* note 73, Figure 9.1.

⁵⁸⁹ This estimate is based on the following calculation: $11,973 \text{ funds} \times 4\% = 479 \text{ funds}$. See also *supra* note 578.

⁵⁹⁰ We recognize, however, that it is possible that some (or all) of these funds may decide, after evaluating the particularized costs and benefits, to reduce (or even eliminate) their use of such transactions and therefore rely on the 150% exposure-based portfolio limitation, or not rely on proposed rule 18f-4 at all. We discuss these potential effects on efficiency, competition, and capital formation above. See *supra* section IV.C.

⁵⁸² See *supra* note 239 and accompanying text (acknowledging that a hedging transaction may not always result in mitigating risk).

⁵⁸³ See *supra* note 314.

⁵⁸⁴ The only difference would be an increased outer limit of aggregate exposure (from 150% to 300% of the fund's net asset value).

⁵⁸⁵ See *supra* note 570.

3. Asset Segregation

a. Requirements

As discussed above in section III.C, the proposed rule would require a fund that seeks to enter into derivatives transactions to manage the risks associated with its derivatives transactions by maintaining an amount of certain assets, defined in the proposed rule as “qualifying coverage assets,” designed to enable the fund to meet its obligations under such transactions. To satisfy this requirement the fund would be required to maintain qualifying coverage assets to cover the fund’s mark-to-market obligations under a derivatives transaction (the “mark-to-market coverage amount,” as noted above), as well as an additional amount, determined in accordance with policies and procedures approved by the fund’s board, designed to address potential future losses and resulting payment obligations under the derivatives transaction (the “risk-based coverage amount,” as noted above).

b. Benefits

The proposed asset segregation will likely improve a fund’s ability to meet its obligations under its derivatives transactions. The proposed rule’s requirement that the fund maintain qualifying coverage assets with a value equal to the fund’s mark-to-market coverage amount is designed to require the fund to have assets sufficient to meet its obligations under the derivatives transaction, which may include margin or similar payments demanded by the fund’s counterparty as a result of mark-to-market losses, or payments that the fund may make in order to exit the transaction. The proposed rule’s requirement that the fund maintain qualifying coverage assets with a value equal to the fund’s risk-based coverage amount is designed to require the fund to have qualifying coverage assets to cover future losses and any resulting future payment obligations.⁵⁹¹ These aspects of the proposed rule’s asset segregation requirements for derivatives transactions are consistent with suggestions of many commenters on the Concept Release, including a commenter that observed that requiring funds to segregate a mark-to-market amount under the contract as well as an additional amount meant to cover future losses “is more akin to the way portfolio

⁵⁹¹ In addition, the asset segregation requirement in the proposed rule would limit a fund’s derivatives exposure to the extent that the fund limits its derivatives usage in order to comply with the asset segregation requirements. See *supra* note 323 and accompanying text.

managers and risk officers assess the portfolio risks created through the use of derivatives.”⁵⁹²

By requiring a fund to determine its risk-based coverage amounts in accordance with board-approved policies and procedures, the proposed rule’s approach to asset segregation is designed to provide a flexible framework that would allow funds to apply the requirements of the proposed rule to particular derivatives transactions used by funds at this time as well as those that may be developed in the future as financial instruments and investment strategies change over time.

In addition, the proposed asset segregation requirements may benefit investors by eliminating the existing practice by some funds (under existing staff guidance) to segregate for certain derivatives transactions (e.g., derivatives that permit physical settlement), the notional amount. As we noted above, the notional amount of a derivatives transaction does not necessarily equal, and often will exceed, the amount of cash or other assets that a fund ultimately would likely be required to pay or deliver under the derivatives transaction. Existing staff guidance contemplates that a fund will segregate assets equal to a derivative’s full notional amount for certain derivatives and the derivative’s daily mark-to-market liability for others. The proposed rule would benefit investors by requiring funds to evaluate their obligations under a derivatives transaction—including by considering future potential payment obligations represented by the derivative’s risk-based coverage amount—rather than segregating assets equal to either a derivative’s notional value or a mark-to-market liability based solely on the type of derivative involved, as under the current approach.

The proposed rule generally would require a fund to segregate cash and cash equivalents as qualifying coverage assets in respect of its coverage obligations for its derivatives transactions. To the extent that a fund currently posts collateral to counterparties for derivatives transactions,⁵⁹³ the fund’s mark-to-market coverage amount would be reduced by the value of the posted assets that represent variation margin, and the fund’s risk-based coverage amount would be reduced by the value of the posted assets that represent initial margin, mitigating the need for the fund

⁵⁹² See ICI Concept Release Comment Letter.

⁵⁹³ See, e.g., ISDA Margin Survey 2015, *supra* note 370.

to segregate additional cash and cash equivalents. We believe that cash equivalents are an appropriate component of qualifying coverage assets for derivatives transactions because these securities usually settle within one day⁵⁹⁴ and do not generally fluctuate in value with market conditions.⁵⁹⁵ Therefore, cash and cash equivalents are readily available to support derivatives positions should the need for additional funding arise at short notice, for example due to margin calls, without a fund having to unwind such positions.⁵⁹⁶ The immediacy of funding needs for derivatives transactions may mean that other types of assets commonly used for short-term needs (such as meeting fund redemption requests which can take three days to settle when redeemed through a broker-dealer⁵⁹⁷) would be insufficiently liquid to meet the fund’s obligations under a derivatives contract. Furthermore, we understand that cash and cash equivalents are commonly used for posting collateral or margin for derivatives transactions.⁵⁹⁸

For all of these reasons, we believe that the proposed asset segregation requirements should more effectively result in a fund having sufficient assets to meet its obligations under its derivatives transactions. By requiring the fund to maintain qualifying coverage assets—generally cash equivalents—sufficient to cover the fund’s current mark-to-market obligation and an additional amount designed to address future losses, the proposed rule is designed to reduce the risk that the fund would be required to sell portfolio assets in order to generate assets to satisfy the fund’s derivatives payment obligations, particularly in an environment where those assets may have experienced a temporary decline in value, thereby magnifying the fund’s losses on the forced sale. In addition to the benefit to investors, as discussed above, counterparties to the derivatives transactions may benefit from an

⁵⁹⁴ See, e.g., <http://www.sec.gov/answers/tplus3.htm>.

⁵⁹⁵ This is in contrast to funds’ segregating any liquid asset under existing staff guidance, which may increase the likelihood that a fund’s segregated assets decline in value at the same time the fund experiences losses on the derivatives transaction.

⁵⁹⁶ We recognize that requiring funds generally to maintain cash and cash equivalents may have other associated effects. We discuss these potential effects above in section IV.C.

⁵⁹⁷ Open-end funds that are redeemed through broker-dealers must meet redemption requests within three business days because broker-dealers are subject to rule 15c6-1 under the Securities Exchange Act of 1934. See Liquidity Release, *supra* note 5, at n.21.

⁵⁹⁸ See the discussion of the ISDA margin Survey 2015 in footnote 370.

increased expectation of repayment given the higher quality of assets that are set aside for the funds' performance of their contractual obligations. The proposed asset segregation requirements may also provide a number of additional positive effects on efficiency, competition, and capital formation as discussed above in section IV.C.

c. Quantified Costs

As with the quantified costs we discuss above regarding the exposure-based and risk-based portfolio limits (section III.B.1), we expect that funds would incur one-time and ongoing operational costs to establish and implement systems in order to comply with the proposed asset segregation requirements. As discussed above, and pursuant to existing Commission statements and staff guidance, two general practices have developed: the notional amount segregation approach and the mark-to-market segregation approach. Also as discussed above, funds today are determining their current mark-to-market losses, if any, each business day with respect to the derivatives for which they currently segregate assets on a mark-to-market basis, and funds also already calculate their liability under derivatives transactions on a daily basis for various other purposes, including to satisfy variation margin requirements and to determine the fund's NAV. We believe that funds that currently calculate their liability under their derivatives transactions on a daily basis would likely calculate the proposed mark-to-market coverage amount in the same manner, and therefore would not likely incur significant new costs when calculating the fund's mark-to-market coverage amount under the proposed rule.⁵⁹⁹

The risk-based coverage amount would be determined in accordance with policies and procedures approved by the fund's board that are required to take into account certain factors specified in the proposed rule. By requiring funds to establish appropriate policies and procedures, rather than prescribing specific segregation amounts or methodologies, the proposed rule is designed to allow funds to assess and determine risk-based coverage amounts based on their specific derivatives

⁵⁹⁹ See *supra* section III.C.1.a (noting that funds already calculate their liability under derivatives transactions on a daily basis for other purposes, including to satisfy variation margin requirements, and to determine the fund's NAV). We discuss below in section IV.D.5, the estimated costs for the proposed asset segregation requirements for a fund that enters solely into financial commitment transactions.

transactions, investment strategies and associated risks. As a result, we expect that, for funds that are significant users of derivatives, these funds may already use VaR or other risk-management tools to manage associated risks, and may be able to reduce costs by using these tools to calculate the risk-based coverage amount. We therefore anticipate that the relative costs to a particular fund are likely to vary, depending on the extent to which a fund enters into derivatives transactions and the level of sophistication of a fund's risk management processes surrounding its use of derivatives. These costs will directly impact funds (and may indirectly impact fund investors if a fund's adviser incurs costs and passes along its costs to investors through increased fees).

Our staff estimates that the one-time operational costs necessary to establish and implement the proposed asset segregation requirements would range from \$25,000 to \$75,000⁶⁰⁰ per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund. These estimated costs are attributable to the following activities: (1) Developing and implementing policies and procedures to comply with the proposed rule's requirement that, at least once each business day, the fund maintains the required qualifying coverage assets in respect of its derivatives transactions; (2) planning, coding, testing, and installing any system modifications relating to the asset segregation requirements; and (3) preparing training materials and administering training sessions for staff in affected areas.

As we discussed above, a fund that is part of a fund complex would likely benefit from economies of scale and incur costs closer to the low-end of the estimated range of costs, while a standalone fund is more likely to incur costs closer to the higher-end of the estimated range of costs. Our staff also estimates that a standalone fund that is a light or moderate user of derivatives may choose to comply with the proposed rule by implementing a less automated system, and thus be more likely to incur costs closer to the low-end of the estimated range of costs. We anticipate that if there is demand to develop systems and tools related to the asset segregation requirements, market participants (or other third parties) may develop programs and applications that a fund could purchase at a cost likely less than our estimated cost to develop the programs and applications internally.

⁶⁰⁰ See *supra* note 570.

Staff also estimates that each fund would incur ongoing costs related to implementing the asset segregation requirements under proposed rule 18f-4. Staff estimates that such costs would range from 65% to 75% of the one-time costs discussed above.⁶⁰¹ Thus, staff estimates that a fund would incur ongoing annual costs associated with the asset segregation requirements that would range from \$16,250 to \$56,250.⁶⁰² These costs are attributable to the following activities: (1) At least once each business day, the fund verifies that it maintains the required qualifying coverage assets in respect of its derivatives transactions; (2) systems maintenance; and (3) additional staff training.

As discussed above in section IV.D.1, in the DERA staff analysis, 68% of all of the sampled funds did not have any exposure to derivatives transactions. These funds thus do not appear to use derivatives transactions or, if they do use them, do not appear to do so to a material extent. Staff estimates that the remaining 32% of funds (3,831 funds⁶⁰³) would seek to rely on the proposed rule, and therefore comply with the rule's asset segregation requirements. As with the other quantified costs we discuss in this Release, we believe that many funds belong to a fund complex and are likely to experience economies of scale. We therefore expect that the lower-end of the estimated range of costs (\$25,000 in one-time costs; \$16,250 in annual costs) better reflects the total costs likely to be incurred by many funds.

The proposed asset segregation requirements may also impose indirect costs, such as the potential reduction in fund returns that could result if funds are required to segregate cash and cash equivalents, rather than potentially higher-yielding liquid assets (such as equities, as permitted under existing staff guidance). We are unable to quantify this cost because we do not have sufficient data with respect to the nature and extent to which funds segregate assets under existing staff

⁶⁰¹ In estimating the total quantified costs of our proposed rule, we estimate that the asset segregation requirements (as compared with the portfolio limitation requirements) would likely impose ongoing costs that are proportionately larger than initial costs (*e.g.*, because of the need to determine and identify qualifying coverage assets each business day). Accordingly, and based on staff experience and outreach, we estimate that these ongoing costs would range from 65% to 75% of the initial costs. See *supra* notes 570 and 574.

⁶⁰² This estimate is based on the following calculations: $0.65 \times \$25,000 = \$16,250$; $0.75 \times \$75,000 = \$56,250$.

⁶⁰³ This estimate is based on the following calculation: $11,973 \text{ funds} \times 32\% = 3,831 \text{ funds}$. See *supra* note 578.

guidance, or sufficient data to determine the amount of the reduction in return under the proposed rule. However, because the proposed rule would permit a fund to reduce its mark-to-market and risk-based coverage amounts by the value of assets that represent variation margin and initial margin, respectively, such costs are likely mitigated. In this regard we note that this treatment does not only apply to cash and cash equivalents, but extends to any asset considered satisfactory as collateral by a counterparty. Therefore, funds retain the flexibility to optimize their collateral management and post their most cost-efficient collateral, subject to limitations that counterparties or other regulatory requirements may impose on the quality of acceptable collateral.⁶⁰⁴ We also do not know if, or the extent to which, funds might instead shift to investments other than derivatives transactions (or financial commitment transactions) that would not be subject to the proposed rule, including the rule's asset segregation requirements. Finally, we do not know the specific manner in which funds' policies and procedures would provide for the determination of risk-based coverage amounts, and thus do not know the amount funds would segregate under the proposed rule to cover the risk-based coverage amounts. For these reasons, we are unable to quantify the impact of these potential indirect costs.

4. Risk Management Program

a. Requirements

As discussed above in section III.D, a fund that seeks to enter into derivatives transactions and rely on proposed rule 18f-4, except with respect to funds that engage in only a limited amount of derivatives transactions and that do not enter into certain complex derivatives transactions, would be required to establish a formalized derivatives risk management program, including the appointment of a derivatives risk manager.

b. Benefits

The proposed derivatives risk management program is designed to complement the proposed rule's portfolio limitations and asset segregation requirements by requiring

that a fund subject to the requirement assess and manage the particular risks presented by the fund's use of derivatives. The derivatives risk management program would not apply, however, to funds that make only limited use of derivatives and do not use complex derivatives because we expect that the risks and potential impact of these funds' derivatives transactions may not be as significant in comparison to the risks of the funds' overall investment portfolios and may be appropriately addressed by the proposed rule's other requirements, including the requirement to determine risk-based coverage amounts. The proposed rule, therefore, provides a tailored approach that we expect would benefit funds and investors by requiring funds that use derivatives more substantially to establish derivatives risk management programs while allowing certain funds to continue using derivatives (as deemed appropriate by a fund) to help implement the fund's strategy without first having to establish a derivatives risk management program under the proposed rule, provided such use is limited.⁶⁰⁵

The proposed derivatives risk management program requirement aims to promote a minimum baseline in the fund industry with regard to the use of derivatives transactions, and should improve funds' management of the risks related to a fund's use of derivatives as well as the awareness of, and oversight by, the fund's board (through the proposed rule's derivatives risk manager's reporting). In this regard we recognize that the benefits a particular fund and its investors would enjoy and the costs that it would incur in establishing a derivatives risk management program would vary depending on the particular fund's current practices. We believe that the proposed rule's promotion of a standardized level of risk management in the fund industry, however, would promote investor protection by elevating the overall quality of derivatives risk management across the fund industry. Improved quality of risk management related to funds' use of derivatives, may, for example, reduce the possibility of fund losses attributable to leverage and other risks related to the use of derivatives.

Investors should have increased confidence, for example, that a fund that states that it uses derivatives as part of

achieving its investment strategy does so in ways that comply with regulatory requirements, and are consistent with the fund's own stated investment objectives, policies, and risk profile. Monitoring of the risks related to derivatives may also help protect investors from losses stemming from derivatives. To the extent that the derivatives risk management program results in more robust monitoring of the risks related to derivatives (including leverage risks that may magnify losses resulting from negative market movements), the derivatives risk management program may reduce the risk of a fund suffering unexpected losses. This, in turn, may reduce adverse repercussions for other market participants, including fund counterparties, and reduce the risk of potential forced sales which can create or exacerbate stress on other market participants. We also expect that the derivatives risk management program (including its recordkeeping requirements) should also improve the ability of the Commission, through its examination program, to evaluate the risks incurred by funds with respect to their derivatives transactions and how funds manage those risks.

c. Quantified Costs

In addition to the costs discussed above regarding the exposure-based and risk-based portfolio limitations and asset segregation requirements, certain funds would also incur one-time costs to establish and implement a derivatives risk management program in compliance with proposed rule 18f-4, as well as ongoing program-related costs. As discussed above, funds today employ a range of different practices, with varying levels of comprehensiveness and sophistication, for managing the risks associated with their use of derivatives. Certain elements of the derivatives risk management program may entail variability in related compliance costs, depending on a fund's particular circumstances, including the fund's investment strategy, and nature and type of derivatives transactions used by a fund.

As discussed in section II.D, we understand that the advisers to many funds whose investment strategies entail the use of derivatives already assess and manage the risks associated with their derivatives transactions. Funds whose current practices closely align with the proposed derivatives risk management program would incur relatively lower costs to comply with proposed rule 18f-4. Funds whose practices regarding derivatives risk management are less comprehensive or not closely aligned

⁶⁰⁴ For example, as discussed above, ISDA reported in a 2015 survey that cash represented 77% of collateral received for uncleared derivatives transactions (with government securities representing an additional 13% percent), while for cleared OTC transactions with clients, cash represented 59% of initial margin received (with government securities representing an additional 39%) and 100% of variation margin received. See *supra* note 370.

⁶⁰⁵ A fund that limits its derivatives exposure to no greater than 50% of the value of the fund's net assets, and that does not use "complex derivatives transactions," would not be required to adopt and implement a derivatives risk management program. See rule 18f-4(a)(3).

with the risk management requirements in the proposed rule, on the other hand, may incur relatively higher initial compliance costs. The nature and extent of a fund's use of derivatives also may affect the level of costs (and benefits) that the fund would incur. A fund that uses derivatives more extensively may incur relatively greater costs in establishing a risk management program reasonably designed to assess and manage the risk associated with the fund's derivatives, particularly if the fund engages in complex derivatives transactions. A fund that engages in derivatives to a lesser extent, or that uses fewer complex derivatives transactions, may incur lower costs. In any case, the costs associated with a fund's risk management program would directly impact funds (and may indirectly impact fund investors if a fund's adviser incurs costs and passes along its costs to investors through increased fees).

Our staff estimates that the one-time costs necessary to establish and implement a derivatives risk management program would range from \$65,000 to \$500,000⁶⁰⁶ per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund. These estimated costs are attributable to the following activities: (1) Developing policies and procedures relating to each of the required program elements and administration of the program (including the designation of a derivatives risk manager); (2) integrating and implementing the policies and procedures described above; and (3) preparing training materials and administering training sessions for staff in affected areas.

Staff estimates that each fund would incur ongoing program-related costs, as a result of proposed rule 18f-4, that range from 65% to 75% of the one-time costs necessary to establish and implement a derivatives risk management program.⁶⁰⁷ Thus, staff

⁶⁰⁶ See *supra* note 570. We note that some funds, and in particular smaller funds for example, may not have appropriate existing personnel capable of fulfilling the responsibilities of the proposed derivatives risk manager, or may choose to hire a new employee to act as the derivatives risk manager rather than assigning that responsibility to a current employee or officer of the fund or the fund's investment adviser who is not a portfolio manager. We would expect that a fund that is required to hire a new derivatives risk manager would likely incur costs on the higher end of our estimated range of costs.

⁶⁰⁷ In estimating the total quantified costs of our proposed rule, we estimate that the derivatives risk management program requirements, similar to the asset segregation requirements, would likely impose ongoing costs that are proportionately larger than initial costs. Accordingly, and based on staff

estimates that a fund would incur ongoing annual costs associated with proposed rule 18f-4 that would range from \$42,250 to \$375,000.⁶⁰⁸ These costs are attributable to the following activities: (1) Assessing, monitoring, and managing the risks associated with the fund's derivatives transactions; (2) reviewing and updating periodically any models (including VaR models), measurement tools, or policies and procedures that are a part of, or used in, the program to evaluate their effectiveness and reflect changes in risks over time; (3) providing written reports to the fund's board, no less frequently than quarterly, describing the adequacy of the fund's program and the effectiveness of its implementation; and (4) additional staff training.

Under the proposed rule, a fund that limits its derivatives exposure to 50% or less of net assets (and does not enter into complex derivatives transactions) would not be required to establish a derivatives risk management program.⁶⁰⁹ In the DERA staff analysis, approximately 10% of all sampled funds had aggregate exposure from derivatives transactions exceeding 50% of net assets.⁶¹⁰ An additional approximately 4% of the funds in DERA's sample had aggregate exposure from derivatives of between 25–50% of net assets.⁶¹¹ In light of this, Commission staff estimates that approximately 14% of funds (1,676

experience and outreach, we estimate that these ongoing costs would range from 65% to 75% of the initial costs. See *supra* note 601.

⁶⁰⁸ This estimate is based on the following calculations: $0.65 \times \$65,000 = \$42,250$; $0.75 \times \$500,000 = \$375,000$.

⁶⁰⁹ A fund would be required to measure its aggregate exposure associated with its derivatives transactions immediately after entering into any senior securities transaction. See rule 18f-4(a)(3)(i). Funds that use complex derivatives transactions, as defined in the proposed rule, also would be required to establish risk management programs, even if the funds' derivatives exposure was less than 50% of net assets. The proposed rule's definition of complex derivatives transactions is based on whether the amount payable by either party to a derivatives transaction is dependent on the value of the underlying reference asset at multiple points in time during the term of the transaction, or is a non-linear function of the value of the underlying reference asset, other than due to the optionality arising from a single strike price. See rules 18f-4(a)(4)(ii); 18f-4(c)(1).

⁶¹⁰ See DERA White Paper, *supra* note 73, Figure 11.1. DERA staff was unable to determine the extent to which funds use derivatives transactions that would be complex derivatives transactions, based on the data available to the staff. The staff is thus unable to estimate the number of funds that would be required to have a risk management program solely as a result of their use of complex derivatives transactions. See *supra* note 609.

⁶¹¹ See DERA White Paper, *supra* note 73, Figure 11.1.

funds⁶¹²) would establish a derivatives risk management program. As with the other quantified costs we discuss in this Release, we believe that many funds belong to a fund complex and are likely to experience economies of scale. We therefore expect that the lower-end of the estimated range of costs (\$65,000 in one-time costs; \$42,250 in annual costs) better reflects the total costs likely to be incurred by many funds.

5. Financial Commitment Transactions

a. Requirements

As discussed above in section III.E, the proposed rule would require a fund that enters into financial commitment transactions in reliance on the rule to maintain qualifying coverage assets, identified on the books and records of the fund and determined at least once each business day, with a value equal to the fund's aggregate financial commitment obligations, which generally are the amounts of cash or other assets that the fund is conditionally or unconditionally obligated to pay or deliver under its financial commitment transactions. The proposed rule would permit a fund to maintain as qualifying assets for a financial commitment transaction assets that are convertible to cash or that will generate cash, equal in amount to the financial commitment obligation, prior to the date on which the fund can be expected to be required to pay such obligation or that have been pledged with respect to the financial commitment obligation and can be expected to satisfy such obligation, determined in accordance with policies and procedures approved by the fund's board of directors.

b. Benefits

By requiring the fund to maintain qualifying coverage assets to cover the fund's full potential obligation under its financial commitment transactions, the proposed rule generally would take the same approach to these transactions that we applied in Release 10666, with some modifications (primarily to the types of segregated assets that would be permitted under the proposed rule). The proposed rule would limit a fund's obligations under financial commitment transactions, in that the fund could not incur obligations under those transactions in excess of the fund's qualifying coverage assets. This would limit a fund's ability to incur obligations under financial commitment transactions to 100% of the fund's net

⁶¹² This estimate is based on the following calculation: $11,973 \text{ funds} \times 14\% = 1,676 \text{ funds}$. See *supra* note 578.

assets, as discussed above in section III.E. As noted above, funds that enter into financial commitment transactions today in reliance on Release 10666 also do not incur obligations in excess of net assets,⁶¹³ and no fund in the DERA sample had greater than 100% aggregate exposure resulting from financial commitment transactions (the current economic baseline for such transactions).⁶¹⁴ As discussed above in section IV.C, we expect that proposed rule 18f-4 would permit a fund that enters solely into financial commitment transactions to operate much in the same way as it does today.

c. Quantified Costs

We estimate above in section IV.D.3 the potential costs of the asset segregation requirement for funds that enter into derivatives transactions. We estimated that the potential costs would include: (1) Developing and implementing policies and procedures to comply with the proposed rule's requirement that the fund maintains the required qualifying coverage assets, identified on the books and records of the fund and determined at least once each business day; (2) planning, coding, testing, and installing any system modifications relating to the asset segregation requirements; and (3) preparing training materials and administering training sessions for staff in affected areas. A fund that enters solely into financial commitment transactions would similarly have an asset segregation requirement.

Although, as discussed above in section III.E, the amount and nature of "qualifying coverage assets" required differ with regard to derivatives transactions and financial commitment transactions, we believe that the operational costs to implement the asset segregation requirements would be the same. For both derivatives transactions and financial commitment transactions, funds would be required to establish policies and procedures regarding qualifying coverage assets, and in both cases funds would be required to assess their obligations under the transactions. For financial commitment transactions, a fund would be required to maintain assets that are convertible to cash or that will generate cash, equal in amount to the financial commitment obligation, prior to the date on which the fund can be expected to be required to pay its financial commitment obligation or that have been pledged with respect to the financial commitment obligation and can be expected to satisfy such

obligation, determined in accordance with policies and procedures approved by the fund's board of directors. For derivatives transactions, funds would be required to determine, in addition to a mark-to-market coverage amount, the transaction's risk-based coverage amount, which would represent an estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions, determined in accordance with policies and procedures approved by the fund's board. Although the required assessments would differ for derivatives transactions and financial commitment transactions, we expect that there would be no material difference in the activities involved (e.g., developing and implementing policies and procedures, and modifying systems, to comply with the proposed rule's requirement that the fund maintains the required qualifying coverage assets), and thus no material difference in the associated costs.

Accordingly, we estimate that the one-time operational costs necessary to establish and implement the proposed asset segregation requirements would range from \$25,000 to \$75,000 per fund.⁶¹⁵ Staff also estimates that each fund would incur ongoing costs related to implementing the asset segregation requirements under proposed rule 18f-4. Staff estimates that such costs would range from 65% to 75% of the one-time costs discussed above.⁶¹⁶ Thus, staff estimates that a fund would incur ongoing annual costs associated with the asset segregation requirements that would range from \$16,250 to \$56,250.⁶¹⁷ In the DERA staff analysis, approximately 3% of all sampled funds entered into at least some financial commitment transactions, but had no exposure from derivatives transactions.⁶¹⁸ Staff estimates, therefore, that 3% of funds (359 funds⁶¹⁹) would comply with the asset segregation requirements in proposed rule 18f-4 (applicable to financial commitment transactions). The above estimate of affected funds does not include money market funds or BDCs. We understand, however, that both money market funds and BDCs may engage in certain types of financial

commitment transactions.⁶²⁰ Therefore, we estimate that 537 money market funds and 88 BDCs would also comply with the asset segregation requirements in proposed rule 18f-4 (applicable to financial commitment transactions).⁶²¹ As with the other quantified costs we discuss in this Release, we believe that many funds belong to a fund complex and are likely to experience economies of scale. We therefore expect that the lower-end of the estimated range of costs (\$25,000 in one-time costs; \$16,250 in annual costs) better reflects the total costs likely to be incurred by many funds.

6. Amendments to Form N-PORT To Report Risk Metrics by Funds That Are Required To Implement a Derivatives Risk Management Program

a. Requirements

As discussed above in section III.G.2, proposed Form N-PORT would require funds that are required to implement a derivatives risk management program to disclose vega and gamma, risk metrics information that is not currently required by the Commission. As we previously stated, we believe that requiring certain funds to report vega and gamma would assist the Commission in better assessing the risk in a fund's portfolio. In consideration of the burdens of reporting selected risk metrics to the Commission and the benefits of more complete disclosure of a fund's risks, we are proposing to limit the reporting of vega and gamma to only those funds that are required to implement a derivatives risk management program.

The current set of requirements under which registered management investment companies (other than money market funds and SBICs) and ETFs organized as UITs publicly report complete portfolio investment information to the Commission on a quarterly basis, as well as the current practice of some investment companies to voluntarily disclose portfolio investment information, is the baseline from which we will discuss the economic effects of vega and gamma disclosure. The baseline is the same baseline from which we discussed the economic effects of Form N-PORT in the Investment Company Reporting Modernization Release.⁶²²

⁶¹⁵ See *supra* note 600.

⁶¹⁶ See *supra* note 601.

⁶¹⁷ This estimate is based on the following calculations: $0.65 \times \$25,000 = \$16,250$; $0.75 \times \$75,000 = \$56,250$.

⁶¹⁸ We address a fund that invests in both derivatives transactions and financial commitment transactions in section IV.D.3.

⁶¹⁹ This estimate is based on the following calculation: $11,973 \text{ funds} \times 3\% = 359 \text{ funds}$. See *supra* note 578.

⁶²⁰ See *supra* note 578.

⁶²¹ See *supra* note 512 and accompanying text.

⁶²² See Investment Company Reporting Modernization Release, *supra* note 138, at section IV.B.a.

⁶¹³ See *supra* note 93 and accompanying text.

⁶¹⁴ DERA White Paper, *supra* note 73, Table 6.

b. Benefits

The benefits of requiring certain funds to report vega and gamma on Form N–PORT are largely the same benefits as those identified in the Investment Company Reporting Modernization Release.⁶²³ As discussed in that release, the information we would receive on Form N–PORT would facilitate the oversight of funds and would assist the Commission to better effectuate its mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. For example, as we discussed in the Release, risk sensitivity measures improve the ability of Commission staff to efficiently analyze information for funds (such as a fund’s exposure to changes in price and volatility) and identify funds with certain risk exposures that appear to be outliers among peer funds. Moreover, the information we would receive on Form N–PORT would improve the Commission’s ability to analyze fund industry trends, monitor funds, and, as appropriate, engage in further inquiry or timely outreach in case of a market or other event. In particular, requiring certain funds to report vega and gamma on Form N–PORT could improve the Commission’s ability to analyze funds’ exposures to volatility and to their exposures to more sizable changes in the value of a derivative’s reference security. These measures could be used in considering whether additional guidance or policy measures may be appropriate. The calculation of position-level risk-measures for some derivatives, including derivatives with unique or complicated payoff structures, sometimes requires time-intensive computation methods or additional information that Form N–PORT as proposed, would not require. In addition, the calculation of a second-order derivative, such as gamma, can be more computationally intensive than the calculation of a first-order derivative, such as delta and may require additional modelling. As discussed in section III. G. above, we believe that many of the funds that would be required to implement a derivatives risk management program already calculate risk measures such as gamma and vega as part of their portfolio management programs or have gamma and vega calculated for them by a service provider. Accordingly, we believe that requiring funds to calculate second-order derivatives, such as gamma, and provide risk measures for

derivatives, such as vega, at the position-level, would improve the ability of staff to efficiently identify risk exposures of funds regardless of the types of derivatives.

The benefits of requiring certain funds to report vega and gamma on Form N–PORT would also benefit investors, to the extent that they use the information, to better differentiate investment companies based on their investment strategies. In general, we expect that institutional investors and other market participants would directly use the information from Form N–PORT more so than individual investors. Individual investors, however, could indirectly benefit from the information in Form N–PORT to the extent that third-party information providers and other interested parties are able to report on the information and other entities utilize the information to help investors make more informed investment decisions. An increase in the ability of investors to differentiate investment companies would allow investors to efficiently allocate capital across reporting funds more in line with their risk preferences, increase the competition among funds for investor capital, and could promote capital formation.

c. Costs

As we discussed in the Investment Company Reporting Modernization Release, to the extent that risk metrics are not currently contained in fund accounting or financial reporting systems, funds would bear one-time costs to update systems to adhere to the new filing requirements.⁶²⁴ The one-time costs would depend on the extent to which investment companies currently report the information required to be disclosed. The one-time costs would also depend on whether an investment company would need to implement new systems, such as to calculate and report vega and gamma, and to integrate information maintained in separate internal systems or by third parties to comply with the new requirements. Based on staff outreach to funds, we believe that, at a minimum, funds would incur systems or licensing costs to obtain a software solution or to retain a service provider in order to report data on risk metrics, as risk metrics are not currently required to be reported on fund financial statements. Our experience with and outreach to funds indicates that the types of systems funds use for warehousing and

aggregating data, including data on risk metrics, vary widely.

Similar to our proposal in the Investment Company Modernization Release,⁶²⁵ the proposed amendments to proposed Form N–PORT relating to vega and gamma would increase the amount and availability of public information about certain investment companies’ portfolio positions and investment strategy and could potentially harm fund shareholders by expanding the opportunities for professional traders to exploit this information by engaging in predatory trading practices, such as “front-running,” and “copycatting/reverse engineering of trading strategies.”⁶²⁶ These practices can reduce the returns of shareholders who invest in actively managed funds.⁶²⁷ These practices can also reduce fund profitability from developing new investment strategies, and therefore negatively affect innovation and impact competition in the fund industry.

As with our proposed liquidity disclosures, we cannot currently predict the extent to which the proposed enhancements to funds’ disclosures on Form N–PORT relating to risk metrics would give rise to front-running, predatory trading, and other activities that could be detrimental to a fund and its investors, and thus we are unable to quantify potential costs related to these activities. The costs that relate to the additional risk-sensitivity measures are also intertwined with the overall costs to funds and market participants that could result from the increased disclosure of currently non-public information associated with Form N–PORT in its entirety.⁶²⁸ For example, any analyses of the risk metric-related disclosure proposed to be required could be affected by the enhanced reporting of any other additional information that could more clearly reveal the investment strategy of reporting funds.

The potential costs associated with the increased disclosure of currently non-public information on Form N–PORT are discussed in detail in our recent proposal to modernize investment company reporting,⁶²⁹ as

⁶²⁵ See Investment Company Reporting Modernization Release, *supra* note 138, at section II.A.4; see also Liquidity Release, *supra* note 5.

⁶²⁶ See Investment Company Reporting Modernization Release, *supra* note 138, at n.170 and accompanying and following text.

⁶²⁷ See Russ Wermers, *The Potential Effects of More Frequent Portfolio Disclosure on Mutual Fund Performance*, 7 Investment Company Institute Perspective No. 3 (June 2001), available at <http://www.ici.org/pdf/per07-03.pdf>.

⁶²⁸ See *id.*, at paragraphs accompanying nn.663–673.

⁶²⁹ See *id.*

⁶²³ See Investment Company Reporting Modernization Release, *supra* note 138, at section IV.B.b.

⁶²⁴ See Investment Company Reporting Modernization Release, *supra* note 138, at section IV.B.c.

well as our recent proposal regarding liquidity risk-management programs.⁶³⁰ These proposals also discuss the ways in which we have endeavored to mitigate these costs, including by proposing to maintain the status quo for the frequency and timing of disclosure of publicly available portfolio information.⁶³¹ While proposed Form N–PORT would be required to be filed monthly, it would be required to be disclosed quarterly and would not be made public until 60 days after the close of the period at issue. Because funds are currently required to disclose their portfolio investments quarterly (and this disclosure is made public with a 60-day lag), we believe that maintaining the status quo with regard to the frequency and the time lag of publicly available portfolio reporting would permit the Commission (as well as the fund industry generally) to assess the impact of the Form N–PORT filing requirements on the mix of information available to the public, and the extent to which these changes might affect the potential for predatory trading, before determining whether more frequent or more timely public disclosure would be beneficial to investors in funds.⁶³²

d. Quantified Costs

As further discussed below⁶³³ and in our Investment Company Modernization Release,⁶³⁴ we estimate that funds would incur certain annual costs associated with preparing, reviewing, and filing reports on Form N–PORT. The proposed amendments to proposed Form N–PORT would require funds that are required to implement a derivatives risk management program to report on Form N–PORT the vega and gamma for certain investments.⁶³⁵ We estimate that 1,676 funds⁶³⁶ would be required to file, on a monthly basis, additional information on Form N–PORT as a

result of the proposed amendments.⁶³⁷ Assuming that 35% of funds (587 funds) would choose to license a software solution to file reports on Form N–PORT in house,⁶³⁸ we estimate an upper bound on the initial annual costs to file the additional information associated with the proposed amendments for funds choosing this option of \$3,352 per fund⁶³⁹ with annual ongoing costs of \$2,991 per fund.⁶⁴⁰ We further assume that 65% of funds (1,089 funds) would choose to retain a third-party service provider to provide data aggregation and validation services as part of the preparation and filing of reports on Form N–PORT,⁶⁴¹ and we estimate an upper bound on the initial costs to file the additional information associated with the proposed amendments for funds choosing this option of \$2,319 per fund⁶⁴² with annual ongoing costs of \$1,517 per fund.⁶⁴³

7. Amendments to Form N–CEN To Report Reliance on Proposed Rule 18f–4

a. Requirements

As discussed above in section III.G.3, our amendments to proposed Form N–CEN would require funds to identify the portfolio limitation(s) on which a fund relied during the reporting period. As we stated above, this information would allow the Commission and others to monitor reliance on the exemptions under proposed rule 18f–4.

The current set of requirements—management companies must file reports on Form N–SAR semi-annually⁶⁴⁴—is the baseline from which we discuss the economic effects of Form N–CEN. The parties that could be affected by the rescission of Form N–SAR and the introduction of Form N–

CEN include funds that currently file reports on Form N–SAR and funds that would file reports on Form N–CEN; the Commission; and, other current and future users of fund census information including investors, third-party information providers, and other interested potential users. The baseline is the same baseline from which we discussed the economic effects of Form N–CEN in the Investment Company Reporting Modernization Release.⁶⁴⁵

b. Benefits

The benefits of requiring funds to report reliance on certain exemptive rules, including proposed rule 18f–4, on Form N–CEN are largely the same benefits as those identified in the Investment Company Reporting Modernization Release.⁶⁴⁶ As we discussed in that release, proposed Form N–CEN would improve the quality and utility of the information reported to the Commission and allow Commission staff to better understand industry trends, inform policy, and assist with the Commission’s examination program. Similarly, identifying the portfolio limitation(s) on which a fund relied during the reporting period would identify for the staff funds that rely on proposed rule 18f–4. As discussed in our recent proposal to modernize Investment Company reporting, the information we would receive on Form N–CEN would facilitate the oversight of funds and would assist the Commission to better effectuate its mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.⁶⁴⁷

c. Costs

As we discussed above, to the extent that reliance on certain exemptive rules is not currently contained in fund accounting or financial reporting systems, funds would bear one-time costs to update systems to adhere to the new filing requirements.⁶⁴⁸ The one-time costs would depend on the extent to which funds currently report the information required to be disclosed. The one-time costs would also depend on whether a fund would need to integrate information maintained in

⁶³⁰ See Liquidity Release, *supra* note 5.

⁶³¹ See *id.*, at section II.A.4 and paragraph accompanying n. 670.

⁶³² See *id.*

⁶³³ See *infra* section V.

⁶³⁴ See Investment Company Reporting Modernization Release, *supra* note 138, at nn.658–662 accompanying text.

⁶³⁵ While we do not have a specific estimate of the number of funds that calculate gamma and vega, based on our discussions with members of the industry and due to the nature of those funds’ investment strategies, we expect that many of those funds currently calculate vega and gamma for its investment programs or have vega and gamma calculated for them by a service provider. However, we realize that it is possible that some funds may not calculate vega and gamma and our cost estimates reflect those costs as well.

⁶³⁶ Commission staff estimates, therefore, that approximately 14% of funds (1,676 funds) would be required to establish a derivatives risk management program. See *supra* note 612 and accompanying text.

⁶³⁷ There were 8,734 open-end funds (excluding money market funds, and including ETFs) as of the end of 2014. See Investment Company Institute, 2015 Investment Company Fact Book (2015), available at https://www.ici.org/pdf/2015_factbook.pdf, at 177, 184.

⁶³⁸ This assumption tracks the assumption made in the Investment Company Reporting Modernization Release that 35% of funds would choose to license a software solution to file reports on Form N–PORT. See Investment Company Reporting Modernization Release, *supra* note 138, at nn.658–659 and accompanying text.

⁶³⁹ See *infra* note 797 and accompanying text.

⁶⁴⁰ See *infra* note 797.

⁶⁴¹ This assumption tracks the assumptions made in the Investment Company Reporting Modernization Release that 65% of funds would choose to retain a third-party service provider to provide data aggregation and validation services as part of the preparation and filing of reports on Form N–PORT. See Investment Company Reporting Modernization Release, *supra* note 138, at nn.660–661 and accompanying text.

⁶⁴² See *infra* note 803 and accompanying text.

⁶⁴³ See *infra* note 804 and accompanying text.

⁶⁴⁴ See rule 30b1–1.

⁶⁴⁵ See Investment Company Reporting Modernization Release, *supra* note 138, at section IV.E.a.

⁶⁴⁶ See Investment Company Reporting Modernization Release, *supra* note 138, at section IV.E.b.

⁶⁴⁷ See *id.*

⁶⁴⁸ See Investment Company Reporting Modernization Release, *supra* note 138, at section IV.B.c.

separate internal systems with the new requirements.

d. Quantified Costs

As further discussed below⁶⁴⁹ and in our Investment Company Modernization Release,⁶⁵⁰ we estimate that funds would incur certain annual costs associated with preparing, reviewing, and filing reports on Form N–CEN. The proposed amendments to proposed Form N CEN would require funds to identify the portfolio limitation(s) on which they relied during the reporting period.

In the Investment Company Modernization Reporting Release, the staff estimated that the Commission would receive an average of 3,146 reports per year, based on the number of existing Form N–SAR filers, including 2,419 funds.⁶⁵¹ We further estimated that management investment companies would require 33.35 annual burden hours in the first year⁶⁵² and 13.35 annual burden hours in each subsequent year for preparing and filing reports on proposed Form N–CEN. We estimated that all Form N–CEN filers would have an aggregate annual expense of \$12,395,064 for reports on Form N–CEN.⁶⁵³

As part of this burden, funds would be required to identify if they relied upon ten different rules under the Act.⁶⁵⁴ While the costs associated with collecting and documenting the requirements under proposed rule 18f–4 are discussed above,⁶⁵⁵ we believe that there are additional costs relating to identifying the portfolio limitation(s) on which a fund relied on proposed Form

N–CEN. We therefore estimate that 2,419 funds would incur an average annual hour burden of .25 hours for the first year to compile (including review of the information), tag, and electronically file the additional information in light of the proposed amendments, and an average annual hour burden of approximately .1 hours for each subsequent year’s filing. We further estimate an upper bound on the initial costs to funds of \$80 per fund⁶⁵⁶ with annual ongoing costs of \$32 per fund.⁶⁵⁷ We do not anticipate any change to the total external annual costs of \$1,748,637.⁶⁵⁸

E. Reasonable Alternatives

In formulating our proposal, we have considered various alternatives to the individual elements of proposed rule 18f–4. Those alternatives are outlined above in the sections discussing the proposed rule elements, and we have requested comment on these alternatives.⁶⁵⁹ The following discussion addresses significant alternatives to proposed rule 18f–4, which involve broader issues than the more granular alternatives to the individual rule elements discussed above in section III of this Release. First, we discuss an alternative approach focused on asset segregation. This approach would allow funds to establish their own minimum asset segregation requirements for derivatives transactions while taking into account a variety of risk measures, but would not include additional limitations designed to impose a limit on leverage. Second, we discuss an approach that would require a fund engaging in derivatives transactions to segregate liquid assets equal in value to the full amount of the potential obligations under the derivatives transactions. This approach would, in effect, apply the approach in Release 10666 to all types of derivatives. Third, we discuss the European Union provisions relating to UCITS funds and alternative investment funds (“AIFs”)⁶⁶⁰ as an alternative approach to our proposed rule. Fourth, we discuss whether it would be a reasonable alternative to rely on enhancing derivatives-related disclosure. In addition to these discussions regarding alternatives to proposed rule 18f–4, we also discuss below certain alternatives

to our proposed amendments to Proposed Form N–PORT.

1. Mark-to-Market Plus “Cushion Amount” Alternative

In the Concept Release we discussed an alternative approach to funds’ current asset segregation approaches—generally, notional amount and mark-to-market segregation as discussed above—that was originally proposed in the 2010 ABA Derivatives Report. This alternative approach would allow individual funds to establish their own asset segregation standards for derivatives transactions but would not impose any additional requirements or overall limits on a fund’s use of derivatives. Under this alternative, a fund would be required to adopt policies and procedures that would include, among other things, minimum asset segregation requirements for each type of derivatives instrument, taking into account relevant factors such as the type of derivative, the specific transaction, and the nature of the assets segregated (“Risk Adjusted Segregation Amounts”). In developing these standards, fund investment advisers might take into account a variety of risk measures, including VaR and other quantitative measures of portfolio risk, and would not be limited to the notional amount or mark-to-market standards.⁶⁶¹ This alternative is similar in some ways to the proposed rule’s asset coverage requirements for derivatives transactions, as discussed in section IV.D.3. The proposed rule differs from this alternative in that it imposes requirements in addition to those related to asset coverage, including overall notional amount limits and the requirement for certain funds to have derivatives risk management programs.

Certain commenters on the Concept Release suggested that segregation of a fund’s daily mark-to-market liability alone may not be effective in at least some cases, and suggested that we impose asset segregation requirements under which a fund would include in its segregated account for a derivative an amount designed to address future losses (a “cushion amount”) in addition to the daily mark-to-market liability for the derivative.⁶⁶² Some commenters specifically supported the 2010 ABA Derivatives Report alternative that used

⁶⁴⁹ See *infra* section V.B.6.

⁶⁵⁰ See Investment Company Reporting Modernization Release, *supra* note 138, at nn.658–662 accompanying text.

⁶⁵¹ This estimate is based on 2,419 management companies and 727 UITs filing reports on Form N–SAR as of Dec. 31, 2014. UITs would not be required to complete Item 31 of proposed Form N–CEN. See General Instruction A of proposed Form N–CEN.

⁶⁵² This estimate is based on the following calculation: 13.35 hours for filings + 20 additional hours for the first filing = 33.35 hours.

⁶⁵³ This estimate is based on annual ongoing burden hour estimate of 32,294 burden hours for management companies (2,419 management companies × 13.35 hours per filing) plus 6,623 burden hours for UITs (727 UITs × 9.11 burden hours per filing), for a total estimate of 38,917 burden ongoing hours. This was then multiplied by a blended hourly wage of \$318.50 per hour, \$303 per hour for Senior Programmers and \$334 per hour for compliance attorneys, as we believe these employees would commonly be responsible for completing reports on proposed Form N–CEN (\$318.50 × 38,917 = \$12,395,064.50). See Investment Company Reporting Modernization Release, *supra* note 138, at n.723 and accompanying text.

⁶⁵⁴ See Item 31 of Proposed Form N–CEN.

⁶⁵⁵ See *supra* Sections IV.D.1. and IV.D.2.

⁶⁵⁶ See *infra* note 815.

⁶⁵⁷ See *infra* note 816.

⁶⁵⁸ See *infra* note 821.

⁶⁵⁹ See *supra* sections III.B–III.F.

⁶⁶⁰ AIFs are alternative investment funds that are marketed to professional investors in the European Union.

⁶⁶¹ The 2010 ABA Derivatives Report recommended that these minimum Risk Adjusted Segregated Amounts be reflected in policies and procedures that would be subject to approval by the fund’s board of directors and disclosed (including the principles underlying the Risk Adjusted Segregated Amounts for different types of derivatives) in the fund’s SAI.

⁶⁶² See, e.g., SIFMA Concept Release Comment Letter; ICI Concept Release Comment Letter.

Risk Adjusted Segregated Amounts and many commenters generally supported using a “principles-based approach” to asset segregation⁶⁶³ that would permit funds to adopt policies and procedures that would include minimum asset segregation requirements for each type of derivatives instrument, taking into account relevant factors.⁶⁶⁴ Some commenters expressed the view that the optimal amount of cover for many derivatives may be somewhere in between the full notional and mark-to-market amounts and that the amount should be expected to cover the potential loss to the fund.⁶⁶⁵ One of these commenters recommended that fund boards should be responsible for designing asset segregation policies with the objective of maintaining segregated assets sufficient to meet obligations arising from the fund’s derivatives under “extreme but plausible market conditions.”⁶⁶⁶ Another commenter argued that the cushion amount generally should be equal to the initial margin that funds will generally be required to post for derivatives following the implementation of margin requirements under the Dodd-Frank Act or, in the alternative, a cushion amount determined by funds based on a portfolio-wide analysis of their derivatives transactions.⁶⁶⁷ This

commenter suggested that initial margin represents an amount designed to protect against potential future losses, and where regulators or clearinghouses have determined the amount of initial margin that must be posted, they have already made determinations about the level of risk represented by an instrument.⁶⁶⁸

As discussed above in section IV.D.3, the rule we are proposing today would require a fund that enters into derivatives transactions and financial commitment transactions in reliance on the proposed rule to maintain an appropriate amount of qualifying coverage assets. For derivatives transactions, a fund would be required to maintain qualifying coverage assets with a value equal to at least the sum of the fund’s aggregate mark-to-market coverage amounts and risk-based coverage amounts.⁶⁶⁹ For financial commitment transactions, a fund would be required to maintain qualifying coverage assets with a value equal to at least the fund’s aggregate financial commitment obligations.⁶⁷⁰

The proposed rule’s asset segregation requirement would in many ways be consistent with the approaches recommended by the 2010 ABA Derivatives Report and by commenters in that it would require funds to maintain amounts intended to cover the fund’s current mark-to-market amount to cover the amount that would be payable by the fund if the fund were to exit the derivatives transaction at such time, plus an additional amount that represents a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions.

However, the proposed rule would differ significantly from the approach recommended in the 2010 ABA Derivatives Report and by some commenters in that the proposed rule would impose portfolio limitations, as discussed in section III.B.1.c, designed to impose a limit on the amount of leverage a fund may obtain through derivatives and other senior securities transactions. The 2010 ABA Derivatives Report alternative, in contrast, focused on asset segregation without any other limitation on a fund’s use of senior securities transactions. The proposed

rule’s inclusion of both portfolio limitations and asset coverage requirements would be consistent with the recommendation of one commenter, which supported a principles-based approach to asset segregation but also recognized that we might “wish to consider adopting an overall leverage limit that funds would be required to comply with, notwithstanding that they have segregated liquid assets to back their obligations.”⁶⁷¹

The 2010 ABA Derivatives Report also recommended an asset segregation approach that would give discretion to boards to determine the segregation amount for each instrument and thus the amount of derivatives exposures that the fund could obtain. The proposed asset coverage requirements, by contrast, would be based in part on procedures approved by the fund’s board, but would also impose specific requirements on the fund’s asset coverage practices, including by generally requiring the fund to segregate short-term, highly liquid assets.

As noted in section III.A, we believe that the proposed rule’s approach for derivatives transactions—providing separate portfolio limitations and asset segregation requirements—would be more effective than an approach focusing on asset segregation alone, particularly when it is coupled with a risk management program for funds that engage in more than a limited amount of derivatives transactions or that use certain complex derivatives transactions, as we are proposing today. Moreover, the approach recommended in the 2010 ABA Derivatives Report and similar suggestions by some commenters would provide discretion to funds to determine their derivatives-related requirements, and as a result, the extent of their use of senior securities transactions. We believe that this alternative approach under the 2010 ABA Derivatives Report, without more, may not result in a meaningful limitation on funds’ use of derivatives, and thus would not address the undue speculation concern expressed in section 1(b)(7) or the asset sufficiency concern expressed in section 1(b)(8), as discussed above in section II. We believe that relying solely on the discretion of funds and their boards of directors for limitations on the use of derivatives would not be a sufficient basis for an exemption from section 18, which imposes a limit on the extent to which funds may issue senior securities.

⁶⁶³ See, e.g., BlackRock Concept Release Comment Letter; Invesco Concept Release Comment Letter; Loomis Concept Release Comment Letter; ICI Concept Release Comment Letter; IDC Concept Release Comment Letter; ABA Concept Release Comment Letter; Comment Letter of Stradley Ronon Stevens & Young LLP (Nov. 7, 2011) (File No. S7-33-11), available at <http://www.sec.gov/comments/s7-33-11/s73311-27.pdf>; MFDF Concept Release Comment Letter; T. Rowe Concept Release Comment Letter; Vanguard Concept Release Comment Letter; AlphaSimplex Concept Release Comment Letter; Oppenheimer Concept Release Comment Letter; Rafferty Concept Release Comment Letter.

⁶⁶⁴ See, e.g., ABA Concept Release Comment Letter; IDC Concept Release Comment Letter; BlackRock Concept Release Comment Letter; Invesco Concept Release Comment Letter; ICI Concept Release Comment Letter; MFDF Concept Release Comment Letter; AlphaSimplex Concept Release Comment Letter; Loomis Concept Release Comment Letter; T. Rowe Price Concept Release Comment Letter; Comment Letter of Security Investors, LLC (Nov. 7, 2011) (File No. S7-33-11), available at <http://www.sec.gov/comments/s7-33-11/s73311-36.pdf>.

⁶⁶⁵ See, e.g., ICI Concept Release Comment Letter; Invesco Concept Release Comment Letter.

⁶⁶⁶ ICI Concept Release Comment Letter (noting that “extreme but plausible market conditions” is a statutory standard used by swap execution facilities and derivatives clearing organizations to determine the minimum amount of financial resources such entities must have to ensure, with a reasonably high degree of certainty, that they will be able to satisfy their obligations. See, e.g., section 5b(c)(2) of the Commodity Exchange Act, as amended by section 725(c) of the Dodd-Frank Act.).

⁶⁶⁷ See SIFMA Concept Release Comment Letter. See section III.C. for a discussion of why we are not

proposing to use initial margin to determine asset segregation amounts.

⁶⁶⁸ See SIFMA Concept Release Comment Letter.

⁶⁶⁹ Proposed rule 18f-4(a)(2). See also proposed rule 18-f(4)(c)(6) (definition of mark-to-market coverage amount) and 18-f(4)(c)(9) (definition of risk-based coverage amount).

⁶⁷⁰ Proposed rule 18f-4(b). See also proposed rule 18f-4(c)(5) (definition of financial commitment obligation).

⁶⁷¹ See Vanguard Concept Release Comment Letter, at n.18.

2. Applying Notional Amount Segregation to All Senior Securities Transactions

Another alternative approach we considered was to apply the approach in Release 10666 to all types of derivatives, thereby requiring that a fund engaging in any derivatives transaction segregate liquid assets of the types we specified in Release 10666 equal in value to the full amount of the conditional and unconditional obligations incurred by the fund (also referred to as notional amount segregation).⁶⁷²

Although the approach in Release 10666 appears to have addressed the concerns reflected in sections 1(b)(7) and 1(b)(8) for the trading practices described in that release, applying it to derivatives by requiring funds to segregate the types of liquid assets we described in Release 10666 equal in value to the full notional amount of each derivative may require funds to hold more liquid assets than may be necessary to address the purposes and concerns underlying section 18, as discussed above in section III.A. Furthermore, as discussed above in section III.B.1.c., given the contingent nature of funds' derivatives obligations and the various ways in which funds use derivatives—both for investment purposes to increase returns but also to mitigate risks—we believe it is appropriate to provide funds some additional flexibility to use derivatives, subject to the limitations set forth in the proposed rule.

3. UCITS Alternative

In developing proposed rule 18f-4, we considered the current guidelines that apply to UCITS funds. As discussed below, while our proposed rule is similar in some respects to the guidelines that cover UCITS funds, our proposed rule also differs in other respects. We also considered the current guidelines that apply to AIFs. We discuss further below how our proposed rule generally differs from the guidelines that govern AIFs.

The Committee of European Securities Regulators (“CESR”) (which, as of January 1, 2011, became the European Securities and Markets Authority, or “ESMA”), conducted an extensive review and consultation concerning exposure measures for derivatives used by UCITS funds. CESR’s Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS (“Global Exposure

Guidelines”)⁶⁷³ were issued in 2010, and addressed the implementation of the European Commission’s 2009 revised UCITS Directive (“2009 Directive”).⁶⁷⁴ Under the 2009 Directive, UCITS funds are permitted to engage in any type of derivatives investments subject to compliance with one of two permissible, alternative methods to limit their exposure to derivatives: (1) The “commitment” approach and (2) the VaR approach.⁶⁷⁵

Under the commitment approach, a UCITS fund’s net exposures from derivatives may not exceed 100% of the fund’s net asset value.⁶⁷⁶ CESR’s Global Exposure Guidelines extensively address the calculation of derivatives exposure and specify a method for calculating derivatives exposure that generally uses the market value of the equivalent position in the underlying asset.⁶⁷⁷ CESR’s Global Exposure Guidelines also incorporate a schedule of derivative investments and their

⁶⁷³ See CESR Global Guidelines, *supra* note 162. In order for CESR’s Global Exposure Guidelines to be binding and operational in a particular EU Member State, the Member State must adopt them. To date, it appears that a few EU Member States, e.g., Ireland and Luxembourg, have adopted them. The majority of UCITS funds, however, are domiciled in either Ireland or Luxembourg.

⁶⁷⁴ See Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (“Directive 2009/65/EC”), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF>.

⁶⁷⁵ See CESR Global Guidelines, *supra* note 162. The CESR’s Global Exposure Guidelines note that the “use of a commitment approach or VaR approach or any other methodology to calculate global exposure does not exempt UCITS from the requirement to establish appropriate internal risk management measures and limits.” *Id.*, at 5. In addition, with respect to the selection of the methodology used to measure global exposure, CESR’s Global Exposure Guidelines note that the “commitment approach should not be applied to UCITS using, to a large extent and in a systematic way, financial derivative instruments as part of complex investment strategies.” *Id.*, at 6.

⁶⁷⁶ Directive 2009/65/EC, *supra* note 674 at Article 51(3) at 62 (“The exposure is calculated taking into account the current value of the underlying assets, the counterparty risk, future market movements and the time available to liquidate the positions”). See also CESR Global Guidelines, *supra* note 162 (“The commitment conversion methodology for standard derivatives is always the market value of the equivalent position in the underlying asset. This may be replaced by the notional value or the price of the futures contract where this is more conservative. For non-standard derivatives, where it is not possible to convert the derivative into the market value or notional value of the equivalent underlying asset, an alternative approach may be used provided that the total amount of the derivatives represent a negligible portion of the UCITS portfolio.”).

⁶⁷⁷ The market value of the underlying reference asset may be “replaced by the notional value or the price of the futures contract where this is more conservative.” See CESR Global Guidelines, *supra* note 162, at 7.

corresponding conversion methods to be used in calculating global exposure.⁶⁷⁸ The applicable conversion method for UCITS funds depends on the particular derivative.⁶⁷⁹ We believe that the calculation of derivatives exposure under CESR’s Global Exposure Guidelines is generally similar to the method of calculating notional amounts, which under our proposed rule would be included in a fund’s calculation of its exposure. Instead of specifying in the rule the precise method of determining notional amounts for every particular type of derivative transaction, we have proposed a definition of notional amount that we believe can be more readily adapted both to current and new types of derivatives transactions.

Although the CESR commitment approach is similar with respect to our proposed method of calculating derivatives exposure, the commitment approach differs from our proposed exposure-based alternative in several ways. First, the commitment approach permits exposures of up to only 100% of the fund’s net assets rather than our proposed rule’s exposure-based portfolio limit of 150%. Second, the commitment approach permits UCITS funds to reduce their calculated derivatives exposure for certain netting and hedging transactions. With respect to netting, CESR’s Global Exposure Guidelines allow netting of derivatives transactions regardless of the derivatives’ due dates, provided that the trades are “concluded with the sole aim of eliminating the risks linked to the positions.”⁶⁸⁰ In addition, UCITS funds are permitted to reduce their exposures for hedging arrangements—these are described in CESR’s Global Exposure Guidelines as transactions that do not necessarily refer to the same underlying asset but are entered into for the “sole

⁶⁷⁸ See *id.*, at 7–12.

⁶⁷⁹ *Id.*, at 8. For example, for bond futures, the applicable conversion method is the number of contracts multiplied by the notional contract size multiplied by the market price of the cheapest-to-deliver reference bond. For plain vanilla fixed/floating interest rate and inflation swaps, the applicable conversion method is the market value of the underlier (though the notional value of the fixed leg may also be applied). *Id.* For foreign exchange forwards, the prescribed conversion method is the notional value of the currency leg(s). *Id.*, at 9. With respect to non-standard derivatives, where it is not possible to convert the derivative into the market value or notional value of the equivalent underlying asset, CESR’s Global Exposure Guidelines note that “an alternative approach may be used provided that the total amount of the derivatives represent a negligible portion of the UCITS portfolio.” *Id.*, at 7.

⁶⁸⁰ See CESR Global Guidelines, *supra* note 162, at 13.

⁶⁷² See *supra* note 54 and accompanying text.

aim of offsetting risks" linked to other positions.⁶⁸¹

As discussed above in section III.B, given the flexibility provided by our proposed 150% exposure limit (and the requirements provided under our proposed risk-based portfolio limit discussed above), the proposed rule does not permit a fund to reduce its exposure for purposes of the rule's portfolio limitations for particular types of hedging, risk-mitigating or offsetting transactions. For all of the reasons discussed in that section, we believe that it would be more appropriate, in lieu of a reduction for hedging on a transaction-by-transaction basis, to provide funds with the flexibility to enter into derivatives transactions for a variety of purposes, including those that are partially or primarily for hedging, through a 150% exposure limitation.

Similar to our proposed rule, the UCITS guidelines also provide an alternative risk-based approach. This alternate method for UCITS compliance is the VaR (or other advanced risk measurement) approach, designed to measure potential losses due to market risk rather than measure leverage exposures.⁶⁸² When following the VaR approach to calculate global exposure, a UCITS fund may use either an absolute VaR approach or a relative VaR approach.⁶⁸³ The absolute VaR approach limits the maximum VaR that a UCITS fund can have relative to its net assets, and as a general matter, the absolute VaR is limited to 20 percent of the UCITS fund's net assets.⁶⁸⁴ Under the relative VaR approach, the VaR of the portfolio cannot be greater than

twice the VaR of an unleveraged reference portfolio.⁶⁸⁵

While our proposed rule also uses a VaR ratio comparison as a risk measurement method to limit the use of derivatives, we have determined not to propose the use of an absolute VaR method that would limit the fund's VaR amount to a specified percentage of net assets, or a relative VaR that would measure a fund's VaR as compared to a reference benchmark. As discussed above in the section III.B.2.b, our concern with respect to an absolute VaR method is that the calculation of VaR on a historical basis is highly dependent on the historical trading conditions during the measurement period and can change dramatically both from year to year and from periods of benign trading conditions to periods of stressed market conditions. As discussed above in section III.B.1.c, we believe that our exposure-based portfolio limit of 150% and our risk-based portfolio limit of 300% are appropriately designed to impose a limit on the amount of leverage a fund may obtain through certain derivatives and other senior securities transactions while also providing flexibility for funds to use derivatives transactions for a variety of purposes. However, a limitation based on an absolute VaR method could potentially allow a fund to obtain very substantial amounts of leveraged exposures that the fund could then be required to unwind during stressed market conditions, which could adversely affect the fund and its investors. In addition, our staff has noted that some UCITS funds relying on the absolute VaR method disclose gross notional amounts for their portfolios that are substantially in excess of our proposed portfolio limitations that we believe are appropriate for funds subject to section 18 of the Act as discussed above in section III.B.1.c.

The relative VaR method for UCITS funds, under which a fund would compare its total portfolio VaR to an unleveraged reference portfolio or benchmark, allows a UCITS fund to use derivatives in its portfolio so long as the VaR of the UCITS fund is not greater than two times the VaR of the reference portfolio or benchmark. As discussed above in section III.B.2.a, we have not proposed this particular approach for several reasons, including concerns regarding difficulties in determining whether a reference index or benchmark

is itself leveraged. Our staff has also noted that a number of UCITS funds do not use the relative VaR method and many alternative funds use a benchmark that is a money market rate (such as LIBOR), oftentimes because an analogous investment benchmark is not available for the fund strategy, which suggests that a VaR comparison to a benchmark would not provide a suitable method for many fund strategies.⁶⁸⁶

In addition to the two alternative exposure limitations, CESR's Global Exposure Guidelines also subject UCITS funds to "cover rules" for investments in financial derivatives.⁶⁸⁷ Under these cover rules, a UCITS fund should, at any given time, be capable of meeting all its payment and delivery obligations incurred by transactions involving financial derivative investments, and should monitor to make sure that financial derivatives transactions are adequately covered.⁶⁸⁸ More specifically, in the case of a derivative that provides, automatically or at the counterparty's choice, for physical delivery of the underlying financial instrument, a UCITS fund: (1) Should hold the underlying financial instrument in its portfolio as cover, or, (2) if the UCITS fund deems the underlying financial instrument to be sufficiently liquid, it may hold as coverage other assets (including cash) as cover on the condition that these assets (after applying appropriate haircuts), held in sufficient quantities, may be used at any time to acquire the underlying financial instrument that is to be delivered.⁶⁸⁹ In the case of a derivative that provides, automatically or at the UCITS fund's choice, for cash settlement, the UCITS fund should hold enough liquid assets after appropriate haircuts to allow the UCITS fund to make the contractually required payments.⁶⁹⁰ Similar to the UCITS cover rules, the asset segregation requirements of our proposed rule are also designed to assure that a fund has sufficient assets to pay its derivatives related

⁶⁸¹ See CESR Global Guidelines, *supra* note 162, at 18. The UCITS requirements also permit the fund to reduce its exposures if the derivative directly swaps the performance of financial assets held by the fund for other reference assets or the derivative, in combination with cash held by the fund, represents the equivalent of a cash investment in the reference asset.

⁶⁸² *Id.*, at 22 ("More particularly, the VaR approach measures the maximum potential loss at a given confidence level (probability) over a specific time period under normal market conditions.").

⁶⁸³ *Id.*, at 23. A global exposure calculation using the VaR approach should consider all the positions in the UCITS' portfolio. *Id.*, at 22. The VaR approach measures the probability of risk of loss rather than the amount of leverage in portfolio and the VaR calculation is required to have a "one-tailed confidence interval of 99%," a holding period of one month (20 business days), an observation period of risk factors of at least one year (unless a shorter observation period is justified by a significant increase in price volatility), at least quarterly updates, and at least daily calculation. *Id.* at 26. UCITS employing the VaR approach are required to conduct a "rigorous, comprehensive and risk-adequate stress testing program." *Id.*, at 30–34.

⁶⁸⁴ *Id.*, at 25–26.

⁶⁸⁵ CESR's Global Exposure Guidelines note that the relative VaR approach does not directly measure leverage of the UCITS' strategies but instead allows the UCITS to double the risk of loss under a given VaR model as compared to a reference benchmark. *Id.*, at 24.

⁶⁸⁶ See *supra* notes 268–270 and accompanying text.

⁶⁸⁷ CESR Global Guidelines, *supra* note 162, at 40.

⁶⁸⁸ *Id.*

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.* On April 14, 2011, ESMA published a final report on the guidelines on risk measurement and the calculation of the global exposure for certain types of structured UCITS funds. See *Guidelines to Competent Authorities and UCITS Management Companies on Risk Measurement and the Calculation of Global Exposure for Certain Types of Structured UCITS*, Final Report Ref: ESMA/2011/112 (Apr. 14, 2011), available at <http://www.esma.europa.eu/popup2.php?id=7542> (these guidelines, which will need to be adopted and implemented by Member States, propose for certain types of structured UCITS, an optional regime for the calculation of the global exposure).

obligations. However, our proposed asset segregation requirements differ from the UCITS requirements for the reasons discussed above in section III.C.

ESMA has also more recently adopted guidelines to assess the leverage used by AIFs marketed to professional investors in the European Union.⁶⁹¹ These guidelines supplement a directive proposed by the European Commission, the Alternative Investment Fund Managers Directive (“AIFMD”), which had the objective to create a comprehensive and effective regulatory and supervisory framework for AIF managers at the European level.⁶⁹² AIFMD defines leverage as “any method by which the [AIF manager] increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means.”⁶⁹³ For each AIF that it manages, the AIF manager is required to establish a maximum level of leverage which it may employ on behalf of the AIF and to report the AIF’s leverage to investors and supervisory authorities.⁶⁹⁴ Unlike the UCITS regime, AIFMD does not restrict the amount of leverage that may be used by an AIF; instead it requires managers to set their own limitation for each AIF. The requirements in AIFMD thus serve primarily to provide a consistent method of measuring and reporting of the amount of leverage used by AIFs.

AIF managers are required to calculate leverage used by AIFs both under a gross method and a commitment method. As described by ESMA, “[t]he gross method gives the overall exposure of the AIF whereas the commitment method gives insight in the hedging and netting techniques used by the manager.”⁶⁹⁵ The measurement of exposure relating to derivatives and

borrowings in our proposed rule generally is similar to AIFMD requirements with respect to the measurement of the gross exposure relating to derivatives and borrowings.⁶⁹⁶ The commitment method under AIFMD, however, allows an AIF also to report its exposure after reduction for netting and hedging arrangements. The determination of whether a set of transactions are eligible for netting or hedging treatment would be made by the AIF manager subject to general principles focusing on whether the transactions result in an “unquestionable reduction of the general market risk” or alternatively whether the transactions are part of an arbitrage strategy that is seeking to generate a return based on the relative performance of two correlated assets.⁶⁹⁷

For reasons discussed above, we have decided not to propose a rule that would allow fund managers to set their own exposure limitation for each fund. In addition, as discussed above, we believe it would be difficult to develop standards for determining circumstances under which transactions are offsetting other transactions, and thus we have chosen not to incorporate a hedging reduction into the proposed exposure limitations. Accordingly, and as discussed above in section III.B.1.c, we believe that a test that focuses on the notional amounts of funds’ derivatives transactions, coupled with an appropriate exposure limit, will better accommodate the broad diversity of registered funds and the ways in which they use derivatives. We also believe that, to the extent fund managers may wish to include more specific risk metrics with respect to their funds, they may do so by including such metrics within the proposed derivatives risk management program.

4. Disclosure Alternative and Considerations

We considered whether enhancements to funds’ disclosure obligations with respect to a fund’s use of derivatives would be a reasonable alternative to the proposed rule.⁶⁹⁸ We received a range of comments on the Concept Release regarding the efficacy of disclosure. Some commenters that recommended disclosure enhancements also suggested approaches that went beyond enhanced disclosure,⁶⁹⁹ and at least one commenter specifically argued that disclosure alone was not sufficient.⁷⁰⁰ For example, this commenter noted that the financial crisis of 2007–2008 demonstrated that disclosure alone is not adequate because markets may do a poor job of regulating the use of leverage by financial institutions, thus allowing leverage to increase until there are catastrophic failures.⁷⁰¹ On the other hand, some commenters specifically argued that in at least certain circumstances the use of derivatives by a fund should be addressed solely through disclosure. For example, one commenter suggested that disclosure requirements would be suitable for transactions that possess only economic leverage, which the commenter argued would implicate the risks and volatility of a fund similar to that of other types of non-derivative investments.⁷⁰² Another commenter argued that leveraged funds, particularly leveraged exchange-traded funds, present fewer concerns than do other funds that use derivatives due in part to their robust level of disclosure, and should not have any additional derivatives limitations imposed on them.⁷⁰³

Although disclosure is an important mechanism through which funds inform existing and prospective shareholders of the fund’s use of derivatives, we do not believe that an approach that focuses on

⁶⁹¹ See Commission Delegated Regulation (EU) No 231/2013 of Dec. 19, 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (“Commission Delegated Regulation No. 231/2013”), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0231> (providing for the calculation of leverage for alternative investment funds).

⁶⁹² Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (“Directive 2011/61/EU”), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0061&from=EN>.

⁶⁹³ See Directive 2011/61/EU, *supra* note 692, at Article 4(1)(v).

⁶⁹⁴ See *id.*, at Articles 15(4) and 7(3)(a).

⁶⁹⁵ See Commission Delegated Regulation No. 231/2013, *supra* note 691, at preamble paragraph (12).

⁶⁹⁶ The AIFMD requirements do allow for a reduction to account for cash equivalents held by the fund while requiring leverage from reinvestment of collateral held by the fund to be added to the leverage calculation.

⁶⁹⁷ For example, the AIF directive notes that a “portfolio management practice which aims to keep the alpha of a basket of shares (comprising a limited number of shares) by combining the investment in that basket of shares with a beta-adjusted short position on a future on a stock market index should not be considered as complying with the hedging criteria. Such a strategy does not aim to offset the significant risks linked to the investment in that basket of shares but to offset the beta (market risk) of that investment and keep the alpha. The alpha component of the basket of shares may dominate over the beta component and as such lead to losses at the level of the AIF. For that reason, it should not be considered as a hedging arrangement.” See Commission Delegated Regulation No. 231/2013, *supra* note 691, at preamble paragraph (23).

⁶⁹⁸ See, e.g., Security Investors Comment Letter (arguing that significant changes to the current regulatory scheme are not warranted, but that the existing regulatory scheme could be improved upon the clarification of existing guidance, including greater disclosure about funds’ investments in derivatives); Ropes and Gray Comment Letter (suggesting that absent any indication that funds are not making adequate disclosure with respect to derivatives, or that fund boards are not fulfilling their oversight responsibilities, there is no compelling reason for the Commission to impose new restrictions on the use of derivatives).

⁶⁹⁹ See, e.g., ABA Concept Release Comment Letter; ICI Concept Release Comment Letter.

⁷⁰⁰ See, e.g., Keen Concept Release Comment Letter.

⁷⁰¹ See Keen Concept Release Comment Letter.

⁷⁰² See ABA Concept Release Comment Letter. See also T. Rowe Price Concept Release Comment Letter; ICI Concept Release Comment Letter.

⁷⁰³ See Rafferty Concept Release Comment Letter.

disclosure would address the purposes and concerns underlying section 18 of the Act as effectively as the approach we are proposing today, particularly given that section 18 itself imposes a specific limitation on the amount of senior securities that may be issued by a fund regardless of the risk associated with the particular senior securities. In this regard we note that investment company abuse of leverage was a primary concern that led to enactment of the Investment Company Act.⁷⁰⁴ In the Investment Company Act's preamble, Congress cited excessive leverage as a major abuse that it meant to correct, declaring in section 1(b)(7) of the Act that the public interest and the interest of investors are adversely affected "when investment companies by excessive borrowing and the issuance of excess amounts of senior securities increase unduly the speculative character of their junior securities."⁷⁰⁵ The proposed rule is designed to impose a limit on the amount of leverage a fund may obtain through derivatives and financial commitment transactions, whereas requiring enhancement to derivatives disclosure, absent additional requirements to limit leverage or potential leverage, would not appear to provide any limit on the amount of leverage a fund may obtain, and thus would not provide any regulatory distinction between funds regulated by the Act and private funds not regulated by the Act in respect of their respective ability to obtain leverage through derivatives. An approach focused on enhanced disclosure requirements thus does not appear to provide a sufficient basis for an exemption from the requirements of section 18 of the Act.

We do, however, believe that disclosure is an important aspect of the existing regulatory framework and that effective derivatives-related disclosure would complement the limitations on derivatives use in the proposed rule. Indeed, in May 2015, we proposed enhanced reporting and disclosure requirements for investment companies that include new reporting requirements for derivatives transactions, including,

⁷⁰⁴ In 1939, the Commission Released an exhaustive study of the investment company industry that laid the foundation for the Investment Company Act. SEC, Investment Trusts and Investment Companies, H.R. Doc. No. 707, 75th Cong., 3d Sess. pt. 1 (1939); SEC, Investment Trusts and Investment Companies, H.R. Doc. No. 70, 76th Cong., 1st Sess. pt. 2 (1939); SEC, Investment Trusts and Investment Companies, H.R. Doc. No. 279 Cong., 1st Sess. pt. 3 (1939). For a discussion of leveraged capital structures of investment companies, see Investment Trust Study pt.3, Ch. V, "Problems in Connection with Capital Structure," 1563-1940.

⁷⁰⁵ Section 1(b)(7) of the Investment Company Act.

for most funds, more detailed reporting of the terms and conditions of each derivatives contract in a fund's portfolio on a monthly basis in a structured format.⁷⁰⁶ The proposal also would require reporting of the fund's monthly net realized gain (or loss) and net change in unrealized appreciation (or depreciation) attributable to derivatives.⁷⁰⁷

As discussed in the Investment Company Reporting Modernization Release, these proposed requirements would, among other things, help the Commission and investors better understand the exposures that the derivatives create or hedge, which can be important to understanding a fund's investment strategy, use of leverage, and potential for risk of loss.⁷⁰⁸ Such information would allow the Commission to better assess industry trends regarding the use of derivatives, which the Commission could use to better carry out its regulatory functions, such as the formulation of policy and guidance, the review of registration statements, and the examination of funds.⁷⁰⁹ The Investment Company Reporting Modernization Release also included amendments to Regulation S-X that would require similar enhanced derivatives disclosures in fund financial statements, which would increase transparency of a fund's use of derivatives and comparability among funds to help investors better assess funds' use of derivatives and make more informed investment decisions.⁷¹⁰

Amendments to Proposed Form N-PORT

The Commission is also proposing to require additional position level risk-sensitivity measures on Form N-PORT, vega and gamma, for funds that are required to implement a derivatives risk management program by proposed rule

⁷⁰⁶ Such information would be reported on proposed Form N-PORT. See Proposed Form N-PORT, Item C.11.; Investment Company Reporting Modernization Release, *supra* note 138. Our staff also has previously addressed funds' disclosure with respect to their use of derivatives in 2010 and 2013. See Letter from Barry D. Miller, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission, to Karrie McMillan, General Counsel, Investment Company Institute (July 30, 2010); SEC, *Disclosure and Compliance Matters for Investment Company Registrants That Invest in Commodity Interests*, IM Guidance Update (Aug. 2013) (No. 2013-05), available at <https://www.sec.gov/divisions/investment/guidance/im-guidance-2013-05.pdf>.

⁷⁰⁷ Proposed Form N-PORT Item B.5.

⁷⁰⁸ See Investment Company Reporting Modernization Release, *supra* note 138, at Part II.A.2.d. and Part II.A.2.g.iv.

⁷⁰⁹ See Investment Company Reporting Modernization Release, *supra* note 138, at Part II.A.

⁷¹⁰ See Investment Company Reporting Modernization Release, *supra* note 138, at Part II.C.

18f-4(a)(3). These measures would improve the ability of Commission staff to efficiently understand and approximate the risk exposures of reporting funds.

A reasonable alternative is to require portfolio- and position-level risk-sensitivity measures in addition to vega and gamma that would provide Commission staff a more precise approximation of the risk exposures of reporting funds. For example, Form N-PORT could require the risk-sensitivity measures theta and rho at the position-level; and at the portfolio level measures that describe the sensitivity of a reporting fund to a 50 or 100 basis point change in interest rates and credit spreads or a measure of convexity. These measures could improve the ability of Commission staff to monitor the fund industry in connection with other risks and more sizable changes in prices and rates. While potentially valuable, requiring these additional measures could increase the burden on funds, and the additional precision might not significantly improve the ability of Commission staff to monitor the fund industry in most market environments. Another reasonable alternative is to not require any additional risk-sensitivity measures. Although the burden to investment companies to provide the information would be less if fewer or no risk-sensitivity measures were required by the Commission, we believe that the benefits from requiring the measures, including the ability to efficiently identify and size specific investment risks, justify the costs to investment companies to provide the measures.

Our proposal would require only those funds that are required to implement a derivatives risk management program to report vega and gamma on proposed Form N-PORT. As an alternative, we could require funds with lower exposures than those funds would be required to implement a derivatives risk management program to also report vega and gamma. Alternatively, we could redefine the basis for funds to implement a derivatives risk management program and therefore require a different set of funds to report the additional risk-sensitivity measures. However, as we discussed above, we believe that the current requirements will capture most of the funds that use derivatives as a significant factor of their returns, while not imposing burdens on funds that do not generally rely on derivatives as an

important part of their investment strategies.⁷¹¹

F. Request for Comment

The Commission requests comment on all aspects of this initial economic analysis, including whether the analysis has: (1) Identified all benefits and costs, including all effects on efficiency, competition, and capital formation; (2) given due consideration to each benefit and cost, including each effect on efficiency, competition, and capital formation; and (3) identified and considered reasonable alternatives to the proposed new rule and rule amendments. We request and encourage any interested person to submit comments regarding the proposed rule, our analysis of the potential effects of the proposed rule and proposed amendments, and other matters that may have an effect on the proposed rule. We request that commenters identify sources of data and information as well as provide data and information to assist us in analyzing the economic consequences of the proposed rule and proposed amendments. We also are interested in comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked.

In addition to our general request for comment on the economic analysis associated with the proposed rule and proposed amendments, we request specific comment on certain aspects of the proposal:

- What factors, taking into account a fund's particular risks and circumstances, would cause particular variance in funds' compliance costs related to the proposed rule?
- We request comment on our estimates of the one-time and ongoing costs associated with proposed rule 18f-4, including the exposure-based and risk-based portfolio limits, asset segregation requirement, and risk management program requirement. Do commenters agree with our cost estimates? If not, how should our estimates be revised, and what changes, if any, should be made to the assumptions forming the basis for our estimates? Are there any significant costs that have not been identified within our estimates that warrant consideration? To what degree would economies of scale affect compliance costs for funds?
- We request comment on our estimate of the number of funds that would seek to comply with the exposure-based and risk-based portfolio limits, asset segregation requirements,

and the derivatives risk management program requirement. Do commenters agree that a fund that belongs to a fund complex is likely to achieve economies of scale that make it more likely that a fund will incur costs closer to the low-end of the range of estimated costs?

- Do commenters agree with our belief that the benefits and costs associated with the asset segregation requirement for a fund that invests solely in financial commitment transactions would be the same as those we estimate for the asset segregation requirements that would apply to a fund that also enters into derivatives transactions? Why or why not?
- To what extent do commenters anticipate that proposed rule 18f-4 could lead funds to modify their investment strategies or decrease their use of derivatives?
- To what extent do funds' current practices regarding derivatives risk management, if applicable, currently align with the proposed derivatives risk management program, and what operational and other costs would funds incur in modifying their current practices to comply with the proposed requirements?

V. Paperwork Reduction Act

A. Introduction

Proposed rule 18f-4 contains several "collections of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").⁷¹² The proposed amendments to proposed Form N-PORT and Form N-CEN would impact the collections of information burdens associated with that proposed form described in the Investment Company Reporting Modernization Release.⁷¹³ In the Investment Company Reporting Modernization Release, we submitted new collections of information for proposed Form N-PORT and Form N-CEN.⁷¹⁴ The title for these new collections of information is "Form N-PORT under the Investment Company Act, Monthly Portfolio Investments Report" and "Form N-CEN Under the Investment Company Act, Annual Report for Registered Investment Companies." We are submitting new collections of information for proposed new rule 18f-4 under the Investment Company Act of 1940. The titles for this new collection of information would be: "Rule 18f-4 under the Investment Company Act of 1940, Use of Derivatives by Registered Investment

Companies and Business Development Companies."

The Commission is submitting these collections of information to the OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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 control number.

The Commission is proposing new rule 18f-4 and is proposing to amend proposed Form N-PORT and Form N-CEN. The proposed rule and amendments are designed to address the investor protection purposes and concerns underlying section 18 of the Act and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives transactions in light of the dramatic growth in the volume and complexity of the derivatives markets over the past two decades and the increased use of derivatives by certain funds. We discuss below the collection of information burdens associated with these reforms.⁷¹⁵

B. Proposed Rule 18f-4

Proposed rule 18f-4 would require a fund that relies on the rule in order to enter into derivatives transactions to: (1) Comply with one of two alternative portfolio limitations designed to impose a limit on the amount of leverage the fund may obtain through derivatives transactions and other senior securities transactions; (2) manage the risks associated with its derivatives transactions by maintaining an amount of certain assets, defined in the rule as "qualifying coverage assets," designed to enable the fund to meet its obligations under its derivatives transactions; and (3) depending on the extent of its derivatives usage, establish a derivatives risk management program. A fund that relies on the proposed rule in order to enter into financial commitment transactions would be required to maintain qualifying coverage assets equal in value to the fund's full obligations under those transactions. As discussed in greater detail below, a number of the proposed requirements are collections of information under the PRA. The respondents to proposed rule 18f-4 would be certain registered open-end and closed-end management investment companies and BDCs. Compliance with proposed rule 18f-4 would be mandatory for all funds that seek to

⁷¹² 44 U.S.C. 3501 through 3521.

⁷¹³ See Investment Company Reporting Modernization Release, *supra* note 138, at section V.

⁷¹⁴ See *id.*

⁷¹⁵ We discuss below these collection of information burdens on each fund, but note that certain of the estimated costs may be incurred instead, at least in part, by other third parties, including a fund's investment adviser.

⁷¹¹ See *supra* section III.G.2.

engage in derivatives transactions and financial commitment transactions in reliance on the rule, which would otherwise be subject to the restrictions of section 18. No information would be submitted directly to the Commission under proposed rule 18f-4. To the extent that records required to be created and maintained by funds under the rule are provided to Commission staff in connection with examinations or investigations, such information would be kept confidential subject to the provisions of applicable law. We believe that our collection of information cost estimates below are an upper bound because, as discussed in section IV, many funds are part of a fund complex and will likely benefit from economies of scale.

1. Portfolio Limitations for Derivatives Transactions

Proposed rule 18f-4 would require a fund that engages in derivatives transactions in reliance on the rule to comply with one of two alternative portfolio limitations.⁷¹⁶ Under the exposure-based portfolio limit, a fund generally would be required to determine that, immediately after entering into any senior securities transaction, its aggregate exposure does not exceed 150% of the value of the fund's net assets.⁷¹⁷ Under the risk-based portfolio limit, a fund generally would be required to determine that, immediately after entering into any senior securities transaction, (1) the fund's full portfolio VaR does not exceed its securities VaR and (2) the fund's aggregate exposure does not exceed 300% of the value of the fund's net assets.⁷¹⁸ In addition, a fund that engages in derivatives transactions in reliance on the proposed rule would not be required to have a derivatives risk management program if the fund complies with a portfolio limitation under which, immediately after entering into any derivatives transaction, the fund's aggregate exposure does not exceed 50% of the value of the fund's net assets and the fund does not use complex derivatives transactions.⁷¹⁹

As discussed above in section IV.D.1 and IV.D.2, in the DERA staff analysis, 68% of all of the sampled funds did not have any exposure to derivatives transactions, and these funds thus do not appear to use derivatives transactions or, if they do use them, do not appear to do so to a material

extent.⁷²⁰ Staff thus estimates that the remaining 32% of funds (3,831 funds⁷²¹) will seek to rely on this part of proposed rule 18f-4, and therefore comply with the portfolio limitation requirements. These funds would be subject to the collections of information described below with respect to their applicable portfolio limitations.

Initial Determination of Portfolio Limitations

The proposed rule would require a fund's board of directors, including a majority of the directors who are not interested persons of the fund, to approve (a) the fund's determination to comply with either the exposure-based portfolio limit or the risk-based portfolio limit under the proposed rule, and (b) if applicable, the fund's determination to limit its aggregate exposure under derivatives transactions to not more than 50% of its NAV and not to use complex derivatives transactions.⁷²² We estimate a one-time burden of 3 hours per fund associated with a board's review and approval of a fund's portfolio limitation or, amortized over a three-year period, a burden of approximately 1 hour annually per fund. We therefore estimate that the total hourly burden for the initial reviews and approvals of funds' portfolio limitations would be 11,493 hours.⁷²³ We estimate that each fund would incur a time cost of approximately \$5,121 to obtain this initial approval, for a total initial time cost for all funds of approximately \$19,618,551.⁷²⁴ In addition to the

⁷²⁰ None of the BDCs in the DERA sample had exposure to derivatives transactions.

⁷²¹ This estimate is based on the following calculation: 11,973 funds \times 32% = 3,831 funds. See *supra* note 578.

⁷²² Proposed rule 18f-4(a)(5)(i). The cost burdens associated with a fund board's approvals include costs incurred to prepare materials for the board's determinations, as well as the board's review and approval of determinations required by the proposed rule. See *infra* note 724.

⁷²³ This estimate is based on the following calculation: 3 hours \times 3,831 funds = 11,493 hours.

⁷²⁴ This estimate is based on the following calculations: 0.6 hours \times \$301 (hourly rate for a senior portfolio manager) = \$181; 0.6 hours \times \$455.5 (blended hourly rate for assistant general counsel (\$426) and chief compliance officer (\$485)) = \$273; 1.0 hours \times \$4,400 (hourly rate for a board of 8 directors) = \$4,400; 0.8 hours (for a fund attorney's time to prepare materials for the board's determinations) \times \$334 (hourly rate for a compliance attorney) = \$267. \$181 + \$273 + \$4,400 + \$267 = \$5,121; \$5,121 \times 3,831 funds = \$19,618,551. The hourly wages used are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. The staff previously estimated in 2009 that the average cost of board of director time was \$4,000 per hour for the board as a whole, based on information received from funds

internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$800 associated with a fund board consulting its outside legal counsel with regard to the required board approvals.⁷²⁵

Recordkeeping

The proposed rule would require a fund to maintain a record of each determination made by the fund's board that the fund will comply with one of the portfolio limitations under the proposed rule, which would include the fund's initial determination as well as a record of any determination made by the fund's board to change the portfolio limitation.⁷²⁶ We estimate a one-time burden of 0.6 hours per fund associated with maintaining a record of a board's initial determination of the fund's portfolio limit or, amortized over a three-year period, a burden of about 0.2 hours annually per fund. We therefore estimate that the total burden for maintaining a record of a board's initial determination of the fund's portfolio limit would be 2,299 hours.⁷²⁷ We also estimate that each fund would incur a time cost of approximately \$38 to meet this requirement, for a total initial time cost of approximately \$164,733.⁷²⁸

In addition, a fund that relies on the proposed rule also would be subject to an ongoing requirement to maintain a written record demonstrating that immediately after the fund entered into any senior securities transaction, the fund complied with its applicable portfolio limit, with such record reflecting the fund's aggregate exposure, the value of its net assets and, if applicable, the fund's full portfolio VaR and its securities VaR.⁷²⁹ We estimate that each fund would incur an average burden of 50 hours to retain these

and their counsel. Adjusting for inflation, the staff estimates that the current average cost of board of director time is approximately \$4,400.

⁷²⁵ This estimate is based on the following calculation: 2 hours \times \$400 (hourly rate for outside legal services) = \$800.

⁷²⁶ Proposed rule 18f-4(a)(6)(i). The fund would be required to maintain this record for a period of not less than five years (the first two years in an easily accessible place) following each determination.

⁷²⁷ This estimate is based on the following calculation: 0.6 hours \times 3,831 funds = 2,299 hours.

⁷²⁸ This estimate is based on the following calculation: 0.3 hours \times \$57 (hourly rate for a general clerk) = \$17; 0.3 hours \times \$87 (hourly rate for a senior computer operator) = \$26. \$17 + \$26 = \$43; \$43 \times 3,831 funds = \$164,733.

⁷²⁹ Proposed rule 18f-4(a)(6)(iv). The fund would be required to maintain this record for a period of not less than five years (the first two years in an easily accessible place) following each senior securities transaction. This written record requirement would also apply to a fund's monitoring of the 50% portfolio limit for purposes of the derivatives risk management program requirement (discussed below).

⁷¹⁶ Proposed rule 18f-4(a)(1).

⁷¹⁷ Proposed rule 18f-4(a)(1)(i).

⁷¹⁸ Proposed rule 18f-4(a)(1)(ii).

⁷¹⁹ Proposed rule 18f-4(a)(1).

records.⁷³⁰ We therefore estimate that the total annual burden for maintaining these records would be 191,550 hours.⁷³¹ We also estimate that each fund would incur an annual time cost of approximately \$3,600, and a total annual time cost for all funds of approximately \$13,791,600.⁷³² We estimate that there are no external costs associated with this collection of information.⁷³³

Accordingly, we estimate that, for recordkeeping associated with a fund's portfolio limitations, including maintenance of a record of a board's initial determination of the fund's portfolio limit and maintenance of written records demonstrating the fund's ongoing compliance with applicable portfolio limits, the time burden per fund would be 50.6 hours and the time cost per fund would be \$3,638.⁷³⁴ We therefore estimate that the total burden for maintaining such records would be 193,849 hours, at an aggregate time cost of \$13,937,178.⁷³⁵

Estimated Total Burden

Amortized over a three-year time period, the hour burdens and time costs for collections of information associated with portfolio limitations under proposed rule 18f-4, including the

⁷³⁰ We assume for purposes of this estimate that funds would implement automated processes for creating a written record of their compliance with the applicable portfolio limit immediately after entering into any senior securities transaction, and that a fund would enter into at least one derivatives transaction or other senior securities transaction per trading day. Based on 250 trading days per year, and assuming 0.1 hours per trading day spent by a general clerk and 0.1 hours per trading day spent by a senior computer operator, we estimate the annual time cost to be $(0.1 \times 250) = 25$ hours per year per fund for each general clerk and senior computer operator.

⁷³¹ This estimate is based on the following calculations: $50 \text{ hours} \times 3,831 \text{ funds} = 191,550$ hours.

⁷³² This estimate is based on the following calculation: $25 \text{ hours} \times \57 (hourly rate for a general clerk) = \$1,425; $25 \text{ hours} \times \87 (hourly rate for a senior computer operator) = \$2,175. $\$1,425 + \$2,175 = \$3,600$; $\$3,600 \times 3,831 \text{ funds} = \$13,791,600$.

⁷³³ Except as provided for above, we have estimated (both for purposes of the economic analysis and the PRA) the cost burdens associated with the proposed rule using a fund's internal resources, rather than third party solutions which may develop in the future. See, e.g., *supra* text in paragraph following note 573.

⁷³⁴ This estimate is based on the following calculations: 0.6 hours (maintenance of a record of board's initial determination of fund's portfolio limit) + 50 hours (maintenance of written records demonstrating fund's compliance with applicable portfolio limits) = 50.6 hours; $\$38$ (maintenance of a record of a board's initial determination of a fund's portfolio limit) + $\$3,600$ (maintenance of written records demonstrating fund's compliance with applicable portfolio limits) = \$3,638.

⁷³⁵ This estimate is based on the following calculations: $50.6 \text{ hours} \times 3,831 \text{ funds} = 193,849$ hours; $\$3,638 \times 3,831 \text{ funds} = \$13,937,178$.

burdens associated with (a) board review and approval of funds' initial portfolio limitations, (b) maintenance of records of initial board determinations of funds' portfolio limits, and (c) maintenance of written records demonstrating funds' compliance with applicable portfolio limits, are estimated to result in an aggregate average annual hour burden of 196,147 hours and aggregate time cost of \$20,386,028.⁷³⁶ In addition to the internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$800.

2. Asset Segregation: Derivatives Transactions

Proposed rule 18f-4 would require a fund that enters into derivatives transactions⁷³⁷ in reliance on the rule to manage the risks associated with its derivatives transactions by maintaining an amount of specified assets (defined in the proposed rule as "qualifying coverage assets") designed to enable the fund to meet its obligations arising from such transactions.⁷³⁸ A fund would be required to identify on the books and records of the fund, at least once each business day, qualifying coverage assets with a value equal to at least the fund's aggregate "mark-to-market coverage amounts" and "risk-based coverage amounts."⁷³⁹ The mark-to-market coverage amount would mean the amount that would be payable by the fund, for each derivatives transaction, if the fund were to exit the derivatives transaction at the time of determination.⁷⁴⁰ The risk-based coverage amount would mean the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions, determined in accordance with board-approved policies and procedures.⁷⁴¹ A fund would be permitted to adjust these

⁷³⁶ These estimates are based on the following calculations: $(11,493 \text{ hours (year 1)} + 2,299 \text{ hours (year 1)} + (3 \times 191,550 \text{ hours (years 1, 2 and 3)}) \div 3 = 196,147$ hours; $(\$19,618,551 \text{ (year 1)} + (\$164,733 \text{ (year 1)} + (3 \times \$13,791,600)) \div 3 = \$20,386,028$.

⁷³⁷ We include in this analysis a fund that enters into derivatives transactions, as well as financial commitment transactions and other senior securities. We discuss estimated PRA costs for a fund that enters solely into financial commitment transactions below.

⁷³⁸ Proposed rule 18f-4(a)(2), (c)(6), (c)(8), (c)(9).

⁷³⁹ Proposed rule 18f-4(a)(2). Qualifying coverage assets for derivatives transactions would generally mean cash and cash equivalents. The exceptions to the requirement to maintain cash and cash equivalents are for derivatives transactions under which a fund may satisfy its obligation by delivering a particular asset, in which case that particular asset would be a qualifying coverage asset. See proposed rule 18f-4(c)(8).

⁷⁴⁰ Proposed rule 18f-4(c)(6).

⁷⁴¹ Proposed rule 18f-4(c)(9).

coverage amounts, at its discretion, if the fund has entered into certain netting agreements, or the fund has posted variation margin (for the mark-to-market coverage amount) or initial margin (for the risk-based coverage amount), or collateral for such amounts payable by the fund.⁷⁴² A fund would be required to have policies and procedures approved by its board of directors (and maintained by the fund in an easily accessible place⁷⁴³) that are reasonably designed to provide for the fund's maintenance of qualifying coverage assets.⁷⁴⁴

As discussed above in section IV.D.3, DERA staff analysis shows that 68% of all sampled funds do not appear to use derivatives transactions (or if they do, do not appear to use them to a material extent). Staff estimates that the remaining 32% of funds (3,831 funds) and no BDCs will seek to rely on this aspect of proposed rule 18f-4, and therefore comply with the asset segregation requirements. These funds would be subject to the collections of information described below with respect to asset segregation requirements.

Identification of Qualifying Coverage Assets

The qualifying coverage assets requirement would subject funds to a collection of information insofar as they are required to make a daily identification on a fund's books and records of its maintenance of qualifying coverage assets, including determinations of the mark-to-market and risk-based coverage amounts. Although we expect that these activities would generally be automated and/or routine, our estimates below include estimates for anticipated time costs by a fund's staff to make manual adjustments to these determinations (e.g., to reflect netting agreements, or account for assets posted as initial or variation margin or collateral). The cost estimates below also reflect the fact that, with regard to the mark-to-market coverage amount, we believe that funds already calculate their liability under derivatives transactions on a daily basis for various other purposes, including to satisfy variation margin requirements and to determine the fund's NAV. Funds also calculate their liability under derivatives transactions on a periodic

⁷⁴² Proposed rules 18f-4(c)(6)(i), (ii); 18f-4(c)(9)(i), (ii).

⁷⁴³ A fund must maintain a written copy of the fund's policies and procedures, approved by the fund's board, in effect, or at any time within the past five years were in effect, in an easily accessible place. Proposed rule 18f-4(a)(6)(ii).

⁷⁴⁴ Proposed rule 18f-4(a)(5)(ii).

basis in order to provide financial statements to investors. We generally expect that funds would be able to use these calculations to determine their mark-to-market coverage amounts.

We do not expect that this aspect of the proposed rule will impose any initial, one-time “collection of information” burdens on funds. We do estimate, however, that each fund would incur an average annual burden of 110 hours associated with the identification of qualifying coverage assets. We therefore estimate that the total annual burden for the identification of qualifying coverage assets would be 421,410 hours.⁷⁴⁵ We also estimate that each fund would incur an annual time cost of approximately \$11,530 to identify qualifying coverage assets, for a total annual time cost for all funds of approximately \$44,171,430.⁷⁴⁶ We estimate that there are no external costs associated with this collection of information.⁷⁴⁷

Board-Approved Policies & Procedures

Proposed rule 18f-4 would require funds to have written policies and procedures reasonably designed to provide for the fund’s maintenance of qualifying coverage assets. For purposes of this PRA analysis, we estimate that a fund would incur a one-time average burden of 15 hours associated with documenting its policies and procedures. The proposed rule would also require that the fund’s board approve such policies and procedures and we estimate a one-time burden of 1 hour per fund associated with fund boards’ review and approval of its policies and procedures. Amortized over a three-year period, this would be an annual burden per fund of approximately 5.3 hours. We estimate that the total one-time burden for the initial documentation, and board approval of, written policies and procedures to provide for a fund’s maintenance of qualifying coverage assets would be 61,296 hours.⁷⁴⁸ We also estimate that each fund would incur a time cost of approximately \$6,291, and a total initial time cost for all funds of approximately

⁷⁴⁵ This estimate is based on the following calculation: 110 hours × 3,831 funds = 421,410 hours.

⁷⁴⁶ This estimate is based on the following calculations: 100 hours × \$87 (hourly rate for a senior computer operator) = \$8,700; 10 hours × \$283 (hourly rate for compliance manager) = \$2,830. \$8,700 + \$2,830 = \$11,530; \$11,530 × 3,831 funds = \$44,171,430.

⁷⁴⁷ See *supra* note 733.

⁷⁴⁸ This estimate is based on the following calculation: 16 hours × 3,831 funds = 61,296 hours.

\$38,593,494.⁷⁴⁹ We estimate that there are no ongoing annual costs associated with this collection of information. In addition to the internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$800 associated with a fund board consulting its outside legal counsel with regard to the required board approvals.⁷⁵⁰

Recordkeeping

The proposed rule would require a fund to maintain a written copy of the policies and procedures approved by the fund’s board of directors that are in effect, or at any time within the past five years were in effect, in an easily accessible place. We estimate a one-time burden (and no ongoing annual burden) of 1 hour per fund associated with maintaining a written copy of the fund’s board-approved policies and procedures or, amortized over a three-year period, a burden of approximately 0.3 hours annually per fund. We therefore estimate that the total one-time burden for maintaining this record would be 3,831 hours.⁷⁵¹ We also estimate that each fund would incur a time cost of approximately \$57, and a total initial time cost for all funds of approximately \$218,367.⁷⁵² We estimate that there are no external costs associated with this collection of information.

In addition, a fund that relies on the proposed rule also would be subject to an ongoing requirement to maintain a written record reflecting the mark-to-market coverage amount and risk-based coverage amount for each derivatives transaction entered into by the fund and identifying the associated qualifying coverage assets, as determined by the fund at least once each business day, for a period of not less than five years (the first two years in an easily accessible place).⁷⁵³ We estimate that each fund would incur an average annual burden of 50 hours to retain these records.⁷⁵⁴

⁷⁴⁹ This estimate is based on the following calculations: 7.5 hours × \$301 (hourly rate for a senior portfolio manager) = \$2,258; 7.5 hours × \$455.5 (blended hourly rate for assistant general counsel (\$426) and chief compliance officer (\$485)) = \$3,416; 1 hour × \$4,400 (hourly rate for a board of 8 directors) = \$4,400. \$2,258 + \$3,416 + \$4,400 = \$10,074; \$10,074 × 3,831 funds = \$38,593,494.

⁷⁵⁰ This estimate is based on the following calculation: 2 hours × \$400 (hourly rate for outside legal services) = \$800.

⁷⁵¹ This estimate is based on the following calculation: 1 hour × 3,831 funds = 3,831 hours.

⁷⁵² This estimate is based on the following calculation: 1 hour × \$57 (hourly rate for a general clerk) = \$57. \$57 × 3,831 funds = \$218,367.

⁷⁵³ Proposed rule 18f-4(a)(6)(v).

⁷⁵⁴ We assume for purposes of this estimate that funds would implement automated processes for creating a written record of their compliance with the qualifying coverage asset requirements and that

We therefore estimate that the total annual burden for maintaining these records would be 191,550 hours.⁷⁵⁵ We also estimate that each fund would incur an annual time cost of approximately \$3,600, and a total annual time cost for all funds of approximately \$13,791,600.⁷⁵⁶ We estimate that there are no external costs associated with this collection of information.

Estimated Total Burden

Amortized over a three-year time period, the hour burdens and time costs for collections of information associated with the asset segregation requirement for derivatives transactions under proposed rule 18f-4, including the burdens associated with (a) identifying qualifying coverage assets; (b) documenting board-approved policies and procedures; and (c) maintaining required records, are estimated to result in an aggregate average annual hour burden of 634,669 hours and aggregate time costs of \$70,900,317.⁷⁵⁷ In addition to the internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$800.

3. Asset Segregation: Financial Commitment Transactions

Proposed rule 18f-4 would require a fund that enters into financial commitment transactions in reliance on the rule to similarly maintain qualifying coverage assets designed to enable the fund to meet its obligations arising from such transactions. A fund would be required to identify on the books and records of the fund, at least once each business day, qualifying coverage assets with a value equal to at least the fund’s aggregate financial commitment obligations.⁷⁵⁸ Financial commitment

a fund would enter into at least one derivatives transaction per trading day. Based on 250 trading days per year, and assuming 0.1 hours per trading day spent by a general clerk and 0.1 hours per trading day spent by a senior computer operator, we estimate the annual time cost to be $(0.1 \times 250) = 25$ hours per year per fund for each general clerk and senior computer operator.

⁷⁵⁵ This estimate is based on the following calculations: 50 hours × 3,831 funds = 191,550 hours.

⁷⁵⁶ This estimate is based on the following calculation: 25 hours × \$57 (hourly rate for a general clerk) = \$1,425; 25 hours × \$87 (hourly rate for a senior computer operator) = \$2,175. \$1,425 + \$2,175 = \$3,600; \$3,600 × 3,831 funds = \$13,791,600.

⁷⁵⁷ These estimates are based on the following calculations: $((3 \times 421,410 \text{ hours}) (\text{years 1, 2 and 3}) + 61,296 (\text{year 1}) + 3,831 (\text{year 1}) + (3 \times 191,550 \text{ hours}) (\text{years 1, 2 and 3})) + 3 = 634,669 \text{ hours}$; $((3 \times \$44,171,430) + (\$38,593,494 (\text{year 1})) + (\$218,367 (\text{year 1})) + (3 \times \$13,791,600) (\text{years 1, 2, and 3})) + 3 = \$70,900,317$.

⁷⁵⁸ Proposed rule 18f-4(b)(1).

obligations would mean the amount of cash or other assets that the fund is conditionally or unconditionally obligated to pay or deliver under a financial commitment transaction (as defined in the proposed rule).⁷⁵⁹ A fund that enters solely into financial commitment transactions would, as described above for a fund that enters into derivatives transactions, be required to have policies and procedures approved by its board of directors (and maintained by the fund in an easily accessible place) that are reasonably designed to provide for the fund's maintenance of qualifying coverage assets.⁷⁶⁰

As discussed above in section IV.D.5, DERA staff analysis shows that approximately 3% of all sampled funds enter into at least some financial commitment transactions, but do not use derivatives transactions. Staff estimates, therefore, that 3% of funds (359 funds) would comply with the asset segregation requirements in proposed rule 18f-4 applicable to financial commitment transactions and would not also be complying with the asset segregation and other requirements applicable to derivatives transactions. In addition, staff estimates that 537 money market funds and 88 BDCs may engage in certain types of financial commitment transactions. In sum, staff estimates that 984 funds would comply with the asset segregation requirements applicable to financial commitment transactions and incur the same costs we estimate above (with regard to funds that engage in derivatives transactions). These funds would be subject to the collections of information described below.

Identification of Qualifying Coverage Assets

Similar to the requirement applicable to a fund that enters into derivatives transactions (discussed above), a fund that enters solely into financial commitment transactions would, under the proposed rule, incur operational costs to establish and implement systems in order to comply with the proposed asset segregation requirements, including the proposed requirement that a fund maintain qualifying coverage assets, identified on the books and records of the fund, at least once each business day. We believe that the activities related to these requirements are largely the same,

⁷⁵⁹ Proposed rule 18f-4(c)(5) (noting, that where the fund is conditionally or unconditionally obligated to deliver a particular asset, the financial commitment obligation shall be the value of the asset, determined at least once each business day).

⁷⁶⁰ Proposed rule 18f-4(b)(2)(3).

whether applicable to a fund that enters into derivatives transactions, or financial commitment transactions. Accordingly, we estimate the same costs to a fund that enters solely into financial commitment transactions as the asset segregation costs we estimate above for funds that enter into derivatives transactions.

We estimate that each fund would incur an average annual burden of 110 hours (and no initial one-time burdens) associated with the identification of qualifying coverage assets. We therefore estimate that the total annual burden for the identification of qualifying coverage assets would be 108,240 hours.⁷⁶¹ We also estimate that each fund would incur an ongoing annual time cost of approximately \$11,530 to identify qualifying coverage assets, for a total ongoing annual time cost for all funds of approximately \$11,345,520.⁷⁶² We estimate that there are no external costs associated with this collection of information.

Board-Approved Policies & Procedures

A fund that enters solely into financial commitment transactions, like a fund that enters into derivatives transactions, would be required under the proposed rule to have board-approved policies and procedures regarding the maintenance of qualifying coverage assets. Accordingly, we estimate that a fund would incur a one-time average burden of 15 hours associated with documenting its policies and procedures. The proposed rule would also require that the fund's board approve such policies and procedures and we estimate a one-time burden of 1 hour per fund associated with fund boards' review and approval of its policies and procedures. Amortized over a three-year period, this would be an annual burden per fund of approximately 5.3 hours. We estimate that the total one-time burden for the initial documentation, and board approval of, written policies and procedures to provide for a fund's maintenance of qualifying coverage assets would be 15,744 hours.⁷⁶³ We also estimate that each fund would incur a time cost of approximately \$6,291, and a total initial time cost for all funds of approximately

⁷⁶¹ This estimate is based on the following calculation: 110 hours × 984 funds = 108,240 hours.

⁷⁶² This estimate is based on the following calculations: 100 hours × \$87 (hourly rate for a senior computer operator) = \$8,700; 10 hours × \$283 (hourly rate for compliance manager) = \$2,830. \$8,700 + \$2,830 = \$11,530; \$11,530 × 984 funds = \$11,345,520.

⁷⁶³ This estimate is based on the following calculation: 16 hours × 984 funds = 15,744 hours.

\$9,912,816.⁷⁶⁴ We estimate that there are no annual time costs associated with this collection of information. In addition to the internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$800 associated with a fund board consulting its outside legal counsel with regard to the required board approvals.⁷⁶⁵

Recordkeeping

A fund that enters solely into financial commitment transactions would also be required under the proposed rule to retain a written copy of the fund's board-approved policies and procedures regarding the maintenance of qualifying coverage assets. This requirement also applies to funds that enter into derivatives transactions. Accordingly, as discussed above for the recordkeeping burdens associated with asset segregation for derivatives transactions, we estimate a one-time burden (and no annual burden) of 1 hour per fund associated with maintaining a written copy of the fund's board-approved policies and procedures or, amortized over a three-year period, a burden of approximately 0.3 hours annually per fund. We therefore estimate that the total one-time burden for maintaining this record would be 984 hours.⁷⁶⁶ We also estimate that each fund would incur a time cost of approximately \$57, and a total initial time cost for all funds of approximately \$56,088.⁷⁶⁷ We estimate that there are no external costs associated with this collection of information.

In addition, a fund that relies on the proposed rule also would be subject to an ongoing requirement to maintain a written record reflecting the amount of each financial commitment obligation associated with each financial commitment transaction entered into by the fund and identifying the associated qualifying coverage assets, as determined by the fund at least once each business day, for a period of not less than five years (the first two years in an easily accessible place).⁷⁶⁸ We

⁷⁶⁴ This estimate is based on the following calculations: 7.5 hours × \$301 (hourly rate for a senior portfolio manager) = \$2,258; 7.5 hours × \$455.5 (blended hourly rate for assistant general counsel (\$426) and chief compliance officer (\$485)) = \$3,416; 1 hour × \$4,400 (hourly rate for a board of 8 directors) = \$4,400. \$2,258 + \$3,416 + \$4,400 = \$10,074; \$10,074 × 984 funds = \$9,912,816.

⁷⁶⁵ This estimate is based on the following calculation: 2 hours × \$400 (hourly rate for outside legal services) = \$800.

⁷⁶⁶ This estimate is based on the following calculation: 1 hour × 984 funds = 984 hours.

⁷⁶⁷ This estimate is based on the following calculation: 1 hour × \$57 (hourly rate for a general clerk) = \$57. \$57 × 984 funds = \$56,088.

⁷⁶⁸ Proposed rule 18f-4(b)(3)(ii).

estimate that each fund would incur an average annual burden of 50 hours to retain these records.⁷⁶⁹ We therefore estimate that the total annual hour burden for maintaining these records would be 49,200 hours.⁷⁷⁰ We also estimate that each fund would incur an annual time cost of approximately \$3,600, and a total annual time cost for all funds of approximately \$3,542,400.⁷⁷¹ We estimate that there are no external costs associated with this collection of information.

Estimated Total Burden

Amortized over a three-year time period, the hour burdens and time costs for collections of information associated with the asset segregation requirement for financial commitment transactions under proposed rule 18f-4, including the burdens associated with (a) identifying qualifying coverage assets; (b) documenting board-approved policies and procedures; and (c) maintaining required records, are estimated to result in an aggregate average annual hour burden of 163,016 hours and aggregate time costs of \$18,210,888.⁷⁷² In addition to the internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$800.

4. Derivatives Risk Management Program

Proposed rule 18f-4 would require that a fund that engages in more than a limited amount of derivatives transactions, or that uses complex derivatives transactions (as defined in the proposed rule), to adopt and implement a derivatives risk management program.⁷⁷³ This risk

⁷⁶⁹ We assume for purposes of this estimate that funds would implement automated processes for creating a written record of their compliance with the qualifying coverage asset requirements and that a fund would enter into at least one financial commitment transaction per trading day. Based on 250 trading days per year, and assuming 0.1 hours per trading day spent by a general clerk and 0.1 hours per trading day spent by a senior computer operator, we estimate the annual time cost to be $(0.1 \times 250) = 25$ hours per year per fund for each general clerk and senior computer operator.

⁷⁷⁰ This estimate is based on the following calculations: $50 \text{ hours} \times 984 \text{ funds} = 49,200 \text{ hours}$.

⁷⁷¹ This estimate is based on the following calculation: $25 \text{ hours} \times \$57 \text{ (hourly rate for a general clerk)} = \$1,425$; $25 \text{ hours} \times \$87 \text{ (hourly rate for a senior computer operator)} = \$2,175$. $\$1,425 + \$2,175 = \$3,600$; $\$3,600 \times 984 \text{ funds} = \$3,542,400$.

⁷⁷² These estimates are based on the following calculations: $((3 \times 108,240 \text{ hours}) \text{ (years 1, 2 and 3)} + 15,744 \text{ (year 1)} + 984 \text{ (year 1)} + (3 \times 49,200) \text{ (years 1, 2 and 3)}) \div 3 = 163,016 \text{ hours}$; $((3 \times \$11,345,520) \text{ (years 1, 2 and 3)} + (\$9,912,816 \text{ (year 1)}) + (\$56,088 \text{ (year 1)}) + (3 \times \$3,542,400) \text{ (years 1, 2 and 3)}) \div 3 = \$18,210,888$.

⁷⁷³ A derivatives risk management program would not be required if the fund complies with a portfolio limitation under which, immediately after entering

management program would require a fund to adopt and implement policies and procedures reasonably designed to assess and manage the risks of the fund's derivatives transactions, reasonably segregate the functions associated with the program from the portfolio management function of the fund, and periodically review and update the program at least annually.⁷⁷⁴ The proposed rule would also require a fund to designate a derivatives risk manager responsible for administering the program and require that the risk manager, no less frequently than quarterly, prepare a written report that describes the adequacy and effectiveness of the fund's risk management program.⁷⁷⁵ A fund's board of directors must also (1) approve the fund's derivatives risk management program, including any material changes to the program; (2) approve the fund's designation of the fund's derivatives risk manager (who cannot be a portfolio manager of the fund); and (3) review, no less frequently than quarterly, the written report prepared by the fund's derivatives risk manager that describes the adequacy and effectiveness of the fund's risk management program.⁷⁷⁶ Finally, proposed rule 18f-4 would impose certain recordkeeping requirements related to the derivatives risk management program (as described below).

As discussed above in section IV.D.4, DERA staff analysis shows that approximately 10% of all sampled funds had aggregate exposure from derivatives transactions high enough (*i.e.*, aggregate exposure of 50% of net assets or greater) to require that they establish a derivatives risk management program under the proposed rule. The DERA staff analysis also shows an additional approximately 4% of funds had aggregate exposure of between 25–50% of net assets. Commission staff estimates, therefore, that approximately 14% of funds (1,676 funds⁷⁷⁷) and no BDCs would be required to establish a derivatives risk management program. These funds would be subject to the collections of information described

into any derivatives transaction, the fund's aggregate exposure associated with the fund's derivatives transactions does not exceed 50% of the value of the fund's net assets, and the fund does not use "complex derivatives" (as defined in proposed rule 18f-4(c)(1)).

⁷⁷⁴ See proposed rule 18f-4(a)(3)(i)(A) through (D).

⁷⁷⁵ See proposed rule 18f-4(a)(3)(ii)(B) and (C).

⁷⁷⁶ Proposed rule 18f-4(a)(3)(ii).

⁷⁷⁷ This estimate is based on the following calculation: $11,973 \text{ funds} \times 14\% = 1,676 \text{ funds}$. See *supra* note 578.

below with respect to the derivatives risk management program provision.

Establishing a Derivatives Risk Management Program

As discussed above in section IV.D.4, we estimated that each fund would incur one-time costs to establish and implement a derivatives risk management program in compliance with proposed rule 18f-4, as well as ongoing program-related costs. For purposes of the PRA analysis, we estimate that each fund would incur an average initial burden of 30 hours associated with establishing a derivatives risk management program, including (1) adopting and implementing (including documenting) policies and procedures reasonably designed to assess and manage the risks of the fund's derivatives transactions and designating a derivatives risk manager (24 hours); and (2) obtaining initial board approval of the derivatives risk management program and the designation of the fund's derivatives risk manager (6 hours). Amortized over a three-year period, this would be an annual burden per fund of 10 hours. Accordingly, we estimate that the total average annual initial burden for establishing a derivatives risk management program would be 50,280 hours.⁷⁷⁸ We also estimate that each fund would incur an initial time cost of \$27,346 in relation to this hour burden, for a total initial time cost for all funds of approximately \$45,831,896.⁷⁷⁹ In addition to the internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$1,600 associated with a fund board consulting its outside legal counsel with regard to the required board approval.⁷⁸⁰

In addition to the initial burden, we estimate that each fund would incur an average annual burden of 38 hours associated with its derivatives risk management program, including that: (1) The fund review and update its risk management program at least annually (8 hours); (2) the derivatives risk

⁷⁷⁸ This estimate is based on the following calculation: $30 \text{ hours} \times 1,676 \text{ funds} = 50,280 \text{ hours}$.

⁷⁷⁹ This estimate is based on the following calculations: $12 \text{ hours} \times \$301 \text{ (hourly rate for a senior portfolio manager)} = \$3,612$; $12 \text{ hours} \times \$455.5 \text{ (blended hourly rate for assistant general counsel (\$426) and chief compliance officer (\$485))} = \$5,466$; $4 \text{ hours} \times \$4,400 \text{ (hourly rate for a board of 8 directors)} = \$17,600$; $2 \text{ hours (for a fund attorney's time to prepare materials for the board's determinations)} \times \$334 \text{ (hourly rate for a compliance attorney)} = \668 . $\$3,612 + \$5,466 + \$17,600 + \$668 = \$27,346$; $\$27,346 \times 1,676 \text{ funds} = \$45,831,896$.

⁷⁸⁰ This estimate is based on the following calculation: $4 \text{ hours} \times \$400 \text{ (hourly rate for outside legal services)} = \$1,600$.

manager prepare, on a quarterly basis, a written report that describes the adequacy and effectiveness of the fund's risk management program (24 hours⁷⁸¹); and (3) the fund's board review, on a quarterly basis, the written report prepared by the fund's derivatives risk manager that describes the adequacy and effectiveness of the fund's risk management program, and approve any material changes to the derivatives risk management program (6 hours). Accordingly, we estimate that the total average annual burden for establishing a derivatives risk management program would be 63,688 hours.⁷⁸² We also estimate that each fund would incur an annual time cost of \$41,066, for a total annual time cost for all funds of approximately \$68,826,616.⁷⁸³ In addition to the internal costs described above, we also estimate that each fund would incur average annual external costs of \$3,200 associated with a fund board's consulting its outside legal counsel with regard to quarterly reviews of the reports prepared by the fund's derivatives risk manager.⁷⁸⁴

Recordkeeping

Proposed rule 18f-4 would require a fund that adopts and implements a derivatives risk management program to maintain: (1) A written copy of the policies and procedures adopted by the fund (as required in proposed rule 18f-4(a)(3)) that are in effect, or any time within the past five years were in effect, in an easily accessible place; (2) copies of any materials provided to the board of directors in connection with its approval of the derivatives risk management program, including any material changes to the program, and any written reports provided to the board relating to the derivatives risk management program, for at least five

⁷⁸¹ The estimate is based on the following calculation: 4 quarterly reports × 6 hours to prepare each written report = 24 hours.

⁷⁸² This estimate is based on the following calculation: 38 hours × 1,676 funds = 63,688 hours.

⁷⁸³ This estimate is based on the following calculations: Reviewing/Updating the risk management program (8 hours): 4 hours × \$301 (hourly rate for a senior portfolio manager) = \$1,204; 4 hours × \$455.5 (blended hourly rate for assistant general counsel (\$426) and chief compliance officer (\$485)) = \$1,822; Preparing quarterly reports by the derivatives risk manager (6 hours × 4 reports = 24 hours): 24 hours × \$485 (hourly rate for chief compliance officer functioning as proposed derivatives risk manager) = \$11,640; Reviewing quarterly reports by the fund's board (1.5 hours × 4 reports = 6 hours): 6 hours × \$4,400 (hourly rate for a board of 8 directors) = \$26,400. (\$1,204 + \$1,822 + \$11,640 + \$26,400 = 41,066; \$41,066 × 1,676 funds = \$68,826,616.

⁷⁸⁴ This estimate is based on the following calculation: 8 hours (2 hours × 4 quarterly reviews) × \$400 (hourly rate for outside legal services) = \$3,200.

years after the end of the fiscal year in which the documents were provided (the first two years in an easily accessible place); and (3) records documenting the periodic reviews and updates required under proposed rule 18f-4(a)(3)(i)(D), for a period of not less than five years (the first two years in an easily accessible place) following each review or update.

We estimate that each fund would incur an annual average burden of 4 hours to retain these records.⁷⁸⁵ We therefore estimate that the total annual burden for maintaining these records would be 6,704 hours.⁷⁸⁶ We also estimate that each fund would incur an annual time cost of approximately \$288, and a total annual time cost for all funds of approximately \$482,688 with respect to this hourly burden.⁷⁸⁷ We estimate that there are no external costs associated with this collection of information.

Estimated Total Burden

Amortized over a three-year time period, the hour burdens and time costs for collections of information associated with the derivatives risk management program under proposed rule 18f-4, including the burdens associated with (a) establishing a derivatives risk management program; and (b) maintaining required records, are estimated to result in an aggregate average annual hour burden of 65,923 hours and aggregate time costs of \$61,644,397.⁷⁸⁸ In addition to the internal costs described above, we also estimate that each fund would incur a one-time average external cost of \$1,600 and average annual external costs of \$3,200.

Estimated Total Burden for Rule 18f-4

Amortized over a three-year time period, the hour burdens and time costs for collections of information associated with proposed rule 18f-4, including the burdens associated with (a) portfolio limitations for derivatives transactions; (b) asset segregation for derivatives transactions; (c) asset segregation for financial commitment transactions; and

⁷⁸⁵ We estimate 2 hours spent by a general clerk and 2 hours spent by a senior computer operator.

⁷⁸⁶ This estimate is based on the following calculation: 4 hours × 1,676 funds = 6,704 hours.

⁷⁸⁷ This estimate is based on the following calculation: 2 hours × \$57 (hourly rate for a general clerk) = \$114; 2 hours × \$87 (hourly rate for a senior computer operator) = \$174. \$114 + \$174 = \$288; \$288 × 1,676 funds = \$482,688.

⁷⁸⁸ These estimates are based on the following calculations: (50,280 hours (year 1) + (2 × 63,688 hours) (years 2 and 3) + (3 × 6,704 hours) (years 1, 2 and 3)) ÷ 3 = 65,923 hours; (\$45,831,896 (year 1) + (2 × \$68,826,616) (years 2 and 3) + (3 × \$482,688) (years 1, 2 and 3)) ÷ 3 = \$61,644,397.

(d) derivatives risk management program, are estimated to result in an aggregate average annual hour burden of 1,059,755 hours and aggregate time costs of \$171,141,630.⁷⁸⁹ In addition to the internal costs described above, we also estimate that each fund would incur an aggregate average one-time external cost of \$4,000 and aggregate average annual external costs of \$3,200.⁷⁹⁰

5. Amendments to Form N-PORT

On May 20, 2015, the Commission proposed Form N-PORT, which would require funds to report information within thirty days after the end of each month about their monthly portfolio holdings to the Commission in a structured data format. Preparing a report on Form N-PORT is mandatory and a collection of information under the PRA, and the information required by Form N-PORT would be data-tagged in XML format. Responses to the reporting requirements would be kept confidential for reports filed with respect to the first two months of each quarter; the third month of the quarter would not be kept confidential, but made public sixty days after the quarter end.

Prior Burden Estimate for Proposed Form N-PORT

In the Investment Company Reporting Modernization Release, we estimated that, for the 35% of funds that would file reports on proposed Form N-PORT in house, the per fund aggregate average annual hour burden was estimated to be 178 hours per fund, and the average cost to license a third-party software solution would be \$4,805 per fund per year.⁷⁹¹ For the remaining 65% of funds that would retain the services of a third party to prepare and file reports on proposed Form N-PORT on the fund's behalf, we estimated the aggregate average annual hour burden to be 125 hours per fund, and each fund would

⁷⁸⁹ These estimates are based on the following calculations: (196,147 hours: portfolio limitations + 634,669 hours: asset segregation (derivatives) + 163,016 hours: asset segregation (financial commitment transactions) + 65,923 hours (risk management program) = 1,059,755 hours; (\$20,386,028: portfolio limitations + \$70,900,317: asset segregation (derivatives) + \$18,210,888: asset segregation (financial commitment transactions) + \$61,644,397 (risk management program) = \$171,141,630.

⁷⁹⁰ These estimates are based on the following calculations: One-time costs: (\$800: portfolio limitations + \$800: asset segregation (derivatives) + \$800: asset segregation (financial commitment transactions) + \$1,600 (risk management program) = \$4,000; Annual costs: (\$3,200: risk management program).

⁷⁹¹ See Investment Company Reporting Modernization Release, *supra* note 138, at nn.736-741, 749 and accompanying text.

pay an average fee of \$11,440 per fund per year for the services of third-party service provider. In sum, we estimated that filing reports on proposed Form N-PORT would impose an average total annual hour burden of 1,537,572 hours on applicable funds, and all applicable funds would incur on average, in the aggregate, external annual costs of \$97,674,221.⁷⁹²

Recordkeeping and Reporting

We are proposing amendments to Form N-PORT that would require each fund that is required to implement a derivatives risk management program as required by proposed rule 18f-4(a)(3) to report for options and warrants, including options on a derivative, such as swaptions.⁷⁹³ We believe that the enhanced reporting proposed in these amendments would help our staff better monitor price and volatility trends, as well as various funds' risk profiles.

Estimated Total Burden

We estimate that 14% of funds (1,676 funds)⁷⁹⁴ would be required to file, on a monthly basis, additional information on Form N-PORT as a result of the proposed amendments. We estimate that each fund that files reports on Form N-PORT in house (35%, or 587 funds) would require an average of approximately 2 burden hours to compile (including review of the information), tag, and electronically file the additional information in light of the proposed amendments for the first monthly filing and an average of approximately 1 burden hour for each subsequent monthly filing. Therefore, we estimate the per fund average annual hour burden associated with the incremental changes to Form N-PORT as a result of the proposed amendments for these funds would be an additional 13 hours for the first year⁷⁹⁵ and an additional 12 hours for each subsequent year.⁷⁹⁶ We further estimate an upper bound on the initial annual costs to funds choosing this option of \$3,352 per fund⁷⁹⁷ with annual ongoing costs of

\$2,991 per fund.⁷⁹⁸ Amortized over three years, the average annual hour burden would be an additional 12 hours per fund⁷⁹⁹ and the aggregate average annual cost would be an additional \$3,111 per fund.⁸⁰⁰

We estimate that 65% of funds (1,075 funds) would retain the services of a third party to provide data aggregation, validation and/or filing services as part of the preparation and filing of reports on proposed Form N-PORT on the fund's behalf. For these funds, we estimate that each fund would require an average of approximately 3 hours to compile and review the information with the service provider prior to electronically filing the monthly report for the first time and an average of .5 burden hours for each subsequent monthly filing. Therefore, we estimate the per fund average annual hour burden associated with the incremental changes to proposed Form N-PORT as a result of the proposed amendments for these funds would be an additional 8.5 hours for the first year⁸⁰¹ and an additional 6 hours for each subsequent year.⁸⁰² We further estimate an upper bound on the initial costs to funds choosing this option of \$2,319 per fund⁸⁰³ with annual ongoing costs of

hours \times \$312/hour for a senior database administrator) + (2 hours \times \$266/hour for a financial reporting manager) + (2 hours \times \$198/hour for a senior accountant) + (2 hours \times \$157/hour for an intermediate accountant) + (2 hours \times \$301/hour for a senior portfolio manager) + (1.5 hours \times \$283/hour for a compliance manager)). See Investment Company Reporting Modernization Release, *supra* note 138, at n.658 and accompanying text.

⁷⁹⁸ This estimate is based upon the following calculations: \$2,991 in internal costs = (2.14 hours \times \$266/hour for a financial reporting manager) + (2.14 hours \times \$198/hour for a senior accountant) + (2.14 hours \times \$157/hour for an intermediate accountant) + (2.14 hours \times \$301/hour for a senior portfolio manager) + (1.71 hours \times \$283/hour for a compliance manager) + (1.71 hours \times \$312/hour for a senior database administrator)). See Investment Company Reporting Modernization Release, *supra* note 138, at n. 659 and accompanying text.

⁷⁹⁹ The estimate is based on the following calculation: (13 + (12 \times 2)) \div 3 = 12.33.

⁸⁰⁰ The estimate is based on the following calculation: (\$3,352 + (\$2,991 \times 2)) \div 3 = \$3,111.

⁸⁰¹ The estimate is based on the following calculation: (1 filing \times 3 hours) + (11 filings \times 0.5 hour) = 8.5 burden hours in the first year.

⁸⁰² This estimate is based on the following calculation: 12 filings \times 0.5 hour = 6 burden hours in each subsequent year.

⁸⁰³ This estimate is based upon the following calculations: \$2,319 in internal costs = (1.5 hours \times \$303/hour for a senior programmer) + (2.5 hours \times \$312/hour for a senior database administrator) + (.9 hours \times \$266/hour for a financial reporting manager) + (.9 hours \times \$198/hour for a senior accountant) + (.9 hours \times \$157/hour for an intermediate accountant) + (.9 hours \times \$301/hour for a senior portfolio manager) + (.9 hours \times \$283/hour for a compliance manager)). See Investment Company Reporting Modernization Release, *supra* note 138, at n.660 and accompanying text.

\$1,517 per fund.⁸⁰⁴ Amortized over three years, the aggregate average annual hour burden would be an additional 7 hours per fund,⁸⁰⁵ with average annual ongoing costs of \$1,784 per fund.⁸⁰⁶

In sum, we estimate that the proposed amendments to Form N-PORT would impose an average total annual hour burden of an additional 14,667 hours on applicable funds,⁸⁰⁷ and an average additional total cost of \$3,768,933 on applicable funds.⁸⁰⁸ We do not anticipate any change to the total external annual costs of \$97,674,221.⁸⁰⁹

6. Amendments to Form N-CEN

On May 20, 2015, we proposed to amend rule 30a-1 to require all funds to file reports with certain census-type information on proposed Form N-CEN with the Commission on an annual basis. Proposed Form N-CEN would be a collection of information under the PRA, and is designed to facilitate the Commission's oversight of funds and its ability to monitor trends and risks. The collection of information under Form N-CEN would be mandatory for all funds, and responses would not be kept confidential.

Prior Burden Estimate for Proposed Form N-CEN

In the Investment Company Reporting Modernization Release, the staff estimated that the Commission would receive an average of 3,146 reports per year, based on the number of existing Form N-SAR filers, including responses from 2,419 management companies.⁸¹⁰ We estimated that management investment companies would require 33.35 annual burden hours in the first

⁸⁰⁴ This estimate is based upon the following calculations: \$1,517 in internal costs = (1 hours \times \$266/hour for a financial reporting manager) + (1 hours \times \$198/hour for a senior accountant) + (1 hours \times \$157/hour for an intermediate accountant) + (1 hours \times \$301/hour for a senior portfolio manager) + (1 hours \times \$283/hour for a compliance manager) + (1 hours \times \$312/hour for a senior database administrator)). See Investment Company Reporting Modernization Release, at n. 661 and accompanying text.

⁸⁰⁵ The estimate is based on the following calculation: (8.5 + (6 \times 2)) \div 3 = 6.83.

⁸⁰⁶ The estimate is based on the following calculation: (\$2,319 + (\$1,517 \times 2)) \div 3 = \$1,784.

⁸⁰⁷ The estimate is based on the following calculation: (587 funds \times 12 hours) + (1,089 funds \times 7 hours) = 14,667 hours.

⁸⁰⁸ The estimate is based on the following calculation: (587 funds \times \$3,111) + (1,089 funds \times \$1,784) = \$3,768,933.

⁸⁰⁹ See Investment Company Reporting Modernization Release, *supra* note 138, at n.751 and accompanying text.

⁸¹⁰ This estimate is based on 2,419 management companies and 727 UITs filing reports on Form N-SAR as of Dec. 31, 2014. UITs would not be required to complete Item 31 of proposed Form N-CEN. See General Instruction A of proposed Form N-CEN.

⁷⁹² See *id.*, at nn.748 and 751 and accompanying text.

⁷⁹³ See Item C.11.c.viii of proposed Form N-PORT.

⁷⁹⁴ Commission staff estimates, therefore, that approximately 14% of funds (1,676 funds) would be required to establish a derivatives risk management program. See *supra* note 612 and accompanying text.

⁷⁹⁵ The estimate is based on the following calculation: (1 filing \times 2 hours) + (11 filings \times 1 hour) = 13 burden hours in the first year.

⁷⁹⁶ This estimate is based on the following calculation: (12 filings \times 1 hour) = 12 burden hours in each subsequent year.

⁷⁹⁷ This estimate is based upon the following calculations: \$3,352 in internal costs = (\$3,196 = 1 hour \times \$303/hour for a senior programmer) + (2.5

year⁸¹¹ and 13.35 annual burden hours in each subsequent year for preparing and filing reports on proposed Form N-CEN. We further estimated that all Form N-CEN filers would have an aggregate annual paperwork related expenses of \$12,395,064 for reports on Form N-CEN.⁸¹² We also estimated that all applicable funds would incur, in the aggregate, external annual costs of \$1,748,637, which would include the costs of registering and maintaining LEIs for funds.

Recordkeeping and Reporting

We are proposing amendments to Form N-CEN to identify whether the fund relied upon proposed rule 18f-4. Specifically, the proposed amendments to Form N-CEN would require a fund to identify the portfolio limitation(s) on which the fund relied during the reporting period.

Estimated Total Burden

As discussed above, as part of the Investment Company Modernization Release proposal, funds would be required to identify if they relied upon ten different rules under the Act during the reporting period.⁸¹³ In addition to the paperwork costs associated with collecting and documenting the requirements under proposed rule 18f-4,⁸¹⁴ we believe that there are additional paperwork cost relating to identifying the portfolio limitation(s) on which a fund relied on proposed Form N-CEN. We therefore estimate that 2,419 funds would incur an average annual hour burden of .25 hours for the first year to compile (including review of the information), tag, and electronically file the additional information in light of the proposed amendments, and an average annual hour burden of approximately .1 hours for each subsequent year's filing. We further estimate an upper bound on the initial costs to funds choosing this

⁸¹¹ This estimate is based on the following calculation: 13.35 hours for filings + 20 additional hours for the first filing = 33.35 hours.

⁸¹² This estimate is based on annual ongoing burden hour estimate of 32,294 burden hours for management companies (2,419 management companies × 13.35 hours per filing) plus 6,623 burden hours for UITs (727 UITs × 9.11 burden hours per filing), for a total estimate of 38,917 burden ongoing hours. This was then multiplied by a blended hourly wage of \$318.50 per hour, \$303 per hour for Senior Programmers and \$334 per hour for compliance attorneys, as we believe these employees would commonly be responsible for completing reports on proposed Form N-CEN (\$318.50 × 38,917 = \$12,395,064.50). See Investment Company Reporting Modernization Release, *supra* note 138, at n.723 and accompanying text.

⁸¹³ See *supra* section IV.D.7.d; see also Item 31 of Proposed Form N-CEN.

⁸¹⁴ See *supra* section V.B.1.

option of \$80 per fund⁸¹⁵ with annual ongoing costs of \$32 per fund.⁸¹⁶ Amortized over three years, the aggregate average annual hour burden would be an additional .15 hours per fund,⁸¹⁷ with average annual ongoing costs of \$48 per fund.⁸¹⁸

In sum, we estimate that the proposed amendments to Form N-CEN would impose an average total annual hour burden of an additional 363 hours on applicable funds,⁸¹⁹ and an average additional total cost of \$115,616 on applicable funds.⁸²⁰ We do not anticipate any change to the total external annual costs of \$1,748,637.⁸²¹

C. Request for Comments

We request comment on whether our estimates for burden hours and any external costs as described above are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

⁸¹⁵ This estimate is based on multiplying .25 hours by a blended hourly wage of \$318.50 per hour, \$303 per hour for Senior Programmers and \$334 per hour for compliance attorneys, as we believe these employees would commonly be responsible for completing reports on proposed Form N-CEN (\$318.50 × .25 = \$80). See Investment Company Reporting Modernization Release, *supra* note 138, at n.723 and accompanying text.

⁸¹⁶ This estimate is based on multiplying .1 hours by a blended hourly wage of \$318.50 per hour, \$303 per hour for Senior Programmers and \$334 per hour for compliance attorneys, as we believe these employees would commonly be responsible for completing reports on proposed Form N-CEN (\$318.50 × .1 = \$32). See Investment Company Reporting Modernization Release, *supra* note 138, at n.723 and accompanying text.

⁸¹⁷ The estimate is based on the following calculation: (.25 + (.1 × 2)) ÷ 3 = .15 hours.

⁸¹⁸ The estimate is based on the following calculation: (\$80 + (\$32 × 2)) ÷ 3 = \$48.

⁸¹⁹ The estimate is based on the following calculation: (2,419 funds × .15 hours) = 363 hours.

⁸²⁰ This estimate is based on annual ongoing burden estimate of 363 burden hours for management companies (2,419 management companies × .15 hours per filing). This was then multiplied by a blended hourly wage of \$318.50 per hour, \$303 per hour for Senior Programmers and \$334 per hour for compliance attorneys, as we believe these employees would commonly be responsible for completing reports on proposed Form N-CEN (\$318.50 × 363 = \$115,616). See Investment Company Reporting Modernization Release, *supra* note 138, at n.723 and accompanying text.

⁸²¹ See Investment Company Reporting Modernization Release, *supra* note 138, at n.769 and accompanying text.

(4) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The agency has submitted the proposed collection of information to OMB for approval. Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090, with reference to File No. S7-24-15. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this Release; therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this Release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-24-15, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

VI. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with section 3 of the Regulatory Flexibility Act ("RFA").⁸²² It relates to proposed rule 18f-4 and proposed amendments to Form N-PORT and Form N-CEN.

A. Reasons for and Objectives of the Proposed Actions

The use of derivatives by funds implicates certain requirements under the Investment Company Act, including section 18 of that Act.⁸²³ In particular, section 18 limits a fund's ability to obtain leverage or incur obligations to persons other than the fund's common shareholders through the issuance of senior securities, as defined in that section.⁸²⁴ As discussed above, funds and their counsel, in light of the guidance we provided in Release 10666 and provided by our staff, have applied the segregated account approach to, or otherwise sought to cover, many types

⁸²² 5 U.S.C. 603.

⁸²³ See *supra* section I.

⁸²⁴ See *supra* section I.

of transactions other than those specifically addressed in Release 10666, including various derivatives and other transactions that implicate section 18.⁸²⁵ We have determined to propose a new approach to funds' use of derivatives in order to address the investor protection purposes and concerns underlying section 18 of the Act and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives transactions in light of the dramatic growth in the volume and complexity of the derivatives markets over the past two decades and the increased use of derivatives by certain funds.

The Commission is proposing a new exemptive rule and amendments to Form N-PORT and Form N-CEN that are designed to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives, as well as certain other transactions that implicate section 18 of the Act, and to more effectively address the purposes and concerns underlying section 18.⁸²⁶ Specifically, proposed rule 18f-4 is designed both to impose a limit on the leverage a fund relying on the rule may obtain through derivatives transactions and financial commitment transactions, and to require the fund to have qualifying coverage assets to meet its obligations under those transactions, in order to address the undue speculation concern expressed in section 1(b)(7) and the asset sufficiency concern expressed in section 1(b)(8).⁸²⁷ In addition, the derivatives risk management program requirement is designed to complement the proposed rule's portfolio limitations and asset segregation requirements by requiring funds subject to the requirement to adopt and implement a derivatives risk management program that addresses the program elements specified in the rule, including the assessment and management of the risks associated with the fund's derivatives transactions.⁸²⁸ The program would be administered by a derivatives risk manager designated by the fund and approved by the fund's board of directors.⁸²⁹ The amendments to Form N-PORT require the reporting of certain risk metrics (vega and gamma) but only by those funds that engage in more than a limited amount of derivatives transactions, by virtue of meeting the threshold requiring them to implement a derivatives risk management program as required by proposed rule 18f-4(a)(3).

⁸²⁵ See *supra* section II.B.3.

⁸²⁶ See *supra* section III.

⁸²⁷ See *supra* section III.A.

⁸²⁸ See *supra* section III.A.

⁸²⁹ See *supra* section III.A.

Last, the amendments to Form N-CEN would require a fund to identify the portfolio limitation(s) on which the fund relied during the reporting period.

B. Legal Basis

The Commission is proposing new rule 18f-4 under the authority set forth in sections 6(c), 12(a), 31(a), and 38(a) of the Investment Company Act of 1940 [15 U.S.C. 80a-6(c), 80a-12(a), 80a-31(a), and 80a-38(a)]. The Commission is proposing amendments to proposed Form N-PORT and Form N-CEN under the authority set forth in sections 8, 30, and 38 of the Investment Company Act of 1940 [15 U.S.C. 80a-8, 80a-30, 80a-38].

C. Small Entities Subject to Proposed Rule 18f-4 and Amendments to Form N-PORT and Form N-CEN

An investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of \$50 million or less as of the end of its most recent fiscal year.⁸³⁰ Commission staff estimates that, as of June 2015, approximately 110 open and closed-end funds are small entities. We discuss below the percentage of small funds that the staff estimates may seek to rely on the proposed rule, and the percentage of small funds that may be required to comply with the various aspects of the proposed rule.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

1. Portfolio Limitations for Derivatives Transactions

Proposed rule 18f-4 would require a fund that engages in derivatives transactions in reliance on the rule, including any small entities that rely on the rule, to comply with one of two alternative portfolio limitations.⁸³¹ A fund that relies on the exposure-based portfolio limit would be required to operate so that its aggregate exposure under senior securities transactions, measured immediately after entering into any such transaction, does not exceed 150% of the fund's net assets.⁸³² Under the risk-based portfolio limit, a fund generally would be required to demonstrate, using a VaR calculation, that its derivatives transactions, in the aggregate, result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives.⁸³³ A fund that elects the

⁸³⁰ See rule 0-10(a) under the Investment Company Act.

⁸³¹ Proposed rule 18f-4(a)(1).

⁸³² Proposed rule 18f-4(a)(1)(i).

⁸³³ Proposed rule 18f-4(a)(1)(ii).

risk-based portfolio limitation under the proposed rule would be permitted to obtain exposure under its derivatives transactions and other senior securities of up to 300% of the fund's net assets.⁸³⁴

The proposed rule would require that for a fund relying on the rule, a fund's board of directors, including a majority of the directors who are not interested persons of the fund, approve which of the two alternative portfolio limitations will apply to the fund.⁸³⁵ In addition, the proposed rule would require a fund to maintain a record of each determination made by the fund's board that the fund will comply with one of the portfolio limitations under the proposed rule, which would include the fund's initial determination as well as a record of any determination made by the fund's board to change the portfolio limitation.⁸³⁶ The fund also would be required to maintain a written record demonstrating that immediately after the fund entered into any senior securities transaction, the fund complied with the portfolio limitation applicable to the fund immediately after entering into the senior securities transaction, reflecting the fund's aggregate exposure, the value of the fund's net assets and, if applicable, the fund's full portfolio VaR and its securities VaR.⁸³⁷

As discussed above in section IV, our staff estimates that the one-time operational costs necessary to establish and implement an exposure-based portfolio limitation would range from \$20,000 to \$150,000 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund.⁸³⁸ Staff also estimates that each fund would incur ongoing costs related to implementing a 150% exposure-based portfolio limitation under proposed rule 18f-4. Staff estimates that such costs would range from 20% to 30% of the one-time costs discussed above. Thus, staff estimates that a fund would incur ongoing annual costs associated with the 150% exposure-based portfolio limit that would range from \$4,000 to \$45,000.

⁸³⁴ Proposed rule 18f-4(a)(1)(ii).

⁸³⁵ Proposed rule 18f-4(a)(5)(i).

⁸³⁶ See proposed rule 18f-4(a)(6)(i). The fund would be required to maintain this record for a period of not less than five years (the first two years in an easily accessible place) following each determination.

⁸³⁷ See proposed rule 18f-4(a)(6)(iv). The fund would be required to maintain this record for a period of not less than five years (the first two years in an easily accessible place) following each senior securities transaction entered into by the fund.

⁸³⁸ See section IV.

As discussed above in section IV.D.1, in the DERA staff analysis, 68% of all of the sampled funds did not have any exposure to derivatives transactions. These funds thus do not appear to use derivatives transactions or, if they do use them, do not appear to do so to a material extent. We estimate that approximately 32% of funds—the percentage of funds that did have derivatives exposure in the DERA sample—are more likely to enter into derivatives transactions and therefore are more likely to incur costs associated with either the exposure-based portfolio limit or the risk-based portfolio limit. Excluding approximately 4% of all funds (corresponding to the percentage of sampled funds that had aggregate exposure of 150% or more of net assets and for which we have estimated costs for the risk-based limit), we estimate that 28% of funds would incur the costs associated with the exposure-based portfolio limit. Staff also estimates that 28% of small funds (approximately 31 small funds) enter into at least some derivatives transactions, and would therefore incur the costs associated with the exposure-based portfolio limit.

As with the costs discussed above regarding the exposure-based portfolio limit, we expect that funds would incur one-time and ongoing operational costs to establish and implement a risk-based exposure limit, including the VaR test. We expect that a fund that seeks to comply with the 300% aggregate exposure limit would incur the same costs as those that we estimated above in order to establish and implement the 150% exposure-based portfolio limit. Accordingly, we estimate below the costs we believe a fund would incur to comply with the VaR test. Our staff estimates that the one-time operational costs necessary to establish and implement a VaR test would range from \$60,000 to \$180,000 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund. Staff also estimates that each fund would incur ongoing costs related to implementing a VaR test under proposed rule 18f-4. Staff estimates that such costs would range from 20% to 30% of the one-time costs discussed above. Thus, staff estimates that a fund would incur ongoing annual costs associated with the VaR test aspect of the risk-based exposure limit that would range from \$12,000 to \$54,000. DERA staff estimates that approximately 4% of all funds sampled had aggregate exposure of 150% (or greater) of net assets. We estimate therefore, that 4% of funds would rely on the proposed rule,

and comply with the risk-based portfolio limit. Staff also estimates that 4% of small funds (approximately 4 small funds) would rely on the proposed rule, and comply with the risk-based portfolio limit.

2. Asset Segregation

Under proposed rule 18f-4, a fund, including a fund that is a small entity, that enters into derivatives transactions in reliance on the rule would be required to manage the risks associated with its derivatives transactions by maintaining an amount of qualifying coverage assets designed to enable the fund to meet its obligations arising from such transactions.⁸³⁹ A fund's board, including a majority of the fund's independent directors, would be required to approve the fund's policies and procedures reasonably designed to provide for the fund's maintenance of qualifying coverage assets.⁸⁴⁰ A fund that would be required to maintain an amount of qualifying coverage assets under the proposed rule also would be subject to certain recordkeeping requirements. The proposed rule would require that qualifying coverage assets for derivatives transactions be identified on the books and records of the fund at least once each business day.⁸⁴¹ In addition, the fund would be required to maintain a written copy of the policies and procedures approved by the board regarding the fund's maintenance of qualifying coverage assets, as required under the proposed rule.⁸⁴²

Our staff estimates that the one-time operational costs necessary to establish and implement the proposed asset segregation requirements would range from \$25,000 to \$75,000 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the funds comprising the fund. Staff also estimates that each fund would incur ongoing costs related to implementing the asset segregation requirements under proposed rule 18f-4. Staff estimates that such costs would range from 65% to 75% of the one-time costs discussed above. Thus, staff estimates that a fund would incur ongoing annual costs associated with the asset segregation requirements that would range from \$16,250 to \$56,250. As discussed above in section IV.D.1, in the DERA staff analysis, 68% of all of the sampled funds did not have any exposure to derivatives transactions. These funds

thus do not appear to use derivatives transactions or, if they do use them, do not appear to do so to a material extent. Staff estimates that the remaining 32% of funds will seek to rely on the proposed rule 18f-4, as noted above, and therefore comply with the asset segregation requirements. Staff also estimates that 32% of small funds (approximately 35 small funds) will seek to rely on proposed rule 18f-4, and therefore comply with the asset segregation requirements.

3. Derivatives Risk Management Program

We are proposing measures under rule 18f-4 that will help enhance derivatives risk management by requiring that any fund, including a small entity, that engages in more than a limited amount of derivatives transactions pursuant to the proposed rule, or that uses complex derivatives transactions, adopt and implement a derivatives risk management program.⁸⁴³ This risk management program would require a fund have policies and procedures reasonably designed to assess and manage the risks of the fund's derivatives transactions.⁸⁴⁴ The program is designed to be tailored by each fund and its adviser to the particular types of derivatives used by the fund and the manner in which those derivatives relate to the fund's investment portfolio and strategy. Funds that make only limited use of derivatives would not be subject to the proposed condition requiring the adoption of a formalized derivatives risk management program. A fund that makes only limited use of derivatives, however, would need to monitor its investments in derivatives to confirm that its aggregate exposure to derivatives transactions is not more than 50% of its NAV and that it does not use complex derivatives.

Under the proposed rule, a fund's board of directors (including a majority of the directors who are not interested persons of the fund) must approve the fund's derivatives risk management program, including any material changes to the program, if applicable.⁸⁴⁵ A fund that has a risk management program would be required to designate a person as a derivatives risk manager responsible for administering the program and such derivatives risk manager would be required to provide a written report to the fund's board of directors, no less frequently than quarterly, that reviews the adequacy and

⁸³⁹ See proposed rule 18f-4(a)(2).

⁸⁴⁰ See proposed rule 18f-4(a)(5)(ii).

⁸⁴¹ See proposed rules 18f-4(a)(2) and 18f-4(a)(6)(v).

⁸⁴² See proposed rule 18f-4(a)(6)(ii).

⁸⁴³ See proposed rule 18f-4(a)(3).

⁸⁴⁴ See proposed rule 18f-4(a)(3).

⁸⁴⁵ See proposed rule 18f-4(a)(3)(ii)(A).

effectiveness of its implementation.⁸⁴⁶ We note that some funds, and in particular smaller funds for example, may not have appropriate existing personnel capable of fulfilling the responsibilities of the proposed derivatives risk manager, or may choose to hire a derivatives risk manager rather than assigning that responsibility to a current employee or officer of the fund or the fund's investment adviser who is not a portfolio manager. We would expect that a fund that is required to hire a new derivatives risk manager would likely incur costs on the higher end of our estimated range of costs provided below.

A fund that is required to have a derivatives risk management program under the proposed rule would be required to maintain a written copy of the fund's risk management program and any associated policies and procedures that are in effect, or at any time within the past five years, were in effect in an easily accessible place.⁸⁴⁷ In addition, a fund would be required to maintain copies of any materials provided to the board of directors in connection with its approval of the derivatives risk management program, including any material changes to the program, and any written reports provided to the board of directors relating to the program.⁸⁴⁸

As discussed in the Economic Analysis section, our staff estimates that the one-time costs necessary to establish and implement a derivatives risk management program would range from \$65,000 to \$500,000 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund. Staff estimates that each fund would incur ongoing program-related costs, as a result of proposed rule 18f-4, that range from 65% to 75% of the one-time costs necessary to establish and implement a derivatives risk management program. Thus, staff estimates that a fund would incur ongoing annual costs associated with proposed rule 18f-4 that would range from \$42,250 to \$375,000. Under the proposed rule, a fund that has no greater than 50% aggregate exposure associated with its derivatives transactions would not be required to establish a derivatives risk management program. DERA staff analysis shows that approximately 10%

of all sampled funds had aggregate exposure from derivatives transactions high enough (*i.e.*, aggregate exposure of 50% of net assets or greater) to require that they establish a derivatives risk management program under the proposed rule. The DERA staff analysis also shows that approximately 4% of additional funds had aggregate exposure of between 25 and 50% of net assets. In light of this, Commission staff estimates that approximately 14% of funds would establish a derivatives risk management program. Staff also estimates that approximately 14% of small funds (approximately 15 small funds) would establish a derivatives risk management program.

4. Financial Commitment Transactions

Under our proposed rule, a fund may also enter into financial commitment transactions, notwithstanding the requirements of section 18(a)(1), section 18(f)(1) and section 61 of the Investment Company Act provided that the fund maintains qualifying coverage assets, identified on the books and records of the fund and determined at least once each business day, with a value equal to at least the fund's aggregate financial commitment obligations.⁸⁴⁹ In addition, the fund's board of directors (including a majority of the directors who are not interested persons of the fund) would be required to approve policies and procedures reasonably designed to provide for the fund's maintenance of qualifying coverage assets.⁸⁵⁰ The fund would also be required to maintain a written copy of the policies and procedures approved by the board of directors that are in effect, or at any time within the past five years were in effect, in an easily accessible place.⁸⁵¹ In addition, the fund would be required to maintain a written record reflecting the amount of each financial commitment obligation associated with each financial commitment transaction entered into by the fund and identifying the qualifying coverage assets maintained by the fund with respect to each financial commitment obligation, as determined by the fund at least once each business day, for a period of not less than five years (the first two years in an easily accessible place).⁸⁵²

Our staff estimates that the one-time operational costs necessary to establish and implement the proposed asset segregation requirements would range from \$25,000 to \$75,000 per fund. Staff

also estimates that each fund would incur ongoing costs related to implementing the asset segregation requirements under proposed rule 18f-4. Staff estimates that such costs would range from 65% to 75% of the one-time costs discussed above. Thus, staff estimates that a fund would incur ongoing annual costs associated with the asset segregation requirements that would range from \$16,250 to \$56,250. DERA staff analysis shows that approximately 3% of all sampled funds enter into at least some financial commitment transactions, but do not use derivatives transactions (or other senior securities transactions). Staff estimates, therefore, that 3% of funds would comply with the asset segregation requirements in proposed rule 18f-4 applicable to financial commitment transactions.⁸⁵³ Staff also estimates that 3% of small funds (approximately 3 small funds) would comply with the asset segregation requirements in proposed rule 18f-4 applicable to financial commitment transactions.

5. Amendments to Proposed Form N-PORT

We are proposing amendments to proposed Form N-PORT to require the reporting of certain risk metrics (vega and gamma) but only by those funds that engage in more than a limited amount of derivatives transactions, by virtue of meeting the threshold requiring them to implement a derivatives risk management program as required by proposed rule 18f-4(a)(3).⁸⁵⁴ As discussed above, we propose to limit the reporting of vega and gamma because: (1) We understand that there are added burdens to reporting risk-metrics and we are therefore proposing to limit the reporting of these risk metrics to only those funds who are engaged in more than a limited amount of derivatives transactions or that use certain complex derivatives transactions, as opposed to funds that engage in a more limited use of derivatives; and (2) we believe many of the funds that would be required to

⁸⁵³ The estimate of affected funds does not include money market funds or BDCs. We understand, however, that both money market funds and BDCs may engage in certain types of financial commitment transactions. We estimate that 537 money market funds and 88 BDCs would also comply with the asset segregation requirements in proposed rule 18f-4 (applicable to financial commitment transactions). Based on information in filings submitted to the Commission, we believe that there are no money market funds that are small entities. The Commission staff further estimates that, as of June 2015, approximately 29 BDCs are small entities.

⁸⁵⁴ See *supra* section III.G. See also proposed rule 18f-4(a)(3).

⁸⁴⁶ See proposed rule 18f-4(a)(3)(ii)(B) and (C).

⁸⁴⁷ See proposed rule 18f-4(a)(6)(iii)(A).

⁸⁴⁸ See proposed rule 18f-4(a)(6)(iii)(B). The fund would be required to maintain this record for a period of not less than five years after the end of the fiscal year in which the documents were provided (the first two years in an easily accessible place).

⁸⁴⁹ Proposed rule 18f-4(b)(1). See also proposed rule 18f-4(c)(5) (definition of financial commitment obligation).

⁸⁵⁰ Proposed rule 18f-4(b)(2).

⁸⁵¹ Proposed rule 18f-4(b)(3)(i).

⁸⁵² Proposed rule 18f-4(b)(3)(ii).

implement a derivatives risk management program and that invest in derivatives as part of their investment strategy currently calculate risk metrics for their own internal risk management programs, albeit, for internal reporting purposes.⁸⁵⁵ We anticipate that the enhanced reporting proposed in these amendments would help our staff better monitor price and volatility trends and various funds' risk profiles. Risk metrics data reported on Form N-PORT that is made publicly available also would inform investors and assist users in assessing funds' relative price and volatility risks and the overall price and volatility risks of the fund industry—particularly for those funds that use investments in derivatives as an important part of their trading strategy.

All funds that would be required to implement a derivatives risk management program as required by proposed rule 18f-4(a)(3) would be subject to the proposed amendments to Form N-PORT, including funds that are small entities. For smaller funds and fund groups⁸⁵⁶ we proposed an extra 12 months (or 30 months after the effective date) to comply with the proposed Form N-PORT reporting requirements. We estimate that 10% of small funds (approximately 11 small funds) would be required to comply with the proposed amendments to Form N-PORT.

We estimate that 1,676 funds would be required to file, on a monthly basis, additional information on Form N-PORT as a result of the proposed amendments.⁸⁵⁷ Assuming that 35% of funds (587 funds) would choose to license a software solution to file reports on Form N-PORT in house, we estimate an upper bound on the initial annual costs to file the additional information associated with the proposed amendments for funds choosing this option of \$3,352 per fund with annual ongoing costs of \$2,991 per fund.⁸⁵⁸ We

⁸⁵⁵ Part C of proposed Form N-PORT would require a fund and its consolidated subsidiaries to disclose its schedule of investments and certain information about the fund's portfolio of investments. We propose to add Item C.11.c.viii to Part C of proposed Form N-PORT that would require funds that are required to implement a risk management program under proposed rule 18f-4(a)(3) provide the gamma and vega for options and warrants, including options on a derivative, such as swaps. See Item C.11.c.viii of proposed Form N-PORT.

⁸⁵⁶ For purposes of the extended compliance date only, we proposed that funds that together with other investment companies in the same "group of related investment companies" have net assets of less than \$1 billion as of the end of the most recent fiscal year be subject to an extra 12 months to comply with proposed Form N-PORT.

⁸⁵⁷ See *supra* note 794.

⁸⁵⁸ See *supra* notes 797 and 798, and accompanying text.

further assume that 65% of funds (1,089 funds) would choose to retain a third-party service provider to provide data aggregation and validation services as part of the preparation and filing of reports on Form N-PORT, and we estimate an upper bound on the initial costs to file the additional information associated with the proposed amendments for funds choosing this option of \$2,319 per fund with annual ongoing costs of \$1,517 per fund.⁸⁵⁹ As noted above, we estimate that 10% of small funds (approximately 11 small funds) would be required to comply with the proposed amendments to Form N-PORT. Staff estimates that 35% of small funds (approximately 4 small funds) would choose to license a software solution to file reports on Form N-PORT in house, and 65% of small funds (approximately 7 small funds) would choose to retain a third-party service provider.

6. Amendments to Form N-CEN

We are proposing amendments to Form N-CEN to require a fund to identify whether the fund relied upon proposed rule 18f-4. Specifically, the proposed amendments to Form N-CEN would require a fund to identify the portfolio limitation(s) under which the fund relied during the reporting period. As we discussed above, while the costs associated with collecting and documenting the requirements under proposed rule 18f-4 are discussed above,⁸⁶⁰ we believe that there are additional costs relating to identifying the portfolio limitation(s) on which a fund relied on proposed Form N-CEN.

We estimate that 2,419 funds would incur initial costs of \$80 per fund,⁸⁶¹ with annual ongoing costs of \$32 per fund,⁸⁶² to compile (including review of the information), tag, and electronically file the additional information in light of the proposed amendments. We do not anticipate any change to the total external annual costs of \$1,748,637.⁸⁶³

As noted above, we estimate that approximately 110 open and closed-end funds are small entities that would be required to identify the portfolio limitation(s) on which they relied on reports on Form N-CEN during the reporting period.⁸⁶⁴

⁸⁵⁹ See *supra* notes 803 and 804, and accompanying text.

⁸⁶⁰ See *supra* sections IV.D.1. and IV.D.2.

⁸⁶¹ See *supra* note 815.

⁸⁶² See *supra* note 816.

⁸⁶³ See *supra* note 821.

⁸⁶⁴ See *supra* section VI.C.

E. Duplicative, Overlapping, or Conflicting Federal Rules

Commission staff has not identified any federal rules that duplicate, overlap, or conflict with proposed rule 18f-4 or the proposed amendments to Form N-PORT and Form N-CEN.

F. Significant Alternatives

The RFA directs the Commission to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant economic impact on small entities. We considered the following alternatives for small entities in relation to our proposal: (1) Exempting funds that are small entities from proposed rule 18f-4, or any part thereof, and/or establishing different requirements under proposed rule 18f-4 to account for resources available to small entities; (2) exempting funds that are small entities from the proposed amendments to Form N-PORT, or establishing different disclosure and reporting requirements, or different reporting frequency, to account for resources available to small entities; (3) the clarification, consolidation, or simplification of compliance requirements under proposed rule 18f-4 for small entities; and (4) the use of performance rather than design standards.

1. Proposed Rule 18f-4

We do not believe that exempting any subset of funds, including funds that are small entities, from the provisions in proposed rule 18f-4 would permit us to achieve our stated objectives. We also do not believe that it would be desirable to establish different requirements applicable to funds of different sizes under proposed rule 18f-4 to account for resources available to small entities⁸⁶⁵ or to use performance standards rather than design standards for small entities where applicable. We note, however, that proposed rule 18f-4 is an exemptive rule, which would require funds to comply with new requirements only if they wish to enter into derivatives transactions and financial commitment transactions. Therefore, if a small entity does not invest in derivatives or financial commitment transactions as part of its investment strategy, then the small entity would not be required to comply with the provisions of proposed rule 18f-4. In the DERA staff analysis, 68%

⁸⁶⁵ We believe, however, that the Commission has accounted for the resources available to small entities by providing some flexibility in the proposed requirement that each fund that is required to adopt and implement a program must *reasonably* segregate the functions associated with the portfolio management of the fund.

of all funds sampled did not have any exposure to derivatives transactions, which would indicate that many funds, including many small funds, will be unaffected by the proposed rule. However, for small funds that would be affected by our proposed rule, providing an exemption or consolidating or simplifying the proposed rule for small entities could subject investors of small funds that invest in derivatives to a higher degree of risk than investors to large funds that would be required to comply with the proposed elements of the rule.

The undue speculation concern expressed in section 1(b)(7) of the Act and the asset sufficiency concern reflected in section 1(b)(8) of the Act that the proposed rule is designed to address applies to both small as well as large funds. As discussed throughout this Release, we believe that the proposed rule would result in multiple investor protection benefits, and these benefits should apply to investors in smaller funds as well as investors in larger funds. We therefore do not believe it would be appropriate to exempt funds that are small entities from the portfolio limitation provisions or the asset segregation provisions of proposed rule 18f-4 or establish different requirements applicable to funds of different sizes under these provisions to account for resources available to small entities. Further, we believe that all of the proposed elements of rule 18f-4 should work together to produce the anticipated investor protection benefits, and therefore do not believe it is appropriate to except or modify the requirements for smaller funds because we believe this would limit the benefits to investors in such funds.

We also do not believe it would be appropriate to exempt funds that are small entities from the derivatives risk management requirements of proposed rule 18f-4 or establish different requirements applicable to funds of different sizes. We believe that all of the proposed program elements would be necessary for a fund to effectively assess and manage its derivatives risk, and we anticipate that all of the proposed program elements would work together to produce the anticipated investor protection benefits. We do note that the costs associated with proposed rule 18f-4 would vary depending on the fund's particular circumstances, and thus the proposed rule could result in different burdens on funds' resources. In particular, we expect that a fund that pursues an investment strategy that involves greater derivatives risk may have greater costs associated with its

derivatives risk management program. However, we believe that it is appropriate to correlate the costs associated with the proposed rule with the level of derivatives risk facing a fund, and not necessarily with the fund's size. Thus, to the extent a fund that is a small entity faces relatively little derivatives risk, it would incur relatively low costs to comply with proposed rule 18f-4. And, to the extent that a fund that is a small entity that engages in a limited amount of derivatives transactions pursuant to the proposed rule, and does not use complex derivatives transactions, such small entity would not be required to adopt and implement a derivatives risk management program.

2. Form N-PORT and Form N-CEN

Similarly, we do not believe that the interests of investors would be served by exempting funds that are small entities from the proposed disclosure and reporting requirements, or subjecting these funds to different disclosure and reporting requirements than larger funds. We believe that all fund investors, including investors in funds that are small entities, would benefit from disclosure and reporting requirements that would permit them to make investment choices that better match their risk tolerances. We also believe that all fund investors would benefit from enhanced Commission monitoring and oversight of the fund industry, which we anticipate would result from the proposed disclosure and reporting requirements.

G. General Request for Comment

The Commission requests comments regarding this analysis. We request comment on the number of small entities that would be subject to our proposal and whether our proposal would have any effects that have not been discussed. We request that commenters describe the nature of any effects on small entities subject to our proposal and provide empirical data to support the nature and extent of such effects. We also request comment on the estimated compliance burdens of our proposal and how they would affect small entities.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), the Commission must advise OMB whether a proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results in or is likely to result in:

- An annual effect on the economy of \$100 million or more;
 - A major increase in costs or prices for consumers or individual industries;
 - or
 - Significant adverse effects on competition, investment, or innovation.
- We request comment on whether our proposal would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:
- The potential effect on the U.S. economy on an annual basis;
 - Any potential increase in costs or prices for consumers or individual industries; and
 - Any potential effect on competition, investment, or innovation.

Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. Statutory Authority

The Commission is proposing new rule 18f-4 under the authority set forth in sections 6(c), 12(a), 31(a), and 38(a) of the Investment Company Act of 1940 [15 U.S.C. 80a-6(c), 80a-31(a), 80a-12(a), and 80a-38(a)]. The Commission is proposing amendments to proposed Form N-PORT and Form N-CEN under the authority set forth in sections 8, 30, and 38 of the Investment Company Act of 1940 [15 U.S.C. 80a-8, 80a-30, 80a-38].

Text of Rules and Forms

List of Subjects in 17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

- 1. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-34(d), 80a-37, 80a-39, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

- 2. Section § 270.18f-4 is added to read as follows:

§ 270.18f-4 Exemption from the requirements of section 18 and section 61 for certain senior securities transactions.

(a) A registered open-end or closed-end company or business development company (each, including any separate series thereof, a "fund") may enter into derivatives transactions, notwithstanding the requirements of

section 18(a)(1) (15 U.S.C. 80a–18(a)(1)), section 18(c) (15 U.S.C. 80a–18(c)), section 18(f)(1) (15 U.S.C. 80a–18(f)(1)) and section 61 (15 U.S.C. 80a–61) of the Investment Company Act; provided that:

(1) The fund complies with one of the following portfolio limitations such that, immediately after entering into any senior securities transaction:

(i) The aggregate exposure of the fund does not exceed 150% of the value of the fund's net assets; or

(ii) The fund's full portfolio VaR is less than the fund's securities VaR and the aggregate exposure of the fund does not exceed 300% of the value of the fund's net assets.

(2) The fund manages the risks associated with its derivatives transactions by maintaining qualifying coverage assets, identified on the books and records of the fund as specified in paragraph (a)(6)(v) of this section and determined at least once each business day, with a value equal to at least the sum of the fund's aggregate mark-to-market coverage amounts and risk-based coverage amounts.

(3) Except as provided in paragraph (a)(4) of this section, the fund adopts and implements a written derivatives risk management program ("program") that is reasonably designed to assess and manage the risks associated with the fund's derivatives transactions.

(i) *Required program elements.* Each fund required to adopt and implement a program must adopt and implement written policies and procedures reasonably designed to:

(A) Assess the risks associated with the fund's derivatives transactions, including an evaluation of potential leverage, market, counterparty, liquidity, and operational risks, as applicable, and any other risks considered relevant;

(B) Manage the risks associated with the fund's derivatives transactions (including the risks identified in paragraph (a)(3)(i)(A) of this section, as applicable), including by:

(1) Monitoring whether the fund's use of derivatives transactions is consistent with any investment guidelines established by the fund or the fund's investment adviser, the relevant portfolio limitation applicable to the fund under this section, and relevant disclosure to investors; and

(2) Informing persons responsible for portfolio management of the fund or the fund's board of directors, as appropriate, regarding material risks arising from the fund's derivatives transactions;

(C) Reasonably segregate the functions associated with the program from the portfolio management of the fund; and

(D) Periodically review and update the program at least annually, including any models (including any VaR calculation models used by the fund during the period covered by the review), measurement tools, or policies and procedures that are part of, or used in, the program to evaluate their effectiveness and reflect changes in risks over time.

(ii) *Board approval and oversight of the program.* (A) The fund shall obtain initial approval of the program, as well as any material change to the program, from the fund's board of directors, including a majority of directors who are not interested persons of the fund;

(B) The fund's board of directors, including a majority of directors who are not interested persons of the fund, shall review, no less frequently than quarterly, a written report prepared by the person designated under paragraph (a)(3)(ii)(C) of this section that describes the adequacy of the fund's program and the effectiveness of its implementation; and

(C) The fund shall designate an employee or officer of the fund or the fund's investment adviser (who may not be a portfolio manager of the fund) responsible for administering the policies and procedures incorporating the elements of paragraphs (a)(3)(i)(A) through (D) of this section, whose designation must be approved by the fund's board of directors, including a majority of the directors who are not interested persons of the fund.

(4) A derivatives risk management program shall not be required if the fund complies, and monitors its compliance, with a portfolio limitation under which:

(i) Immediately after entering into any derivatives transaction the aggregate exposure associated with the fund's derivatives transactions does not exceed 50% of the value of the fund's net assets; and

(ii) The fund does not enter into complex derivatives transactions.

(5) The fund's board of directors (including a majority of the directors who are not interested persons of the fund) has:

(i) Approved the particular portfolio limitation under which the fund will operate pursuant to paragraph (a)(1) of this section and, if applicable, paragraph (a)(4) of this section;

(ii) Approved policies and procedures reasonably designed to provide for the fund's maintenance of qualifying coverage assets, as required under paragraph (a)(2) of this section; and

(iii) If the fund is required to adopt and implement a derivatives risk management program, taken the actions

specified in paragraph (a)(3)(ii) of this section.

(6) The fund maintains:

(i) A written record of each determination made by the fund's board of directors under paragraph (a)(5)(i) of this section with respect to the portfolio limitation applicable to the fund for a period of not less than five years (the first two years in an easily accessible place) following each determination;

(ii) A written copy of the policies and procedures approved by the board of directors under paragraph (a)(5)(ii) of this section that are in effect, or at any time within the past five years were in effect, in an easily accessible place; and

(iii) If the fund is required to adopt and implement a derivatives risk management program:

(A) A written copy of the policies and procedures adopted by the fund under paragraph (a)(3) of this section that are in effect, or at any time within the past five years were in effect, in an easily accessible place;

(B) Copies of any materials provided to the board of directors in connection with its approval of the derivatives risk management program, including any material changes to the program, and any written reports provided to the board of directors relating to the program, for at least five years after the end of the fiscal year in which the documents were provided, the first two years in an easily accessible place; and

(C) Records documenting the periodic reviews and updates conducted in accordance with paragraph (a)(3)(i)(D) of this section (including any updates to any VaR calculation models used by the fund and the basis for any material changes thereto), for a period of not less than five years (the first two years in an easily accessible place) following each review or update.

(iv) A written record demonstrating that immediately after the fund entered into any senior securities transaction, the fund complied with the portfolio limitation applicable to the fund immediately after entering into the senior securities transaction, reflecting the fund's aggregate exposure, the value of the fund's net assets and, if applicable, the fund's full portfolio VaR and its securities VaR, for a period of not less than five years (the first two years in an easily accessible place) following each senior securities transaction entered into by the fund.

(v) A written record reflecting the mark-to-market coverage amount and the risk-based coverage amount for each derivatives transaction entered into by the fund and identifying the qualifying coverage assets maintained by the fund with respect to the fund's aggregate

mark-to-market and risk-based coverage amounts, as determined by the fund at least once each business day, for a period of not less than five years (the first two years in an easily accessible place).

(b) A fund may enter into financial commitment transactions, notwithstanding the requirements of section 18(a)(1) (15 U.S.C. 80a–18(a)(1)), section 18(c) (15 U.S.C. 80a–18(c)), section 18(f)(1) (15 U.S.C. 80a–18(f)(1)) and section 61 (15 U.S.C. 80a–61) of the Investment Company Act; provided that:

(1) The fund maintains qualifying coverage assets, identified on the books and records of the fund as specified in paragraph (b)(3)(ii) of this section and determined at least once each business day, with a value equal to at least the fund's aggregate financial commitment obligations.

(2) The fund's board of directors (including a majority of the directors who are not interested persons of the fund) has approved policies and procedures reasonably designed to provide for the fund's maintenance of qualifying coverage assets, as required under paragraph (b)(1) of this section.

(3) The fund maintains:

(i) A written copy of the policies and procedures approved by the board of directors under paragraph (b)(2) of this section that are in effect, or at any time within the past five years were in effect, in an easily accessible place; and

(ii) A written record reflecting the amount of each financial commitment obligation associated with each financial commitment transaction entered into by the fund and identifying the qualifying coverage assets maintained by the fund with respect to each financial commitment obligation, as determined by the fund at least once each business day, for a period of not less than five years (the first two years in an easily accessible place).

(c) *Definitions.* (1) *Complex derivatives transaction* means any derivatives transaction for which the amount payable by either party upon settlement date, maturity or exercise:

(i) Is dependent on the value of the underlying reference asset at multiple points in time during the term of the transaction; or

(ii) Is a non-linear function of the value of the underlying reference asset, other than due to optionality arising from a single strike price.

(2) *Derivatives transaction* means any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument (“derivatives instrument”) under which the fund is or

may be required to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination, whether as a margin or settlement payment or otherwise.

(3) *Exposure* means the sum of the following amounts, determined immediately after the fund enters into any senior securities transaction:

(i) The aggregate notional amounts of the fund's derivatives transactions, provided that a fund may net any directly offsetting derivatives transactions that are the same type of instrument and have the same underlying reference asset, maturity and other material terms;

(ii) The aggregate financial commitment obligations of the fund; and

(iii) The aggregate indebtedness (and with respect to any closed-end fund or business development company, involuntary liquidation preference) with respect to any senior securities transaction entered into by the fund pursuant to section 18 (15 U.S.C. 80a–18) or 61 (15 U.S.C. 80a–61) of the Investment Company Act without regard to the exemption provided by this section.

(4) *Financial commitment transaction* means any reverse repurchase agreement, short sale borrowing, or any firm or standby commitment agreement or similar agreement (such as an agreement under which a fund has obligated itself, conditionally or unconditionally, to make a loan to a company or to invest equity in a company, including by making a capital commitment to a private fund that can be drawn at the discretion of the fund's general partner).

(5) *Financial commitment obligation* means the amount of cash or other assets that the fund is conditionally or unconditionally obligated to pay or deliver under a financial commitment transaction. Where the fund is conditionally or unconditionally obligated to deliver a particular asset, the financial commitment obligation shall be the value of the asset, determined at least once each business day.

(6) *Mark-to-market coverage amount* means, for each derivatives transaction, at any time of determination under this section, the amount that would be payable by the fund if the fund were to exit the derivatives transaction at such time; provided that:

(i) If the fund has entered into a netting agreement that allows the fund to net its payment obligations with respect to multiple derivatives transactions, the mark-to-market

coverage amount for those derivatives transactions may be calculated as the net amount that would be payable by the fund, if any, with respect to all derivatives transactions covered by the netting agreement; and

(ii) The fund's mark-to-market coverage amount for a derivatives transaction may be reduced by the value of assets that represent variation margin or collateral for the amounts payable referred to in paragraph (c)(6) of this section with respect to the derivatives transaction.

(7) *Notional amount* means, with respect to any derivatives transaction:

(i) The market value of an equivalent position in the underlying reference asset for the derivatives transaction (expressed as a positive amount for both long and short positions); or

(ii) The principal amount on which payment obligations under the derivatives transaction are calculated; and

(iii) Notwithstanding paragraphs (c)(7)(i) and (ii) of this section:

(A) For any derivatives transaction that provides a return based on the leveraged performance of a reference asset, the notional amount shall be multiplied by the leverage factor;

(B) For any derivatives transaction for which the reference asset is a managed account or entity formed or operated primarily for the purpose of investing in or trading derivatives transactions, or an index that reflects the performance of such a managed account or entity, the notional amount shall be determined by reference to the fund's pro rata share of the notional amounts of the derivatives transactions of such account or entity; and

(C) For any complex derivatives transaction, the notional amount shall be an amount equal to the aggregate notional amount of derivatives instruments, excluding other complex derivatives transactions, reasonably estimated to offset substantially all of the market risk of the complex derivatives transaction.

(8) *Qualifying coverage assets* means assets of the fund described in paragraphs (c)(8)(i) through (iii) of this section, provided that the total amount of a fund's qualifying coverage assets shall not exceed the fund's net assets, and that assets of the fund maintained as qualifying coverage assets shall not be used to cover both a derivatives transaction and a financial commitment transaction:

(i) Cash and cash equivalents;

(ii) With respect to any derivatives transaction or financial commitment transaction under which the fund may satisfy its obligations under the

transaction by delivering a particular asset, that particular asset; and

(iii) With respect to any financial commitment obligation, assets that are convertible to cash or that will generate cash, equal in amount to the financial commitment obligation, prior to the date on which the fund can be expected to be required to pay such obligation or that have been pledged with respect to the financial commitment obligation and can be expected to satisfy such obligation, determined in accordance with policies and procedures approved by the fund's board of directors as provided in paragraph (b)(2) of this section.

(9) Risk-based coverage amount means, for each derivatives transaction, an amount, in addition to the derivative transaction's mark-to-market coverage amount, that represents, at any time of determination under this section, a reasonable estimate of the potential amount payable by the fund if the fund were to exit the derivatives transaction under stressed conditions, determined in accordance with policies and procedures (which must take into account, as relevant, the structure, terms and characteristics of the derivatives transaction and the underlying reference asset) approved by the fund's board of directors as provided in paragraph (a)(5) of this section; provided that:

(i) The risk-based coverage amount may be determined on a net basis for derivatives transactions that are covered by a netting agreement that allows the fund to net its payment obligations with respect to multiple derivatives transactions, in accordance with the terms of the netting agreement; and
(ii) The fund's risk-based coverage amount for a derivatives transaction may be reduced by the value of assets that represent initial margin or collateral for the potential amounts payable referred to in paragraph (c)(9) of this section with respect to the derivatives transaction.

(10) Senior securities transaction means any derivatives transaction, financial commitment transaction, or any transaction involving a senior security entered into by the fund pursuant to section 18 (15 U.S.C. 80a-18) or 61 (15 U.S.C. 80a-61) of the Act without regard to the exemption provided by this section.

(11) Value-at-risk or VaR means an estimate of potential losses on an instrument or portfolio, expressed as a positive amount in U.S. dollars, over a specified time horizon and at a given confidence interval, provided that:

(i) For purposes of the portfolio limitation described in (a)(1)(ii) of this section:

(A) A fund's "securities VaR" means the VaR of the fund's portfolio of securities and other investments, but excluding any derivatives transactions;

(B) A fund's "full portfolio VaR" means the VaR of the fund's entire portfolio, including securities, other investments and derivatives transactions; and

(C) A fund must apply its VaR model consistently when calculating the fund's securities VaR and the fund's full portfolio VaR.

(ii) Any VaR model used by a fund for purposes of determining the fund's securities VaR and full portfolio VaR must:

(A) Take into account and incorporate all significant, identifiable market risk factors associated with a fund's investments, including, as applicable:

(1) Equity price risk, interest rate risk, credit spread risk, foreign currency risk and commodity price risk;

(2) Material risks arising from the nonlinear price characteristics of a fund's investments, including options and positions with embedded optionality; and

(3) The sensitivity of the market value of the fund's investments to changes in volatility;

(B) Use a 99% confidence level and a time horizon of not less than 10 and not more than 20 trading days; and

(C) If using historical simulation, include at least three years of historical market data.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 3. The authority citation for part 274 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, 80a-29, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 4. Further amend Form N-CEN (referenced in 274.101) as proposed at 80 FR 33699, June 12, 2015, and further amended at 80 FR 62387, October 15, 2015, by, in Part C, adding paragraphs k and l to Item 31 to read as follows:

§ 274.101 Form N-CEN, annual report of registered investment companies.

* * * * *

Part C. Additional Questions for Management Investment Companies

* * * * *

Item 31. * * *

* * * * *

k. Rule 18f-4(a)(1)(i) (17 CFR 270.18f-4(a)(1)(i)): _____

l. Rule 18f-4(a)(1)(ii) (17 CFR 270.18f-4(a)(1)(ii)): _____

* * * * *

■ 5. Amend Form N-PORT (referenced in 274.150), as proposed at 80 FR 33712, June 12, 2015, and further amended at 80 FR 62387, October 15, 2015, by:

■ a. In Part C, revising Item C. 11.c.viii; and

■ b. In Part C, adding Item C.11.c.ix.

The revision and addition read as follows:

§ 274.150 Form N-PORT, Monthly portfolio holdings report.

* * * * *

Part C: Schedule of Portfolio Investments

* * * * *

Item C.11. * * *

c. * * *

viii. For funds that are required to implement a risk management program under rule 18f-4(a)(3) under the Investment Company Act, provide:

1. Gamma.

2. Vega.

* * * * *

ix. Unrealized appreciation or depreciation.

* * * * *

By the Commission.

Dated: December 11, 2015.

Brent J. Fields,

Secretary.

[FR Doc. 2015-31704 Filed 12-24-15; 8:45 am]

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Part III

Securities and Exchange Commission

17 CFR Parts 240, 242, 249

Regulation of NMS Stock Alternative Trading Systems; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, 249

[Release No. 34-76474; File No. S7-23-15]

RIN 3235-AL66

Regulation of NMS Stock Alternative Trading Systems

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing to amend the regulatory requirements in Regulation ATS under the Securities Exchange Act of 1934 (“Exchange Act”) applicable to alternative trading systems (“ATSs”) that transact in National Market System (“NMS”) stocks (hereinafter referred to as (“NMS Stock ATSs”), including so called “dark pools.” First, the Commission is proposing to amend Regulation ATS to adopt Form ATS-N to provide information about the broker-dealer that operates the NMS Stock ATS (“broker-dealer operator”) and the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS, and to provide detailed information about the manner of operations of the ATS. Second, the Commission is proposing to make filings on Form ATS-N public by posting certain Form ATS-N filings on the Commission’s internet Web site and requiring each NMS Stock ATS that has a Web site to post on the NMS Stock ATS’s Web site a direct URL hyperlink to the Commission’s Web site that contains the required documents. Third, the Commission is proposing to amend Regulation ATS to provide a process for the Commission to determine whether an entity qualifies for the exemption from the definition of “exchange” under Exchange Act Rule 3a1-1(a)(2) with regard to NMS stocks and declare an NMS Stock ATS’s Form ATS-N either effective or, after notice and opportunity for hearing, ineffective. Fourth, under the proposal, the Commission could suspend, limit, or revoke the exemption from the definition of “exchange” after providing notice and opportunity for hearing. Fifth, the Commission is proposing to require that an ATS’s safeguards and procedures to protect subscribers’ confidential trading information be written. The Commission is also proposing to make conforming changes to Regulation ATS and Exchange Act Rule 3a1-1(a). Additionally, the Commission is requesting comment about, among other things, changing the requirements of the

exemption from the definition of “exchange” pursuant to Exchange Act Rule 3a1-1(a) for ATSs that facilitate transactions in securities other than NMS stocks. Lastly, the Commission is also requesting comment regarding its consideration to amend Exchange Act Rules 600 and 606 to improve transparency around the handling and routing of institutional customer orders by broker-dealers.

DATES: Comments should be received on or before February 26, 2016.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed>); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-23-15 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-23-15. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments will also be available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission’s Web site. To ensure direct electronic receipt of such notifications, sign up through the “Stay Connected” option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT:

Tyler Raimo, Senior Special Counsel, at

(202) 551-6227; Matthew Cursio, Special Counsel, at (202) 551-5748; Marsha Dixon, Special Counsel, at (202) 551-5782; Jennifer Dodd, Special Counsel, at (202) 551-5653; David Garcia, Special Counsel, at (202) 551-5681; or Derek James, Special Counsel, at (202) 551-5792; Office of Market Supervision, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing: (1) New Form ATS-N under the Exchange Act provided by Rule 3a1-1(a) of the Exchange Act [17 CFR 240.3a1-1(a)], which NMS Stock ATSs would rely on to qualify for the exemption from the definition of “exchange”; (2) to amend Regulation ATS under the Exchange Act [17 CFR 242.300 through 242.303] to add new Rule 304 to provide new conditions for NMS Stock ATSs seeking to rely on the exemption from the definition of “exchange”; and (3) related amendments to Rule 300, 301, and 303 of Regulation ATS and Rule 3a1-1(a) under the Exchange Act [17 CFR 242.300; 17 CFR 242.301, 17 CFR 242.303; and 17 CFR 240.3a1-1]. The Commission is also proposing amendments to Rules 301(b)(10) and 303 of Regulation ATS under the Exchange Act [17 CFR 242.301(b)(10) and 17 CFR 242.303] to require all ATSs to make and keep written safeguards and written procedures to protect subscribers’ confidential trading information.

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- XVI. Statutory Authority and Text of Proposed Amendments

I. Introduction

Section 11A(a)(2) of the Exchange Act,¹ enacted as part of the Securities Acts Amendments of 1975 (“1975 Amendments”),² directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under the Exchange Act to facilitate the establishment of a national market system for securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Exchange Act.³ Among the findings and objectives in Section 11A(a)(1) are that “[n]ew data processing and communications techniques create the opportunity for more efficient and effective market operations”⁴ and “[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the economically efficient execution of securities transactions”⁵ and the “practicability of brokers executing investors’ orders in the best markets.”⁶ Congress also found, as noted by the Commission when it adopted Regulation ATS, that it was in the public interest to assure “fair

¹ 15 U.S.C. 78k–1(a)(2).

² Public Law 94–29, 89 Stat. 97 (1975).

³ 15 U.S.C. 78k–1(a)(1).

⁴ Section 11A(a)(1)(B) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(B).

⁵ Section 11A(a)(1)(C)(i) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C)(i).

⁶ Section 11A(a)(1)(C)(iv) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C)(iv).

competition . . . between exchange markets and markets other than exchange markets.”⁷ Congress recognized that the securities markets dynamically change and, accordingly, granted the Commission broad authority to oversee the implementation, operation, and regulation of the national market system in accordance with Congressional goals and objectives.⁸

In December 1998, the Commission adopted Regulation ATS to advance the goals of the national market system and establish a regulatory framework for ATSS.⁹ At that time, there had been a surge in a variety of alternative trading systems that traded NMS stocks and furnished services traditionally provided by national securities exchanges,¹⁰ such as matching counterparties’ orders, executing trades, operating limit order books, and facilitating active price discovery.¹¹ The Commission observed at the time that, among other things, activity on ATSS was not fully disclosed, or accessible, to investors, and that these systems had no obligation to provide investors a fair opportunity to participate on the systems or to treat their participants fairly.¹² The Commission noted in the Regulation ATS Adopting Release that while ATSS at that time operated in a manner similar to registered national securities exchanges, each type of trading center was subject to different regulatory regimes, and that these differences created disparities that affected investor protection and the operation of the markets as a whole, calling into question the fairness of the then-current regulatory requirements.¹³

⁷ See Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (Regulation of Exchanges and Alternative Trading Systems, hereinafter “Regulation ATS Adopting Release”) at 70858 n.113 and accompanying text (citing Section 11A(a)(1)(C)(ii) of the Exchange Act, 15 U.S.C. 78k-1(a)(1)(C)(ii)). The Commission also noted that a fundamental goal of a national market system was to “achieve a market characterized by economically efficient executions, fair competition, [and the] broad dissemination of basic market information.” See *id.* at 70858 n.113 (quoting S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 101).

⁸ See *id.* at 70858 n.110 and accompanying text (citing S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 8-9). The Commission also noted that Congress explicitly rejected mandating specific components of a national market system because of uncertainty as to how technological and economic changes would affect the securities market. See *id.* at 70858 n.109 and accompanying text (citing S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 8-9).

⁹ See generally Regulation ATS Adopting Release, *supra* note 7.

¹⁰ See *id.* at 70845.

¹¹ See *id.* at 70848.

¹² See *id.* at 70845.

¹³ See *id.* at 70845-46 (noting that alternative trading systems prior to the adoption of Regulation ATS were private markets, which were open to only

In response to the substantial changes in the way securities were traded at the time, and the regulatory disparity between registered national securities exchanges and non-exchange markets, the Commission adopted a new regulatory framework that the Commission believed would encourage market innovation, while ensuring basic investor protections,¹⁴ by giving securities markets a choice to register as national securities exchanges, or to register as broker-dealers and comply with Regulation ATS. Regulation ATS was designed to permit market centers meeting the Commission’s updated interpretation of the definition of “exchange,” as set forth in Exchange Act Rule 3b-16,¹⁵ to select the regulatory framework more applicable to their business models. Among other things, Regulation ATS was intended to better integrate ATSS into the national market system, and ensure that market participants have fair access to ATSS with significant volume.¹⁶

In the seventeen years since the Commission adopted Regulation ATS, the equity markets have evolved significantly, resulting in an increased number of trading centers and a reduced concentration of trading activity in NMS stocks.¹⁷ The growth in trading centers and trading activity has been fueled primarily by advances in technology for generating, routing, and executing orders. These technologies have markedly improved the speed, capacity, and sophistication of the trading mechanisms and processes that are available to market participants. Today, ATSS that trade NMS stocks have become an integral part of the national market system, as the number of these ATSS, and the volume of NMS stocks transacted on them, has increased significantly since the adoption of Regulation ATS.¹⁸ Despite the emergence of ATSS as a significant

chosen subscribers, and were regulated as broker-dealers and not like registered national securities exchanges).

¹⁴ See *id.* at 70847.

¹⁵ 17 CFR 240.3b-16.

¹⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70846, 70874. The Commission also notes that when it adopted Regulation ATS, it stated its belief that the Commission’s regulation of markets should both accommodate traditional market structures and provide sufficient flexibility to ensure that new markets promote fairness, efficiency, and transparency. See Regulation ATS Adopting Release, *supra* note 7, at 70846.

¹⁷ See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014), 72262 (adopting final rules for systems compliance and integrity) (“SCI Adopting Release”) at 72262 n.105 and n.106 and accompanying text (discussing the increased significance of NMS Stock ATSS).

¹⁸ See *infra* notes 116-122 and accompanying text.

source of liquidity in NMS stocks among today’s markets, and the fact that ATSS compete with, and operate with almost the same complexity and sophistication as, registered national securities exchanges, the regulatory requirements applicable to ATSS have remained, for the most part, the same since Regulation ATS was adopted.¹⁹

Although ATSS and registered national securities exchanges generally operate in a similar manner and compete as trading centers for order flow in NMS stocks, each of these types of trading centers is subject to a separate regulatory regime with a different mix of benefits and obligations, including with respect to their obligations to disclose information about their trading operations. Unlike ATSS, national securities exchanges must register with the Commission pursuant to Section 6 of the Exchange Act,²⁰ and undertake self-regulatory²¹ obligations over their members. Before a national securities exchange may commence operations, the Commission must approve the national securities exchange’s application for registration filed on Form 1. Section 6(b) of the Exchange Act requires, among other things, that the national securities exchange be so organized and have the capacity to carry out the purposes of the Exchange Act and to comply and enforce compliance by its members, and persons associated with its members, with the federal

¹⁹ The Commission notes that when the Commission adopted Regulation NMS, it also amended Regulation ATS to lower the threshold that triggers the Regulation ATS fair access requirements from 20% of the average daily volume in a security to 5%. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37550 (June 29, 2005) (“Regulation NMS Adopting Release”). See also *infra* notes 92-95 and accompanying text (discussing the fair access requirements of Regulation ATS).

When adopting Regulation ATS, the Commission noted that the 20% volume threshold was based on current market conditions, and that if such conditions changed, or if the Commission believed that alternative trading systems with less than 20% of the trading volume were engaging in inappropriate exclusionary practices or in anticompetitive conduct, the Commission could revisit the fair access thresholds. See Regulation ATS Adopting Release, *supra* note 7, at 70873 n.245. The Commission also stated its intent to monitor the impact and effect of the fair access rules, as well as the practices of ATSS, and consider changing the rules if necessary to prevent anticompetitive behavior and ensure that qualified investors have access to significant sources of liquidity in the securities markets. See *id.*

See also *infra* note 107 and accompanying text (discussing amendments to Regulation ATS in connection with the adoption of Regulation SCI).

²⁰ 15 U.S.C. 78f.

²¹ Section 3(a)(26) of the Exchange Act defines a self-regulatory organization (“SRO”) as any national securities exchange, registered securities association, registered clearing agency, or (with limitations) the Municipal Securities Rulemaking Board. See 15 U.S.C. 78c(a)(26).

securities laws and the rules of the exchange.²² Both a national securities exchange's registration application and the Commission's order approving the application are public. After registering, a national securities exchange must file with the Commission any proposed changes to its rules.²³ The initial application on Form 1, amendments thereto, and filings for proposed rule changes, in combination, publicly disclose important information about national securities exchanges, such as trading services and fees. As an SRO, a national securities exchange enjoys certain unique benefits, such as limited immunity from private liability with respect to its regulatory functions and the ability to receive market data revenue, among others.

Although falling within the statutory definition of "exchange," an ATS is exempt from that definition if it complies with Regulation ATS. Regulation ATS includes the requirement that, as an alternative to registering as a national securities exchange, an ATS must register as a broker-dealer with the Commission, which entails becoming a member of an SRO, such as the Financial Industry Regulatory Authority ("FINRA").²⁴ Unlike national securities exchanges, ATSs are not approved by the Commission, but are instead required only to provide notice of their operations by filing a Form ATS with the Commission 20 days before commencing operations as an ATS.²⁵ Form ATS is "deemed confidential when filed,"²⁶ and it only requires an ATS to disclose limited aspects of the ATS's operations. ATSs are neither required to file proposed rule changes with the Commission nor otherwise publicly disclose their trading services, operations, or fees.

The Commission is concerned that the current regulatory requirements relating to operational transparency for ATSs, particularly those that execute trades in NMS stocks, may no longer fully meet

the goals of furthering the public interest and protecting investors. Today, ATSs account for approximately 15.4% of the total dollar volume in NMS stocks²⁷ and as noted, compete with, and operate with respect to trading in a manner similar to, registered national securities exchanges. Unlike registered national securities exchanges, however, there is limited public information available to market participants about the operations of ATSs, including how orders and other trading interest may interact, match, and execute on ATSs. The Commission is concerned that the differences between ATSs that trade NMS stocks and registered national securities exchanges with regard to operational transparency may be creating a competitive imbalance between two functionally similar trading centers that may trade the same security but are subject to different regulatory requirements. The Commission is also concerned that this difference in operational transparency disadvantages market participants by limiting their ability to adequately assess the relative merits of many trading centers.²⁸ Specifically, the Commission is concerned that the lack of operational transparency around ATSs limits market participants' ability to adequately discern how their orders interact, match, and execute on ATSs and to find the optimal market or markets for their orders.

The Commission is also concerned about the current lack of transparency around potential conflicts of interest that arise from the activities of the broker-dealer operator of the NMS Stock ATS and its affiliates²⁹ in connection with the ATS. As discussed herein, an ATS must register as a broker-dealer pursuant to Rule 301(b)(1) of Regulation ATS. This broker-dealer operator, its affiliates, or both, however, may also conduct brokerage or dealing activities in NMS stocks in addition to operating the ATS.³⁰ Broker-dealer operators may

also have affiliates that support the operations of the ATS or trade on it. The Commission notes that these multi-service broker-dealers that engage in brokerage and dealing activities, in addition to the operation of their ATSs, have become more prevalent since the adoption of Regulation ATS and the other services multi-service broker-dealers provide have become increasingly intertwined with the operation of their ATSs. Given the unique position that the broker-dealer operator and its affiliates occupy with regard to the operation of an ATS, potential conflicts of interest arise when the various business interests of the broker-dealer operator or its affiliates compete with the interests of market participants that access and trade on the ATS.³¹ Some of the recent settled actions against ATSs highlight this potential.³² As discussed further below, although the operations of most ATSs and their broker-dealer operators have become more closely connected, market participants receive limited information about the activities of the broker-dealer operator and its affiliates and the potential conflicts of interest that arise from these activities.

Transparency is a hallmark of the U.S. securities markets and a primary tool by which investors protect their own interests, and the Commission is concerned that the current lack of transparency around potential conflicts of interest of the broker-dealer operator may impede market participants from adequately protecting their interests when doing business on the NMS Stock ATS. The Commission preliminarily believes that if market participants have more information about the operations of NMS Stock ATSs and the activities of the broker-dealer operators and the broker-dealer operators' affiliates, they could better evaluate whether to do business with an ATS and make more informed decisions about where to route their orders.³³

²² See Section 6(b)(1) of the Exchange Act, 15 U.S.C. 78f(b)(1). The Commission must also find that the national securities exchange has rules that meet certain criteria. See generally Exchange Act Section 6(b)(2) through (10), 15 U.S.C. 78f(b)(2) through (10).

²³ See generally Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b).

²⁴ Section 15(b)(8) of the Exchange Act requires a broker or dealer to become a member of a registered national securities association, unless it effects transactions in securities solely on an exchange of which it is a member. 15 U.S.C. 78o(b)(8).

²⁵ See Regulation ATS Adopting Release, *supra* note 7, at 70863 and *infra* Section II.B (discussing the current requirements of Regulation ATS applicable to all ATSs).

²⁶ See 17 CFR 242.301(b)(2)(vii).

²⁷ See *infra* Table 1 "NMS Stock ATSs Ranked by Dollar Trading Volume—March 30, 2015 to June 26, 2015." Total dollar trading volume on all exchanges and off-exchange trading in the second quarter of 2015 was approximately \$16.3 trillion and approximately 397 billion shares. See *id.*

²⁸ Market participants may include many different types of persons seeking to transact in NMS stocks, including broker-dealers and institutional or retail investors.

²⁹ The Commission is proposing to define "affiliate" for purposes of proposed Form ATS-N as described and discussed further below. See *infra* note 378 and accompanying text. See also Instruction G to proposed Form ATS-N.

³⁰ Throughout this release, broker-dealer operators of NMS Stock ATSs that also provide brokerage or dealing services in addition to operating an NMS Stock ATS are referred to as "multi-service broker-dealers".

³¹ See *infra* Section VII.A (discussing the relationship between NMS Stock ATSs and the other business functions of their broker-dealer operators). The Commission notes that, although it was concerned at the time of adoption of Regulation ATS about conflicts of interest that may be present when the broker-dealer operator of an ATS also performs other trading functions (see *infra* notes 530-532 and accompanying text discussing the Commission's concerns regarding the potential for misuse of confidential trading information that led to the adoption of Rule 301(b)(10)), the business structure of broker-dealers that operate NMS Stock ATSs has changed since 1998.

³² See *infra* note 375 and accompanying text.

³³ See, e.g., *infra* notes 187 and 189 and accompanying text (discussing a comment by the Consumer Federation of America about how more detailed information about ATS operations would

The Commission has long recognized that effective competition requires transparency and access across the national market system.³⁴ The Commission preliminarily believes that the proposals discussed below could promote more efficient and effective market operations by providing more transparency to market participants about the operations of ATSs and the potential conflicts of interest of the controlling broker-dealer operator and its affiliates.³⁵ The Commission preliminarily believes that the operational transparency rules being proposed today could increase competition among trading centers in regard to order routing and execution quality. For example, the proposed rules could reveal order interaction procedures that may result in the differential treatment of some order types handled by an NMS Stock ATS. This improved visibility, in turn, could cause market participants to shift order flow to NMS Stock ATSs that provide better opportunities for executions. The Commission preliminarily believes that the proposal could facilitate comparisons among trading centers in NMS stocks and increase competition by informing market participants about the operations of NMS Stock ATSs.

The Commission preliminarily believes that a wide range of market participants would benefit from the operational transparency that would result from the proposal. For example, many brokers subscribe to NMS Stock ATSs and route their orders, and those of their customers, to NMS Stock ATSs for execution. The Commission preliminarily believes that improved transparency about the operations of NMS Stock ATSs could aid brokers with meeting their best execution obligations

allow participants to assess whether it makes sense to trade on that venue, and a comment by Bloomberg Tradebook LLC that because buy-side representatives might not be customers of all ATSs, they could not assess order interaction that occurs across the market structure); and *infra* note 374 (citing recent enforcement actions settled by the Commission, many of which, such as the Liquidnet Settlement, the Pipeline Settlement, the UBS Settlement, and the ITC Settlement, included allegations that subscribers were fraudulently misled about the operations of certain ATSs).

³⁴ See generally Regulation ATS Adopting Release, *supra* note 7.

³⁵ See *infra* Sections XIII.B and C (analyzing the possible impact from the current lack of public disclosure of NMS Stock ATSs' operations, as well as disparate levels of information available to market participants about NMS Stock ATS operations and the activities of their broker-dealer operators and their affiliates; the competitive environment between national securities exchanges and NMS Stock ATSs, between NMS Stock ATSs, and between broker-dealers that operate NMS Stock ATSs and broker-dealers that do not operate NMS Stock ATSs; and the anticipated costs and benefits of improving transparency).

to their customers, as they can better assess the trading venues to which they route orders.³⁶ The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances (*i.e.*, at the best reasonably available price).³⁷ The Commission has not viewed the duty of best execution as inconsistent with the automated routing of orders or requiring automated routing on an order-by-order basis to the market with the best quoted price at the time.³⁸ Rather, the duty of best execution requires broker-dealers to periodically assess the quality of competing markets to assure that order flow is directed to the markets providing the most beneficial terms for their customer orders.³⁹

In addition, the Commission preliminarily believes that the proposal could also help customers of broker-dealers, whose orders are routed to an NMS Stock ATS for possible execution in the ATS, evaluate whether their broker-dealer fulfilled its duty of best-

³⁶ See, e.g., *infra* note 187 and accompanying text (noting that The Consumer Federation of America previously commented that Form ATS should require ATSs to provide "critical details about an ATS's participants, segmentation, and fee structure" because the "information will allow market participants, regulators, and third party analysts to assess whether an ATS's terms of access and service are such that it makes sense to trade on that venue").

³⁷ A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated in SRO rules and, through judicial and Commission decisions, in the antifraud provisions of the federal securities laws. See Order Execution Obligations, Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48322 (Sept. 12, 1996). See also *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 270, 273 (3d Cir. 1998) (en banc), cert. denied, 525 U.S. 811 (1998) (finding that failure to satisfy the duty of best execution can constitute fraud because a broker-dealer, in agreeing to execute a customer's order, makes an implied representation that it will execute it in a manner that maximizes the customer's economic gain in the transaction, and stating that "[T]he basis for the duty of best execution is the mutual understanding that the client is engaging in the trade—and retaining the services of the broker as his agent—solely for the purpose of maximizing his own economic benefit, and that the broker receives her compensation because she assists the client in reaching that goal."); *Matter of Marc N. Geman*, Securities Exchange Act Release No. 43963 (Feb. 14, 2001), *aff'd*, *Geman v. SEC*, 334 F.3d 1183 (10th Cir. 2003) (citing *Newton*, but deciding against finding a violation of the duty of best execution based on the record). See also Payment for Order Flow, Securities Exchange Act Release No. 34902 (Oct. 27, 1994), 59 FR 55006, 55009 (Nov. 2, 1994). If the broker-dealer intends not to act in a manner that maximizes the customer's economic gain when he accepts the order and does not disclose this to the customer, a trier of fact could find that the broker-dealer's implied representation was false. See *Newton*, 135 F.3d at 273–274.

³⁸ See Regulation NMS Adopting Release, *supra* note 19, at 37538.

³⁹ *Id.*

execution. The Commission preliminarily believes that institutional investors, who may subscribe to an NMS Stock ATS or whose orders may be routed to an NMS Stock ATS by their brokers, should have more information about how NMS Stock ATSs operate, including how the ATS may match and execute customer orders.⁴⁰ The Commission preliminarily believes that additional information about how NMS Stock ATSs operate could aid these investors in evaluating the routing decisions of their brokers and understanding whether their broker routed their orders to a trading venue that best fits their needs. To illustrate this point, institutional investors would likely find it useful to know whether an NMS Stock ATS provides execution priority to customer order flow, uses strict price-time priority rules to rank and execute orders, or applies certain execution allocation methodologies for institutional orders. Such information could permit an institutional investor to compare NMS Stock ATSs against each other, as well as against national securities exchanges, to determine which trading centers would best fit its needs. Additionally, there may be market participants, who may not currently subscribe to an NMS Stock ATS, that may wish to obtain information about how a particular NMS Stock ATS operates before sending orders to that trading venue.

This proposal is primarily designed to provide market participants with greater transparency around the operations of

⁴⁰ See, e.g., Consumer Federation of America letter, *infra* note 175, at 22, 37–38 (expressing support for requiring all ATSs to publicly disclose Form ATS "so that the public can see how these venues operate," and opining that the Commission should "undertake an exhaustive investigation of the current order types, requiring exchanges and all ATSs . . . to disclose in easily understandable terms what their purpose is, how they are used in practice, who is using them, and why they are not discriminatory or resulting in undue benefit or harm to any traders"); Citadel letter, *infra* note 214, at 4 (expressing the view that "dark pools should be subject to increased transparency," and that "ATS operational information and filings should be publicly available"); KOR Group letter, *infra* note 175, at 12 (opining that the fact that "ATS filings are hidden from the public while the burden is on SROs to file publicly . . . does not serve the public interest in any way" and that there "should not be any reasoned argument against" making Form ATS publicly available); Liquidnet letter #1, *infra* note 166, at D–5–6, –11 (stating that the Commission should require institutional brokers, including institutional ATSs, to disclose to their customers specific order handling practices, including identification of external venues to which the broker routes orders, the process for crossing orders with other orders, execution of orders as agent and principal, a detailed description of the operation and function of each ATS or trading desk operated by the broker, and a clear and detailed description of each algorithm and order type offered by the broker and expressing the view that Form ATS should be made publicly available).

NMS Stock ATSs and potential conflicts of interest that may arise involving the broker-dealer operator and its affiliates. The proposed rules would require public, detailed information to be disclosed about the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS, including: Their operation of non-ATS trading centers and other NMS Stock ATSs; the products and services offered to subscribers; any arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS of the broker-dealer operator or its affiliates; the use of smart order routers (“SORs”) (or similar functionality) and algorithms used to send or receive orders or other trading interest to or from the NMS Stock ATS; shared employees of the NMS Stock ATS and third parties used to operate the NMS Stock ATS; any differences in the availability of services, functionalities, or procedures to subscribers and the availability of those services, functionalities, or procedures to the broker-dealer operator or its affiliates; and the NMS Stock ATS’s safeguards and procedures to protect subscribers’ confidential trading information. Form ATS–N would also require detailed information about the operations of the NMS Stock ATS, including: Any eligibility requirements and any terms and conditions imposed for subscribers; the NMS Stock ATS’s hours of operation; the types of orders or other trading interest that can be entered on the NMS Stock ATS; any connectivity, order entry, and co-location procedures or services; the segmentation of order flow (and notice given about segmentation); the display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling and execution procedures; procedures governing the suspension of trading and trading during a system disruption or malfunction; opening, re-opening, closing, and after hours processes or trading procedures; any outbound routing services; the NMS Stock ATS’s use of market data; fees, rebates, or other charges of the NMS Stock ATS; any trade reporting, clearance or settlement arrangements or procedures; order display and execution access and fair access information (if applicable); and market quality statistics published or provided to one or more subscribers. The Commission preliminarily believes that greater transparency in this regard would provide important information to market participants so they can evaluate whether submitting order flow to a particular NMS Stock ATS aligns with

their trading or investment objectives. Among other things, these enhanced, public disclosures also are designed to limit the potential that a broker-dealer operator of an NMS Stock ATS could provide certain subscribers with greater disclosure about the operations and system functionalities of the ATS than it provides to other market participants.

The Commission also preliminarily believes that proposing a process for the Commission to determine whether an NMS Stock ATS qualifies for the exemption from the Exchange Act definition of “exchange” would facilitate better Commission oversight of NMS Stock ATSs and thus, better protection of investors.⁴¹ The proposed process would provide the Commission with an opportunity to review disclosures on Form ATS–N for compliance with the Form ATS–N requirements, Regulation ATS, and other applicable requirements of the federal securities laws and regulations. To qualify for the exemption from the Exchange Act definition of “exchange,” an NMS Stock ATS would be required to file with the Commission a Form ATS–N, in accordance with the instructions therein, and the Form ATS–N would need to be declared effective by the Commission. The Commission would declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest and is consistent with the protection of investors.⁴² If the Commission declares a Form ATS–N ineffective, the NMS Stock ATS would be prohibited from operating as an NMS Stock ATS,⁴³ but would not be prohibited from subsequently filing a new Form ATS–N. The Commission also preliminarily believes that proposing a process for the Commission to review and declare ineffective Form ATS–N Amendments, if it finds that such action is necessary or appropriate in the public interest and is consistent with the protection of investors, would aid the Commission’s ongoing oversight of NMS Stock ATSs.⁴⁴

In this light, the Commission is proposing to amend Regulation ATS, including as follows: (1) Define in proposed Rule 300(k) of Regulation ATS

the term NMS Stock ATS, amend the definition of “control” under current Rule 300(f) of Regulation ATS to specify that control means to direct the management or policies of the broker-dealer of an ATS, and amend the exemption from the definition of “exchange” in Rule 3a1–1(a) to require NMS Stock ATSs to comply with proposed Rule 304 (in addition to the other requirements of Regulation ATS) as a condition of the exemption; (2) amend Rule 301(b)(2) to require NMS Stock ATSs to file the reports and amendments mandated by proposed Rule 304, which would include filing proposed Form ATS–N, in lieu of current Form ATS, to provide detailed disclosures about an NMS Stock ATS’s operations and the activities of its broker-dealer operator and its affiliates and amend Rule 301(b)(2) to require an ATS that effects transactions in both NMS stocks and non-NMS stocks to file the reports and amendments mandated by proposed Rule 304 for its NMS stock trading activity and the reports and amendments required under current Rule 301(b)(2) of Regulation ATS for its non-NMS stock trading activity; (3) amend Rule 301(b)(9) to require an ATS that trades both NMS stocks and non-NMS stocks to separately report its transactions in NMS stocks on one Form ATS–R, and its transactions in securities other than NMS stocks on another Form ATS–R; (4) provide a process for the Commission, pursuant to proposed Rule 304(a)(1), to declare a Form ATS–N effective or, after notice and opportunity for hearing, ineffective; (5) establish the requirements for amending Form ATS–N pursuant to proposed Rule 304(a)(2); (6) provide, pursuant to proposed Rule 304(a)(3), that a notice of cessation shall cause the Form ATS–N to be ineffective on the date designated by the NMS Stock ATS; (7) provide a process for the Commission, pursuant to proposed Rule 304(a)(4), to suspend, limit, or revoke the exemption of an NMS Stock ATS’s Form ATS–N upon notice and after opportunity for hearing; (8) provide that the Commission, pursuant to proposed Rule 304(b), will publicly post on its Web site: each effective Form ATS–N, each properly filed Form ATS–N Amendment, and each properly filed Form ATS–N notice of cessation, as well as each order of effectiveness or ineffectiveness of a Form ATS–N, order of ineffectiveness of a Form ATS–N Amendment, and order suspending, limiting, or revoking an NMS Stock ATS’s exemption, issued by the Commission; and also require each NMS Stock ATS that has a Web site to post on the NMS Stock ATS’s Web site a

⁴¹ See proposed Rule 304(a)(1)(i). See also *infra* Section IV.C (discussing the proposed process for Commission review of Form ATS–N and circumstances under which an NMS Stock ATS may not qualify for the exemption, as well as the benefits that the process should provide to market participants).

⁴² See proposed Rule 304(a)(1)(iii).

⁴³ See proposed Rule 304(a)(1)(iv).

⁴⁴ See *infra* Section IV.C (discussing the proposed process for Commission review of amendments). See also proposed Rule 304(a)(2)(ii).

direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2); (9) amend existing Rule 301(b)(10) of Regulation ATS to require all ATSs to adopt written safeguards and written procedures to protect subscribers' confidential trading information, as well as written oversight procedures to ensure those safeguards and procedures are followed; and (10) amend Rule 303(a) to require that the written safeguards and written procedures required by proposed Rule 301(b)(10) and reports pursuant to proposed Rule 304 be preserved.

II. Current ATS Regulatory Framework

A. Exemption From National Securities Exchange Registration

A fundamental component of the current ATS regulatory framework adopted by the Commission in 1998 is Exchange Act Rule 3b-16.⁴⁵ Rule 3b-16 was designed to address the blurring of traditional classifications between exchanges and broker-dealers as a result of advances in technology by providing a more comprehensive and meaningful interpretation of what constitutes an exchange under Section 3(a) of the Exchange Act.⁴⁶ Rule 3b-16(a) provides a functional test to assess whether a trading platform meets the definition of exchange under Section 3(a)(1) of the Exchange Act, and thus is required to register as a national securities exchange pursuant to Sections 5 and 6 of the Exchange Act.⁴⁷ Under Rule 3b-16, an organization, association, or group of persons shall be considered to constitute, maintain, or provide "a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange," if such organization, association, or group of persons: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each

other, and the buyers and sellers entering such orders agree to the terms of a trade.⁴⁸

The Commission adopted Exchange Act Rule 3b-16(b) to explicitly exclude certain systems that the Commission believed did not meet the exchange definition.⁴⁹ Specifically, Rule 3b-16(b) excludes systems that perform only traditional broker-dealer activities, including: (1) Systems that route orders to a national securities exchange, a market operated by a national securities association, or a broker-dealer for execution, or (2) systems that allow persons to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met.⁵⁰ Accordingly, a system is not included in the Commission's interpretation of "exchange" if: (1) The system fails to meet the two-part test in paragraph (a) of Rule 3b-16; (2) the system falls within one of the exclusions in paragraph (b) of Rule 3b-16; or (3) the Commission otherwise conditionally or unconditionally exempts⁵¹ the system from the definition.

For those systems that meet the criteria of Rule 3b-16(a) and are not excluded under Rule 3b-16(b) of the Exchange Act,⁵² Rule 3a1-1(a)(2)⁵³ provides an exemption from the definition of "exchange." Specifically,

⁴⁸ See 17 CFR 240.3b-16(a).

⁴⁹ See Regulation ATS Adopting Release, *supra* note 7, at 70852.

⁵⁰ See 17 CFR 240.3b-16(b). Rule 3b-16(b)(2) excludes systems that allow persons to enter orders for execution against the bids and offers of a single dealer if, as an incidental part of such activities, the system matches orders that are not displayed to any person other than the dealer and its employees; or in the course of acting as a registered market maker with an SRO, the system displays the limit orders of the market maker's, or other broker-dealer's, customers, and in addition, matches customer orders with those displayed limit orders and, as an incidental part of its market making activities, the system crosses or matches orders that are not displayed to any person other than the market maker and its employees. See 17 CFR 240.3b-16(b)(2). The purpose of the exclusions in 17 CFR 240.3b-16(b)(2) was to encompass systems operated by third market makers, as well as those systems operated by dealers, primarily in debt securities, who display their own quotations to customers and other broker-dealers on a proprietary basis. Rule 3b-16(b)(2)(ii) was adopted to exclude registered market makers that display their own quotes and, in order to comply with a Commission or SRO rule, customer limit orders, and allow their customers and other broker-dealers to enter orders of execution against the displayed orders. Additionally, it was designed to allow registered market makers, as an incidental activity resulting from their market maker status, to match or cross orders for securities in which they make a market, even if those orders are not displayed. See Regulation ATS Adopting Release, *supra* note 7, at 70854.

⁵¹ See 17 CFR 240.3b-16(e).

⁵² See 17 CFR 240.3b-16(b).

⁵³ See 17 CFR 240.3a1-1(a)(2).

Exchange Act Rule 3a1-1(a)(2) exempts from the Exchange Act Section 3(a)(1) definition of "exchange" an organization, association, or group of persons that complies with Regulation ATS,⁵⁴ which includes, among other things, the requirement to register as a broker-dealer.⁵⁵ Therefore, an organization, association, or group of persons that complies with Regulation ATS is not subject to Section 5 of the Exchange Act,⁵⁶ which requires that an "exchange" register with the Commission as a national securities exchange pursuant to Section 6 of the Exchange Act⁵⁷ or otherwise be exempt. Additionally, an ATS that is not required to register as a national securities exchange pursuant to Section 5 is not an SRO⁵⁸ and is not required to comply with applicable requirements.⁵⁹

To satisfy the requirements of the Rule 3a1-1(a)(2) exemption, a system that otherwise meets the definition of an "exchange" must comply with Regulation ATS. An ATS that fails to comply with the requirements of Regulation ATS would no longer qualify for the exemption from the definition of an "exchange" provided under Exchange Act Rule 3a1-1(a)(2), and thus, risks operating as an unregistered exchange in violation of Section 5 of the Exchange Act.⁶⁰

B. Conditions to the ATS Exemption; Confidential Notice Regime

Rule 300(a) of Regulation ATS defines an ATS as: "any organization, association, person, group of persons, or system: (1) [t]hat constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Rule 3b-16]; and (2) [t]hat does not: (i) [s]et rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) [d]iscipline subscribers other than by exclusion

⁵⁴ See 17 CFR 240.3a1-1(a)(2). Rule 3a1-1 also provides two other exemptions from the definition of "exchange" for any ATS operated by a national securities association, and any ATS not required to comply with Regulation ATS pursuant to Rule 301(a) of Regulation ATS. See 17 CFR 240.3a1-1(a)(1) and (3).

⁵⁵ See 17 CFR 242.301(b)(1).

⁵⁶ 15 U.S.C. 78e.

⁵⁷ 15 U.S.C. 78f.

⁵⁸ See *supra* note 21 (setting forth the statutory definition of SRO).

⁵⁹ See, e.g., Section 19 of the Exchange Act, 15 U.S.C. 78s.

⁶⁰ See 15 U.S.C. 78e.

⁴⁵ See 17 CFR 240.3b-16.

⁴⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70847. Pursuant to Section 3(a)(1) of the Exchange Act, the statutory definition of "exchange" means "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange . . . * 15 U.S.C. 78c(a)(1).

⁴⁷ See 15 U.S.C. 78e and 78f. A "national securities exchange" is an exchange registered as such under Section 6 of the Exchange Act.

from trading.”⁶¹ Governing the conduct of or disciplining subscribers are functions performed by an SRO that the Commission believes should be regulated as such.⁶² Accordingly, pursuant to the definition in Rule 300(a), a trading system that performs SRO functions, or performs functions common to national securities exchanges, such as establishing listing standards, is precluded from the definition of ATS and would be required to register as a national securities exchange or be operated by a national securities association (or seek another exemption).⁶³

Rule 301(b)(1) of Regulation ATS requires that every ATS that is subject to Regulation ATS, pursuant to paragraph (a) of Rule 301,⁶⁴ be registered as a broker-dealer under Section 15 of the Exchange Act,⁶⁵ and thus become a member of an SRO, such as FINRA.⁶⁶ In the Regulation ATS Adopting Release, the Commission stated that an ATS that registers as a broker-dealer must, in addition to complying with Regulation ATS,

comply with the filing and conduct obligations associated with being a registered broker-dealer, including membership in an SRO and compliance with SRO rules.⁶⁷

In addition, Rule 301(b)(2) of Regulation ATS requires an ATS to file an initial operation report with the Commission on Form ATS⁶⁸ at least 20 days before commencing operations.⁶⁹ The Commission stated in the Regulation ATS Adopting Release that Form ATS would provide the Commission the opportunity to identify problems that might impact investors before the system begins to operate.⁷⁰ Unlike a Form 1 filed by a national securities exchange, Form ATS is not approved by the Commission. Instead, Form ATS provides the Commission with notice about its operations prior to commencing operations.⁷¹

Form ATS requires, among other things, that an ATS provide information about: Classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing order entry and execution; and trade reporting, clearance and settlement of trades on the ATS. Regulation ATS states that information filed by an ATS on Form ATS is “deemed confidential when filed.”⁷² Thus, under the current regulatory requirements, market participants generally do not have information about, for example, how orders are entered, prioritized, handled, and executed on an NMS Stock ATS, ATSs are not otherwise required to publicly disclose such information.⁷³

In addition to providing notice of its initial operation, an ATS must notify the Commission of any changes in its operations by filing an amendment to its initial operation report. There are three types of amendments to an initial

operation report.⁷⁴ First, if any material change is made to its operations, the ATS must file an amendment on Form ATS at least 20 calendar days before implementing such change.⁷⁵ Second, if any information contained in the initial operation report becomes inaccurate for any reason and has not been previously reported to the Commission as an amendment on Form ATS, the ATS must file an amendment on Form ATS correcting the information within 30 calendar days after the end of the calendar quarter in which the system has operated.⁷⁶ Third, an ATS must promptly file an amendment on Form ATS correcting information that it previously reported on Form ATS after discovery that any information was inaccurate when filed.⁷⁷ Also, upon ceasing to operate as an ATS, an ATS is required to promptly file a cessation of operations report on Form ATS.⁷⁸ As is the case with respect to initial operation reports, Form ATS amendments and cessation of operations reports serve as notice to the Commission of changes to the ATS’s operations,⁷⁹ and Rule 301(b)(2)(vii) and the instructions to the form state that Form ATS is “deemed confidential.”⁸⁰

Rule 301(b)(9) of Regulation ATS also requires ATSs to periodically report certain information about transactions on the ATS and information about certain activities on Form ATS–R within 30 calendar days after the end of each calendar quarter in which the market has operated.⁸¹ Form ATS–R requires quarterly volume information for specified categories of securities, as well as a list of all securities traded on the ATS during the quarter and a list of all subscribers that were participants

⁷⁴ Form ATS is used for three types of submissions: Initial operation reports; amendments to initial operation reports; and cessation of operations reports. An ATS designates the type of submission on the form. See Form ATS.

⁷⁵ See 17 CFR 242.301(b)(2)(ii). A “material change,” includes, but is not limited to, any change to the operating platform, the types of securities traded, or the types of subscribers. In addition, the Commission has stated that ATSs implicitly make materiality decisions in determining when to notify their subscribers of changes. See Regulation ATS Adopting Release, *supra* note 7, at 70864. See also *supra* Section IV.C.6 (discussing the proposed materiality standard that would apply to the filing of amendments on Form ATS–N).

⁷⁶ See 17 CFR 242.301(b)(2)(iii).

⁷⁷ See 17 CFR 242.301(b)(2)(iv).

⁷⁸ See 17 CFR 242.301(b)(2)(v).

⁷⁹ See Regulation ATS Adopting Release, *supra* note 7, at 70864.

⁸⁰ See 17 CFR 242.301(b)(2)(vii); Form ATS at 3, General Instructions A.7.

⁸¹ See 17 CFR 242.301(b)(9)(i). Form ATS–R and the Form ATS–R Instructions are available at <https://www.sec.gov/about/forms/formats-r.pdf>.

⁶¹ See 17 CFR 242.300(a).

⁶² See Regulation ATS Adopting Release, *supra* note 7, at 70859. As the Commission noted when it adopted Regulation ATS, the Commission believes that any system that uses its market power to regulate its participants should be regulated as an SRO. The Commission noted that it would consider a trading system to be “governing the conduct of subscribers” outside the trading system if it imposed on subscribers, as conditions of participation in trading, any requirements for which the trading system had to examine subscribers for compliance. In addition, the Commission stated its belief that if a trading system imposed as conditions of participation, directly or indirectly, restrictions on subscribers’ activities outside of the trading system, such a trading system should be a registered exchange or operated by a national securities association, but that the limitation would not preclude an alternative trading system from imposing credit conditions on subscribers or requiring subscribers to submit financial information to the alternative trading system. See *id.*

⁶³ See *id.*

⁶⁴ Pursuant to Rule 301(a), certain ATSs that are subject to other appropriate regulations are not required to comply with Regulation ATS. These ATSs include those that are: Registered as an exchange under Section 6 of the Exchange Act; exempt from exchange registration based on the limited volume of transactions effected; operated by a national securities association; registered as a broker-dealer under Sections 15(b) or 15C of the Exchange Act, or is a bank, that limits its activities to certain instruments; or exempted, conditionally or unconditionally, by Commission order, after application by such alternative trading system. See 17 CFR 242.301(a). For example, an ATS that is registered as a broker-dealer, or is a bank, and limits its securities activities solely to government securities is not required to comply with Regulation ATS. See 17 CFR 242.301(a)(4).

⁶⁵ See 17 CFR 242.301(b)(1).

⁶⁶ See Section 15(b)(8) of the Exchange Act; 15 U.S.C. 78o(b)(8). See also *supra* 24 note and *infra* note 295 and accompanying text (setting forth the requirements of Section 15(b)(8) of the Exchange Act).

⁶⁷ See Regulation ATS Adopting Release, *supra* note 7, at 70903.

⁶⁸ Form ATS and the Form ATS Instructions are available at <http://www.sec.gov/about/forms/formats.pdf>.

⁶⁹ See 17 CFR 242.301(b)(2)(i).

⁷⁰ See Regulation ATS Adopting Release, *supra* note 7, at 70864.

⁷¹ See *id.* As discussed more fully below, the current notice process applicable to ATSs is very different than the process by which exchanges register with the Commission and how amendments to exchange rules are regulated. See *infra* notes 158–162 and accompanying text.

⁷² See 17 CFR 242.301(b)(2)(vii).

⁷³ The Commission does note, however, that some ATSs may currently make voluntary public disclosures. See, e.g., *infra* note 156.

during the quarter.⁸² Form ATS-R also requires an ATS that is subject to the fair access obligations under Rule 301(b)(5) of Regulation ATS to: (1) Provide a list of all persons granted, denied, or limited access to the ATS during the period covered by the ATS-R and (2) designate for each person: (a) Whether they were granted, denied, or limited access; (b) the date the ATS took such action; (c) the effective date of such action; and (d) the nature of any denial or limitation of access.⁸³ In the Regulation ATS Adopting Release, the Commission stated that the information provided on Form ATS-R would permit the Commission to monitor the trading on ATSs.⁸⁴ Like Form ATS, Rule 301(b)(2)(vii) and the instructions to Form ATS-R state that Form ATS-R is “deemed confidential.”⁸⁵

In addition to the reporting requirements under Rules 301(b)(2) and 301(b)(9) of Regulation ATS, an ATS’s exemption from national securities exchange registration is conditioned on the ATS complying with the other requirements under Regulation ATS. Under Rule 301(b)(3), an ATS that (1) displays subscriber orders in an NMS stock to any person (other than an employee of the ATS) and (2) during at least four of the preceding six calendar months, had an average daily trading volume of 5% or more of the aggregate average daily share volume for that NMS stock, as reported by an effective transaction reporting plan, must:⁸⁶

- Pursuant to Rule 301(b)(3)(ii),⁸⁷ provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such NMS stock, displayed to more than one person in the ATS, for inclusion in the quotation data made available by the national securities exchange or national securities association pursuant to Rule 602 under Regulation NMS;⁸⁸ and
- pursuant to Rule 301(b)(3)(iii),⁸⁹ with respect to any such order

⁸² See Form ATS-R at 4, Items 1 and 2 (describing the requirements for Exhibit A and Exhibit B of Form ATS-R). ATSs must also complete and file Form ATS-R within 10 calendar days after ceasing to operate. See 17 CFR 242.301(b)(9)(ii); Form ATS-R at 2, General Instructions A.2 to Form ATS-R.

⁸³ See Form ATS-R at 6, Item 7 (explaining requirements for Exhibit C).

⁸⁴ See Regulation ATS Adopting Release, *supra* note 7, at 70878.

⁸⁵ See 17 CFR 242.301(b)(2)(vii); Form ATS-R at 2, General Instruction A.7.

⁸⁶ See 17 CFR 242.301(b)(3)(i).

⁸⁷ See 17 CFR 242.301(b)(3)(ii).

⁸⁸ See 17 CFR 242.602.

⁸⁹ See 17 CFR 242.301(b)(3)(iii).

displayed pursuant to Rule 301(b)(3)(ii), provide to any broker-dealer that has access to the national securities exchange or national securities association to which the ATS provides the prices and sizes of displayed orders pursuant to Rule 301(b)(3)(ii), the ability to effect a transaction with such orders that is:

- equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and

- at the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer.

These order display and execution access obligations were adopted by the Commission with the expectation they would promote additional market integration and further discourage two-tier markets when trading in an NMS stock on an ATS reaches a certain level.⁹⁰

Under Rule 301(b)(4), an ATS must not charge any fee to broker-dealers that access the ATS through a national securities exchange or national securities association that is inconsistent with the equivalent access to the ATS that is required under Rule 301(b)(3)(iii).⁹¹

Under Rule 301(b)(5)—and even if the ATS does not display subscribers’ orders to any person (other than an ATS employee)—an ATS with 5% or more of the average daily volume in an NMS stock during at least four of the preceding six calendar months, as reported by an effective transaction reporting plan, must:⁹²

- Establish written standards for granting access to trading on its system;
- not unreasonably prohibit or limit any person in respect to access to services offered by such ATS by applying the above standards in an unfair or discriminatory manner;
- make and keep records of:

- all grants of access including, for all subscribers, the reasons for granting such access; and

- all denials or limitations of access and reasons, for each applicant, for denying or limiting access; and

- report the information required in Exhibit C of Form ATS-R regarding grants, denials, and limitations of access.⁹³

The above requirements of Rule 301(b)(5) are referred to as the “fair access” requirements and apply on a security-by-security basis.⁹⁴ A denial of access to a market participant after an ATS reaches the above 5% fair access threshold in an NMS stock would be reasonable if it is based on objective standards.⁹⁵

Additionally, under Rule 301(b)(6), an ATS that trades only municipal securities or corporate fixed income debt with 20% or more of the average daily volume traded in the U.S. during at least four of the preceding six calendar months, must do the following with respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison:⁹⁶

- Establish reasonable current and future capacity estimates;
- conduct periodic capacity stress tests of critical systems to determine such system’s ability to process transactions in an accurate, timely, and efficient manner;
- develop and implement reasonable procedures to review and keep current its system development and testing methodology;
- review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters;
- establish adequate contingency and disaster recovery plans;
- on an annual basis, perform an independent review, in accordance with

⁹³ See 17 CFR 242.301(b)(5)(ii). Regulation ATS does not mandate compliance with these requirements when an ATS reaches the 5% trading threshold in an NMS stock if the following conditions are met: The ATS matches customer orders for a security with other customer orders; such customers’ orders are not displayed to any person, other than employees of the ATS; and such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices. See 17 CFR 242.301(b)(5)(iii).

⁹⁴ The fair access requirements also apply for non-NMS stocks when an ATS reaches a 5% trading threshold in certain securities other than NMS stocks, including certain equity securities, municipal securities and corporate debt securities. See 17 CFR 242.301(b)(5)(i).

⁹⁵ See Regulation ATS Adopting Release, *supra* note 7, at 70874.

⁹⁶ See 17 CFR 242.301(b)(6)(i).

⁹⁰ See Regulation ATS Adopting Release, *supra* note 7, at 70867.

⁹¹ See 17 CFR 242.301(b)(4). In addition, if the national securities exchange or national securities association to which an ATS provides the prices and sizes of orders under Rules 301(b)(3)(ii) and 301(b)(3)(iii) establishes rules designed to assure consistency with standards for access to quotations displayed on such national securities exchange, or the market operated by such national securities association, the ATS shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules. See *id.*

⁹² 17 CFR 242.301(b)(5)(i).

established audit procedures and standards, of the ATS's controls for ensuring that the above requirements are met, and conduct a review by senior management of a report containing the recommendations and conclusions of the independent review; and

- promptly notify the Commission and its staff of material systems outages and significant systems changes.⁹⁷

Prior to the Commission's adoption of Regulation SCI,⁹⁸ the requirements of Rule 301(b)(6) also applied to ATSs with regard to their trading in NMS stocks and non-NMS equity securities.⁹⁹ Regulation SCI superseded and replaced Rule 301(b)(6)'s requirements with regard to ATSs that trade NMS stocks and non-NMS stocks.¹⁰⁰ In general, Regulation SCI requires SCI entities,¹⁰¹ including NMS Stock ATSs that meet the definition of an "SCI ATS,"¹⁰² to

⁹⁷ See 17 CFR 242.301(b)(6)(ii). Also, as with the fair access requirements pursuant to Rule 301(b)(5), Regulation ATS does not mandate compliance with the requirements under Rule 301(b)(6) when an ATS reaches a 20% trading threshold if the following conditions are met: The ATS matches customer orders for a security with other customer orders; such customers' orders are not displayed to any person, other than employees of the ATS; and such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

See 17 CFR 242.301(b)(6)(iii).

⁹⁸ See SCI Adopting Release, *supra* note 17.

⁹⁹ See Regulation ATS Adopting Release, *supra* note 7, at 70875–76.

¹⁰⁰ Regulation SCI does not apply to ATSs that trade only municipal securities or corporate debt securities. See SCI Adopting Release, *supra* note 17, at 72262. Prior to the adoption of Regulation SCI, Rule 301(b)(6) of Regulation ATS imposed by rule certain aspects of Commission policy statements with respect to technology systems of significant-volume ATSs.

Specifically, Regulation SCI, with regard to SCI entities (as defined in Regulation SCI; see *infra* note 101), superseded and replaced the Commission's prior Automation Review Policy ("ARP"), established by the Commission's two policy statements, each titled "Automated Systems of Self-Regulatory Organizations," issued in 1989 and 1991, see Securities Exchange Act Release Nos. 27445 (November 16, 1989), 54 FR 48703 (November 24, 1989), and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991), including the aspects of those policy statements previously codified in Rule 301(b)(6) of Regulation ATS applicable to significant-volume ATSs that trade NMS stocks and non-NMS stocks. See SCI Adopting Release, *supra* note 17, at 72252.

¹⁰¹ Regulation SCI defines "SCI entity" to mean "an SCI self-regulatory organization, SCI alternative trading system, plan processor, or exempt clearing agency subject to [the Commission's Automation Review Policies]." See 17 CFR 242.1000.

¹⁰² Regulation SCI defines "SCI alternative trading system" or "SCI ATS" to mean an ATS, which during at least four of the preceding six calendar months: (1) Had with respect to NMS stocks (a) five percent (5%) or more in any single NMS stock, and one-quarter percent (0.25%) or more in all NMS stocks, of the average daily dollar volume reported by applicable transaction reporting plans, or (b) one percent (1%) or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans; or (2) had

establish written policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that they operate in a manner that complies with the Exchange Act.¹⁰³ In addition, Regulation SCI requires SCI entities, including NMS Stock ATSs that are SCI entities, to take corrective action with respect to SCI events (defined to include systems disruptions, systems compliance issues, and systems intrusions), and notify the Commission of such events.¹⁰⁴ Regulation SCI further requires SCI entities, including NMS Stock ATSs that are SCI entities, to disseminate information about certain SCI events to affected members or participants and, for certain major SCI events, to all members or participants of the SCI entity. In addition, Regulation SCI requires SCI entities, including NMS Stock ATSs that are SCI entities, to conduct a review of their systems by objective, qualified personnel at least annually, submit quarterly reports regarding completed, ongoing, and planned material changes to their SCI systems to the Commission, and maintain certain books and records.¹⁰⁵ It also requires SCI entities, including NMS Stock ATSs that are SCI entities, to mandate participation by designated members or participants in scheduled testing of the operation of their business continuity and disaster recovery plans, including backup systems, and to coordinate such testing on an industry- or sector-wide basis with other SCI entities.¹⁰⁶ Regulation SCI, as compared to the former Rule 301(b)(6), also modified the volume thresholds applicable to SCI ATSs.¹⁰⁷

Rule 301(b)(7)¹⁰⁸ requires all ATSs, regardless of the volume traded on their

with respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, five percent (5%) or more of the average daily dollar volume as calculated by the self-regulatory organization to which such transactions are reported. However, an SCI ATS is not required to comply with the requirements of Regulation SCI until six months after satisfying the aforementioned criteria. See 17 CFR 242.1000.

¹⁰³ See SCI Adopting Release, *supra* note 17, at 72252.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *supra* note 102. Prior to the adoption of Regulation SCI, the requirements of Rule 301(b)(6) also applied to ATSs that, during at least 4 of the preceding 6 calendar months, had with respect to any NMS stock, 20% or more of the average daily volume reported by an effective transaction reporting plan.

¹⁰⁸ See 17 CFR 242.301(b)(7).

systems, to permit the examination and inspection of their premises, systems, and records, and cooperate with the examination, inspection, or investigation of subscribers, whether such examination is being conducted by the Commission or by an SRO of which such subscriber is a member. Rule 301(b)(8)¹⁰⁹ requires all ATSs to make and keep current the records specified in Rule 302 of Regulation ATS¹¹⁰ and preserve the records specified in Rule 303 of Regulation ATS.¹¹¹

Under Rule 301(b)(10), all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, which must include the following:

- Limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with these or any other applicable rules; and
- implementing standards controlling employees of the ATS trading for their own accounts.¹¹²

Furthermore, all ATSs must adopt and implement adequate oversight procedures to ensure that the above safeguards and procedures are followed.¹¹³

Finally, Rule 301(b)(11)¹¹⁴ expressly prohibits any ATS from using the word "exchange" or derivations of the word "exchange," such as the term "stock market," in its name.¹¹⁵

III. Role of ATSs in the Current Equity Market Structure

A. Significant Source of Liquidity for NMS Stocks

The equity market structure in 1998 was starkly different than it is today. At the time Regulation ATS was proposed, there were only 8 registered national

¹⁰⁹ See 17 CFR 242.301(b)(8).

¹¹⁰ See 17 CFR 242.302.

¹¹¹ See 17 CFR 242.303. In the Regulation ATS Adopting Release, the Commission stated that these requirements to make, keep, and preserve records are necessary to create a meaningful audit trail and to permit surveillance and examination to help ensure fair and orderly markets. See Regulation ATS Adopting Release, *supra* note 7, at 70877–78.

¹¹² See 17 CFR 242.301(b)(10)(i).

¹¹³ See 17 CFR 242.301(b)(10)(ii).

¹¹⁴ See 17 CFR 240.301(b)(11).

¹¹⁵ When the Commission proposed Regulation ATS, it said that "it is important that the investing public not be confused about the market role [ATSs] have chosen to assume." See Securities Exchange Act Release No. 39884 (April 21, 1998), 63 FR 23504, 23523 (April 29, 1998) ("Regulation ATS Proposing Release"). The Commission expressed concern that "use of the term 'exchange' by a system not regulated as an exchange would be deceptive and could mislead investors that such alternative trading system is registered as a national securities exchange." See *id.*

securities exchanges,¹¹⁶ and the Commission estimated that there were approximately 43 systems that would be eligible to operate as ATSS.¹¹⁷ Currently, there are 18 registered national securities exchanges, of which there are 11 national securities exchanges that trade NMS stocks,¹¹⁸ and 84 ATSS with a Form ATS on file with the Commission. Currently, there are 46 ATSS that have noticed on their Form ATS that they expect to trade NMS stocks.¹¹⁹ As the Commission noted in the SCI Adopting Release, even smaller trading centers, such as certain high-volume ATSS, now collectively represent a significant source of liquidity for NMS stocks, and some ATSS have similar and, in some cases, greater trading volume than some national securities exchanges.¹²⁰ In the second quarter of 2015, there were 38 ATSS that reported transactions in NMS stocks, accounting for 59 billion shares traded in NMS stocks (\$2.5 trillion), and represented approximately 15.0% of total share trading volume (15.4% of total dollar trading volume) on all national securities exchanges, ATSS, and non-ATS OTC trading venues combined.¹²¹ During this period, no individual ATS executed more than approximately 13% of the total share volume on NMS Stock ATSS and no more than approximately 2% of total NMS stock share volume.¹²² Given this

dispersal of trading volume in NMS stocks among an increasing number of trading centers, NMS Stock ATSS, with their approximately 15% market share, represent a significant source of liquidity in NMS stocks.

Another significant aspect of the increased role of NMS Stock ATSS in equity market structure is the proliferation of ATSS that trade NMS stocks but do not publicly display quotations in the consolidated quotation data, commonly referred to as “dark pools.”¹²³ Dark pools originally were designed to offer certain market participants, particularly institutional investors, the ability to minimize transaction costs when executing trades in large size by completing their trades without prematurely revealing the full extent of their trading interest to the broader market. The disclosure of large size trades could have an impact on the market, and reduce the likelihood of the orders being filled.¹²⁴ As the Commission has previously noted, some dark pools, such as block crossing networks, offer specialized size

discovery mechanisms that attempt to bring large buyers and sellers in the same stock together anonymously and to facilitate a trade between them.¹²⁵ The traditional definition of block orders are orders for more than 10,000 shares,¹²⁶ however average trade sizes can far exceed this and be as high as 500,000 shares per trade.¹²⁷

Most dark pools today, however, primarily execute trades with small sizes that are more comparable to the average size of trades on registered national securities exchanges, which is 181 shares.¹²⁸ These dark pools that primarily match smaller orders (though the matched orders may be “child” orders of much larger “parent” orders) execute more than 90% of dark pool volume.¹²⁹ The majority of this volume is executed by dark pools that are operated by multi-service broker-dealers.¹³⁰ These broker-dealers typically also offer order routing services, trade as principal in the ATS that they are operating, or both.¹³¹

In recent years, as the number of NMS Stock ATSS has increased, so has the number of dark pools. The number of active dark pools trading NMS stocks has increased from approximately 10 in 2002,¹³² to 32 in 2009,¹³³ to over 40 today.¹³⁴ Furthermore, in 2009, dark pools accounted for 7.9% of NMS share volume.¹³⁵ It is now estimated that of the approximately 397 billion shares traded in NMS stocks (\$16.3 trillion), 14.9% of total NMS stock share volume is attributable to dark pools, with no

¹¹⁶ See Regulation ATS Proposing Release, *supra* note 115, at 23543 n.341.

¹¹⁷ See *id.* at 23540 n.313 and accompanying text.

¹¹⁸ The Commission notes that National Stock Exchange, Inc. ceased trading on its system as of the close of business on May 30, 2014. See Securities Exchange Act Release No. 72107 (May 6, 2014), 79 FR 27017 (May 12, 2014) (SR-NSX-2014-14).

¹¹⁹ Data compiled from Forms ATS submitted to the Commission as of November 1, 2015.

¹²⁰ See SCI Adopting Release, *supra* note 17, at 72262.

¹²¹ See *infra* Table 1—“NMS Stock ATSS Ranked by Dollar Trading Volume—March 30, 2015 to June 26, 2015.” Total dollar trading volume on all exchanges and off-exchange trading in the second quarter of 2015 was approximately \$16.3 trillion and approximately 397 billion shares. See Market Volume Summary, https://www.batstrading.com/market_summary/. See also *infra* Section XIII.B.1.

Competitors for listed-equity (NMS) trading services also include several hundred OTC market makers and broker-dealers.

¹²² The NMS Stock ATSS with the greatest volume executed approximately 12.7% of NMS Stock ATS share volume and 1.9% of the total consolidated NMS stock share trading volume.

The market share percentages were calculated by Commission staff using market volume statistics reported by BATS and FINRA ATS data collected from ATSS pursuant to FINRA Rule 4552. See *infra* Table 1—“NMS Stock ATSS Ranked by Dollar Trading Volume—March 30, 2015 to June 26, 2015.”

FINRA recently adopted a rule that requires NMS Stock ATSS to report aggregate weekly volume information and number of trades to FINRA in certain equity securities, including NMS stocks,

some of which FINRA makes publicly available. Reporting is on a security-by-security basis for transactions occurring within the ATS. Each ATS is also required to use a unique MPID in its reporting to FINRA, such that its volume reporting is distinguishable from other transaction volume reported by the broker-dealer operator of the ATS, including volume reported for other ATSS operated by the same broker-dealer. See FINRA Rules 4552, 6160, 6170, 6480 and 6720. See also Securities Exchange Act Release No. 71341 (January 17, 2014), 79 FR 4213 (January 24, 2014) (SR-FINRA-2013-042) (order granting approval of a proposed rule change to require alternative trading systems to report volume information to FINRA and use a unique market participant identifier) (“FINRA ATS Reporting Approval”).

FINRA publishes on its Web site the trading information (volume and number of trades) reported for each equity security, with appropriate disclosures that the information is based on ATS-submitted reports and not on reports produced or validated by FINRA. See *id.* at 4214. See also Alternative Trading System (ATS) Transparency on FINRA’s Web site, <http://www.finra.org/Industry/Compliance/MarketTransparency/ATS/>.

¹²³ The term “dark pool” is not used or defined in the Exchange Act or Commission rules. For purposes of this release, the term refers to NMS Stock ATSS that do not publicly display quotations in the consolidated quotation data. See Regulation of Non-Public Trading Interest, Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208, 61209 (November 23, 2009) (“Regulation of Non-Public Trading Interest”) (proposing rules and amendment to joint-industry plans describing the term dark pool).

Some trading centers, such as OTC market makers, also offer dark liquidity, primarily in a principal capacity, and do not operate as ATSS. For purposes of this release, these trading centers are not defined as dark pools because they are not ATSS. These trading centers may, however, offer electronic dark liquidity services that are analogous to those offered by dark pools. See *id.* at 61209 n.8.

¹²⁴ See, e.g., Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3599 n.28 (January 21, 2010) (“2010 Equity Market Structure Release”).

¹²⁵ See *id.* at 3599.

¹²⁶ See Rule 600(b)(9) of Regulation NMS (defining block size with respect to an order), 17 CFR 242.600(b)(9). See also Laura Tuttle, *Alternative Trading Systems: Description of ATS Trading in National Market System Stocks*, at 9–10 (October 2013), <http://www.sec.gov/marketstructure/research/alternative-trading-systems-march-2014.pdf> (“Tuttle: ATS Trading in NMS Stocks”).

¹²⁷ See *infra*, Table 2—“NMS Stock ATSS Ranked by Average Trade Size—March 30, 2015 to June 26, 2015.”

¹²⁸ See *infra* note 725 and accompanying text.

¹²⁹ See 2010 Equity Market Structure Release, *supra* note 124, 75 FR at 3599; see also *infra*, Table 2—“NMS Stock ATSS Ranked by Average Trade Size—March 30, 2015 to June 26, 2015.”

¹³⁰ See *infra* note 364 and accompanying text and Table 1—“NMS Stock ATSS Ranked by Dollar Trading Volume—March 30, 2015 to June 26, 2015.”

¹³¹ See 2010 Equity Market Structure Release, *supra* note 124, at 3599.

¹³² See Regulation of Non-Public Trading Interest, *supra* note 123, at 61209 n.9 and accompanying text.

¹³³ See 2010 Equity Market Structure Release, *supra* note 124, at 3598 n.22 and accompanying text.

¹³⁴ Data compiled from Forms ATS and Forms ATS-R filed to the Commission as of the end of, and for the third quarter of, 2015.

¹³⁵ See 2010 Equity Market Structure Release, *supra* note 124, at 3598.

single individual dark pool executing more than 1.9% of total NMS stock share volume.¹³⁶ The Commission also notes that some NMS Stock ATSs, which do not provide their best priced-orders for inclusion in the consolidated quotation data, make available to subscribers real-time information about quotes, orders, or other trading interest on the NMS Stock ATS.

In contrast to dark pools, an ATS could be an Electronic Communication Network (“ECN”). ECNs are ATSs that provide their best-priced orders for inclusion in the consolidated quotation data, whether voluntarily or as required by Rule 301(b)(3) of Regulation ATS.¹³⁷ In general, ECNs offer trading services (such as displayed or non-displayed order types, maker-taker pricing, and data feeds) that are analogous to registered national securities exchanges.¹³⁸

B. Heightened Operational Complexity and Sophistication of NMS Stock ATSs

Since Regulation ATS was adopted, ATSs have gained market share in NMS stocks and have also evolved to become more complex and sophisticated trading centers. In addition, ATSs that transact in NMS stocks increasingly are operated by multi-service broker-dealers that engage in significant brokerage and dealing activities in addition to their operation of their ATSs, and the operations of NMS Stock ATSs have become increasingly intertwined with operations of their broker-dealer operator, adding to the complexity of the manner in which those ATSs operate.¹³⁹ The Commission is concerned that market participants have limited information about the complex operations of NMS Stock ATSs and the unique relationship between an NMS Stock ATS and its broker-dealer operator and the affiliates of the broker-dealer operator, who often provide a significant source of liquidity on the NMS Stock ATS. The Commission preliminarily believes that improving

transparency of information available to market participants would enable them to better assess NMS Stock ATSs as potential trading venues.¹⁴⁰

Since Regulation ATS was adopted, ATSs that effect transactions in NMS stocks have grown increasingly complex in terms of the services and functionalities that they offer subscribers. Over the past 16 years, these ATSs, like registered national securities exchanges, have used advances in technology to improve the speed, capacity, and efficiency of their trading functionalities to bring together the orders in NMS stocks of multiple buyers and sellers using established, non-discretionary methods under which such orders interact and trade. Before Regulation ATS was adopted, ATSs primarily operated as ECNs, as dark pools were not prevalent during that period. Today, the vast majority of NMS Stock ATSs operate as dark pools. Furthermore, based on Commission experience, ATSs that traded NMS stocks prior to the adoption of Regulation ATS did not offer the same services and functionalities as they do today. Today, most NMS Stock ATSs, like most registered national securities exchanges, are fully-electronic, automated systems that provide a myriad of trading services to facilitate order interaction among various types of users on the NMS Stock ATS. For example, NMS Stock ATSs offer a wide range of order types, which are a primary means by which subscribers communicate their instructions for the handling of their orders on the ATS. Based on Commission experience, some NMS Stock ATSs allow subscribers to submit indications of interests, conditional orders, and various types of pegged orders, often with time-in-force, or other specifications, which are similar to those offered by exchanges, such as all or none, minimum execution quantity, immediate or cancel, good till cancelled, and day. Unlike registered national securities exchanges, however, most NMS Stock ATSs have adopted a dark trading model, and do not display any quotations in the consolidated quotation data.

Additionally, at the time Regulation ATS was adopted, SORs were not a primary point of access to ATSs that trade NMS stocks. Today, however, brokers compete to offer sophisticated technology tools to monitor liquidity at many different venues and to

implement order routing strategies.¹⁴¹ Using that knowledge of available liquidity, many brokers offer smart order routing technology to route orders to various trading centers to access such liquidity.¹⁴² Based on Commission experience, broker-dealer operators frequently use SORs (or similar functionality) to route orders to their NMS Stock ATSs in today’s marketplace. Furthermore, for some NMS Stock ATSs, most orders must pass through the broker-dealer operator’s SOR (or similar functionality) to enter the ATS.¹⁴³

In today’s highly automated trading environment, NMS Stock ATSs offer various matching systems to bring together orders and counterparties in NMS stocks. These automated matching systems, including limit order books, crossing systems, and various types of auctions, are generally pre-programmed to execute orders pursuant to established non-discretionary methods. These established non-discretionary methods dictate the terms of trading among multiple buyers and sellers entering orders into the NMS Stock ATS and generally include priority and allocation procedures. Based on Commission experience, some NMS Stock ATSs offer price-time priority, while others offer midpoint only matching with time priority, or time priority at other prices derived from the NBBO. Some NMS Stock ATSs may also offer priority mechanisms with additional overlays. For example, amongst orders at a given price, priority may be given to a certain type of order (e.g., agency orders), before then applying time priority. Additionally, some NMS Stock ATSs offer order routing services similar to those offered by national securities exchanges.¹⁴⁴

Some NMS Stock ATSs also offer subscribers the ability to further customize trading parameters, or the broker-dealer operator may set parameters around the interaction of various order flow. Based on Commission experience with information disclosed on Form ATS, some NMS Stock ATSs may enable subscribers to select the types of, or

¹⁴¹ See 2010 Equity Market Structure Release, *supra* note 124, 75 FR at 3602.

¹⁴² See *id.*

¹⁴³ For a further discussion about the increased use of SORs (or similar functionalities) by broker-dealer operators of NMS Stock ATSs, see *infra* Section VII.B.7.

¹⁴⁴ For example, based on Commission experience, some NMS Stock ATSs, like national securities exchanges, will route a subscriber’s order to another trading center when the NMS Stock ATS cannot execute the order without trading through the NBBO, or if otherwise directed by the subscriber.

¹³⁶ See *infra* Section XIII.B.1.

¹³⁷ See Rule 600(b)(23) of Regulation NMS, 17 CFR 242.600(b)(23) (definition of “electronic communications network”); see also 2010 Equity Market Structure Release, *supra* note 124, at 3599.

¹³⁸ See 2010 Equity Market Structure Release, *supra* note 124, at 3599. See *infra* note 494 (describing the maker-taker pricing model).

¹³⁹ As exemplified by some commenters’ responses and as discussed further below, market participants are interested in information about, among other things, ATS affiliations, sharing of order information, operation of smart order routers and to whom they give preference, priority rules, order types, calculation of reference prices, and segmentation. See, e.g., *infra* notes 186 and 190 and accompanying text (describing comments received from Blackrock, Inc. and Bloomberg Tradebook LLC).

¹⁴⁰ See, e.g., *infra* note 187 and accompanying text (describing a comment received from the Consumer Federation of America).

even specific, subscriber or order flow with which the subscriber wishes to interact. For example, some NMS Stock ATSs may enable subscribers to prevent their orders from interacting with principal order flow of the ATS's broker-dealer operator, or may enable subscribers to prohibit execution of their order flow against that of subscribers with certain execution characteristics (e.g., so called high-frequency traders or "HFTs"). Subscribers may also have the option to prevent self-matching with other order flow originating from the same firm. Some NMS Stock ATSs may also segment order flow into various classifications of subscribers based upon parameters set by the broker-dealer operator, such as historical execution characteristics, or may limit access to certain crossing mechanisms based on a subscriber's profile (e.g., the system may be programmed such that institutional order flow only executes against other institutional order flow).¹⁴⁵ Subscribers may or may not be aware that they have been classified as a particular type of participant on the NMS Stock ATS, which may limit their ability to interact with order flow of certain other subscribers to that NMS Stock ATS.

The Commission also preliminarily believes that, since Regulation ATS was adopted, the operations of NMS Stock ATSs have become increasingly intertwined with operations of the broker-dealer operator, providing additional complexity to the manner in which NMS Stock ATSs operate. Given this close relationship, the Commission preliminarily believes that conflicts of interest can arise between the broker-dealer operator's interest in its NMS Stock ATS and its interest in its other non-ATS businesses. As discussed further below, at the time Regulation ATS was adopted, the Commission recognized that broker-dealer operators may perform additional functions other than the operation of their ATS, such as other trading services, and adopted Rule 301(b)(10), which requires that ATSs have safeguards and procedures to protect confidential subscriber trading information.¹⁴⁶ The Commission is concerned that today, the potential for conflicts of interest as a result of a broker-dealer operator's other business interests, including those of its affiliates, may be greater than it was at that time, particularly due to trading centers that multi-service broker-dealer operators

¹⁴⁵ A purported reason for such segmentation may be to help reduce information leakage or the possibility of trading with undesirable counterparties.

¹⁴⁶ See *infra* Section IX.

own and operate.¹⁴⁷ Additionally, the broker-dealer operator of an NMS Stock ATS controls all aspects of the operation of the ATS, including, among other things: Means of access; who may trade; how orders interact, match, and execute; market data used for prioritizing or executing orders; display of orders and trading interest, and determining the availability of ATS services among subscribers.¹⁴⁸ The non-ATS operations of a broker-dealer operator and its NMS Stock ATS typically are connected in many ways. For example, in some cases, the broker-dealer operator, or its affiliates, owns, and controls access to, the technology and systems that support the trading facilities of the NMS Stock ATS, and provides and directs personnel to service the trading facilities of the ATS. As discussed in more detail below,¹⁴⁹ the Commission is aware that most NMS Stock ATSs are operated by broker-dealers that also engage in brokerage and dealing activities, and offer their customers a variety of brokerage services, including algorithmic trading software, agency sales desk support, and automated smart order routing services, often with, or through, their affiliates. In addition, multi-service broker-dealers and their affiliates may operate, among other things, an OTC market making desk or proprietary trading desk in addition to operating an ATS, or may have other business units that actively trade NMS stocks on a principal or agency basis in the ATS or at other trading centers. Furthermore, the broker-dealer operator of an NMS Stock ATS may have arrangements with third-parties to perform certain aspects of its ATS's operations, and affiliates of those third parties may subscribe to the NMS Stock ATS, which the Commission is concerned give rise to the potential for information leakage or conflicts of interest, of which market participants may be unaware.¹⁵⁰

As discussed further below, the Commission preliminarily believes that details about the operations and trading services of ATSs, such as those

¹⁴⁷ See *infra* Section VII.A (discussing the activities of broker-dealer operators of NMS Stock ATSs and the possible conflicts of interest that may result, and the Commission's preliminary belief that providing market participants with information about such activities will enable market participants to assess whether potential conflicts of interest exist so that they may make more informed decisions about whether to send their order flow to a particular NMS Stock ATS).

¹⁴⁸ See *infra* Section VII.A.1.

¹⁴⁹ See *id.*

¹⁵⁰ See *infra* Sections VII.B.6 and 9 (discussing trading on the ATS by the broker-dealer operator and its affiliates, and the relationship between an NMS Stock ATS and its service providers, and proposing to require related disclosure).

described above, are useful to market participants' understanding of the terms and conditions under which their orders will be handled and executed on a given ATS.¹⁵¹ The Commission also preliminarily believes that market participants should have access to information about the relationship between a broker-dealer, its affiliates, and the NMS Stock ATS that it operates, to adequately understand the operations of the ATS and potential conflicts of interest that may arise.

C. Lack of Operational Transparency for NMS Stock ATSs

The Commission believes that one of the most important functions it can perform for investors is to ensure that they have access to the information they need to protect and further their own interests.¹⁵² As noted above, although transparency has long been a hallmark of the U.S. securities markets and is one of the primary tools used by investors to protect their interests, market participants have limited knowledge of the operations of ATSs and how orders interact, match, and execute on ATSs.¹⁵³ The Commission is concerned that market participants have limited information about the non-ATS activities of the broker-dealer operators of NMS Stock ATSs and potential conflicts of interest that might arise from those activities.¹⁵⁴ The Commission is also concerned that different classes of subscribers may have different levels of information about the operations of NMS Stock ATSs and how their orders or other trading interests may interact on the NMS Stock ATS. To address these concerns, the Commission's proposal is designed to provide better access to information about the operations of NMS Stock ATSs to all market participants, including subscribers and potential subscribers.

Under current rules, a Form ATS is "deemed confidential when filed."¹⁵⁵ As a result, market participants

¹⁵¹ See generally *infra* Sections VII and VIII.

¹⁵² See, e.g., Securities Exchange Act Release No. 42208, 64 FR 70613, 70614 (December 17, 1999) (concept release reviewing regulation of market information fees and revenues).

¹⁵³ See *supra* notes 40 and 139 (citing prior comment letters expressing the view that Form ATS should be made publicly available and expressing support for making publicly available ATS filings with the Commission, and exemplifying the kinds of information about NMS Stock ATS operations that market participants, including broker-dealers and intuitional investors, seek, but to which they may not currently have access).

¹⁵⁴ See *infra* Section VII.A.

¹⁵⁵ See 17 CR 242.301(b)(2)(vii). The information on Form ATS is available for examination by staff, state securities authorities, and SROs. See Form ATS at 3, Instruction A.7.

typically have, at best, limited access to Form ATS filings and the information contained therein. Additionally, Form ATS discloses only limited aspects of an ATS's operations, and the Commission preliminarily believes that even where an ATS has voluntarily made public its Form ATS,¹⁵⁶ market participants currently might not be able to obtain a complete understanding of how ATSs operate. In addition, Form ATS does not solicit information about possible circumstances that give rise to potential conflicts of interest resulting from the activities of the broker-dealer operator and its affiliates. Despite the confidentiality afforded Form ATS, based on Commission experience, including the Commission's experience reviewing disclosures made by ATSs on Form ATS over the past 16 years, ATSs have often provided minimal, summary disclosures about their operations on Form ATS. Furthermore, the Commission preliminarily believes that the complexity of the operations of NMS Stock ATSs has increased substantially and in a manner that causes the current disclosure requirements of Form ATS to result in a potentially insufficient, and inconsistent, level of detail about the operations of NMS Stock ATSs.

By comparison, national securities exchanges, with which NMS Stock ATSs directly compete, are subject to comprehensive registration and rule filing requirements under Section 19(b) of the Exchange Act.¹⁵⁷ Under these requirements, national securities exchanges must make public their trading rules and detail their trading operations. As discussed above, national securities exchanges register with the Commission on Form 1, and thereafter file proposed rule changes on Form 19b-4, which are not confidential, are approved by the Commission or become effective by operation of law, and are made public.¹⁵⁸ These mandatory filings

publicly disclose, among other things, details about the exchange's trading services, operations, order types, order interaction protocols, priority procedures, and fees.¹⁵⁹ A national securities exchange must file such a proposed rule change any time it seeks to change its rules,¹⁶⁰ and even non-controversial rule changes cannot be implemented until the exchange files a Form 19b-4 with the Commission.¹⁶¹ In contrast, an ATS can change its operations in certain cases before notifying the Commission, and in all cases, without obtaining Commission approval or notifying ATS subscribers or the public about the change.¹⁶²

The Commission preliminarily believes that the increased complexity of NMS Stock ATS operations and the business structures of their broker-dealer operators, combined with a lack of transparency around the operation of NMS Stock ATSs and the activities of their broker-dealer operators, could inhibit a market participant's ability to assess an NMS Stock ATS as a potential trading venue. Further, the Commission recognizes that Form ATS was designed before NMS Stock ATSs operated at the level of complexity that they do today, and the equity market structure has substantially changed since Regulation ATS was adopted.¹⁶³ As such, the

accompanying text; <http://www.sec.gov/rules/sro.shtml>.

¹⁵⁹ Among other things, Form 1 requires an exchange applying for registration as a national securities exchange to disclose its procedures governing entry and display of quotations and orders in its system, procedures governing the execution, reporting, clearance and settlement of transactions in connection with the system, and fees. See Form 1, Exhibits E.2-E.4. The disclosures required in Form 1 must include sufficient detail for the Commission to determine the exchange's rules are consistent with the Act. See generally 15 U.S.C. 78f(b)(1). Once registered, a national securities exchange must file any proposed rule or any proposed change in, addition to, or deletion from its rules. See 15 U.S.C. 78s(b)(2).

¹⁶⁰ See 15 U.S.C. 78s(b)(1).

¹⁶¹ See 17 CFR 240.19b-4(f).

¹⁶² See *supra* notes 20-25 and accompanying text and *infra* notes 342-343 and accompanying text (discussing, in more detail, the differences in the regulatory regimes for registered national securities exchanges and ATSs, including with respect to requirements related to transparency of operations). See also 17 CFR 242.301(b)(2) (requiring ATSs to file amendments on Form ATS at least 20 days prior to implementing a material change to the operation of the ATS, and within 30 calendar days after the end of each calendar quarter to update any other information that has become inaccurate and not previously reported).

¹⁶³ The Commission preliminarily believes that information solicited on Form ATS-N would be similar to portions of what registered national securities exchange are required to publicly disclose, and thus, that disclosure of the information would not place NMS Stock ATSs at a competitive disadvantage with respect to competing trading venues. See *infra* Section IV.D. The Commission notes that, while some of the

Commission preliminarily believes that transparency of NMS Stock ATSs' operations will promote competition and benefit investors by informing market participants about differences between trading venues that could impact the quality of the execution of their orders.¹⁶⁴ The Commission preliminarily believes that requiring ATSs to respond to proposed Form ATS-N, which would require more detailed information about the ATSs' operations and be made available to the public on the Commission's Web site, would facilitate the public's understanding of NMS Stock ATSs by improving the information available to market participants, enabling them to make better decisions about where to route their orders to achieve their investing or trading objectives.

D. Prior Comments on Operational Transparency and Regulatory Framework for NMS Stock ATSs

The Commission is proposing to amend Regulation ATS to adopt Form ATS-N, which would require an NMS Stock ATS to publicly disclose detailed information about its operations and the activities of the broker-dealer operator and its affiliates. The Commission is also proposing to modify the regulatory requirements that apply to NMS Stock ATSs and qualify NMS Stock ATSs for the exemption from the definition of "exchange" under Exchange Act Rule 3a1-1(a)(2) by declaring the Form ATS-N effective or ineffective.

In 2009, the Commission proposed to amend the regulatory requirements of the Exchange Act that apply to non-public trading interest in NMS stocks, including dark pools.¹⁶⁵ Among other

questions on Form ATS-N are designed to provide information about potential conflicts of interest arising from the activities of the broker-dealer operator or its affiliates and are dissimilar to information required to be disclosed by a national securities exchange, national securities exchanges must have rules that are consistent with the Exchange Act, and in particular Section 6. To date, national securities exchanges have implemented rules to address the potential for conflicts of interest when the national securities exchange is affiliated with a broker-dealer that is a member of the national securities exchange. See, *infra*, notes 369-373 and accompanying text (discussing the Commission's concerns regarding conflicts of interest in the context of national securities exchanges).

¹⁶⁴ See *infra* Section XIII.C (discussing the Commission's preliminary belief that the proposal would help market participants make better decisions about where to route their orders, improve the efficiency of capital allocation, and execution quality, and also addressing the effect of the disclosure of proprietary information on competition).

¹⁶⁵ See Regulation of Non-Public Trading Interest, *supra* note 123, at 62108 (proposing rules and amendment to joint-industry plans).

¹⁵⁶ The Commission notes that some ATSs have chosen to make Form ATS filings publicly available. See, e.g., IEX ATS Form ATS Amendment, dated July 29, 2015, <http://www.iextrading.com/policy/ats/>; PDQ ATS Inc's Form ATS Amendment, dated January 30, 2015, http://www.pdqats.com/wp-content/uploads/2013/10/PDQ-FORM-ATS-FILING_01_30_15-Website.pdf; Liquidnet H2O ATS Form ATS Amendment, dated February 4, 2015, [http://www.liquidnet.com/uploads/ATS_\(H2O\)_Form-Exhibits_CLEAN_4feb2015.pdf](http://www.liquidnet.com/uploads/ATS_(H2O)_Form-Exhibits_CLEAN_4feb2015.pdf); SIGMA X Form ATS Amendment, dated May 21, 2014, <http://www.goldmansachs.com/media-relations/in-the-news/current/pdf-media/gs-form-ats-amendment.pdf>; POSIT Form ATS Amendment, dated January 26, 2015, http://www.itg.com/marketing/ITG_Form_ATS_for_POSIT_02112015.pdf.

¹⁵⁷ 15 U.S.C. 78s(b).

¹⁵⁸ See generally 15 U.S.C. 78s(a) and (b); and 17 CFR 240.19b-4. See also *supra* notes 20-23 and

things, the Commission proposed to substantially lower the trading volume threshold in Regulation ATS that triggers public display obligations for ATSs and to amend joint-industry plans for publicly disseminating consolidated trade data to require real-time disclosure of the identity of an ATS in the consolidated last-sale report. The Commission received four comments on its Regulation of Non-Public Interest proposal that directly relate to the amendments to Regulation ATS that the Commission is proposing today.¹⁶⁶

Three commenters expressed the view that the Commission should address the regulatory disparity between national securities exchanges and ATSs. Senator Edward E. Kaufman expressed the view that “as trading continues to become faster and more dispersed, it is that much more difficult for regulators to perform their vital oversight and surveillance functions,” and that “the Commission should consider strengthening the regulatory requirements for becoming an Alternative Trading System or starting a new trading platform for existing market centers.”¹⁶⁷ Senator Kaufman further urged the Commission to “harmonize rules across all market centers to ensure exchanges and ATSs are competing on a level playing field that serves the interests of all investors.” NYSE Euronext stated that because “ATSs now represent a significant share of trading volume in NMS stocks . . . the time is ripe to move to a framework that has consistent regulatory requirements when the trading activity at issue is essentially the same.”¹⁶⁸ The National Investor Relations Institute opined that “the same regulatory oversight, market surveillance, reporting, and other investor safeguards that exist for exchanges should be in place for all trading venues to ensure maximum investor protection.”¹⁶⁹

¹⁶⁶ See letter to Mary L. Schapiro, Chairman, Commission, from Sen. Edward E. Kaufman, United States Senate, dated August 5, 2010 (“Kaufman letter”); letters to Elizabeth M. Murphy, Secretary, Commission, from Janet M. Kissane, Senior Vice President, Legal & Corporate Secretary Office of the General Counsel, NYSE Euronext, dated February 22, 2010 (“NYSE Euronext letter #1”); from Jeffrey D. Morgan, CAE, President and CEO, National Investor Relations Institute, dated February 16, 2010 (“National Investor Relations Institute letter”); letter to the Commission, from Seth Merrin, Chief Executive Officer; Anthony Barchetto, Head of Trading Strategy; Jay Biancamo, Global Head of Marketplace; Vlad Khandros, Market Structure Analyst; Howard Meyerson, General Counsel, Liquidnet, Inc., dated December 21, 2009 (“Liquidnet letter #1”).

¹⁶⁷ Kaufman letter, *supra* note 166, attachment at 4–5.

¹⁶⁸ NYSE Euronext letter #1, *supra* note 166, at 3.

¹⁶⁹ National Investor Relations Institute letter, *supra* note 166, at 2.

Liquidnet expressed the view that the Commission should require institutional brokers, including institutional ATSs, to disclose to their customers specific order handling practices and that Regulation ATS should be amended to enhance the review process of new ATSs and material changes to ATSs’ business operations.¹⁷⁰ Liquidnet stated that disclosures by institutional brokers, including institutional ATSs, to their customers should include, among other things, identification of external venues to which the broker routes orders, the process for crossing orders with other orders received by the broker, execution of orders as agent and principal, a detailed description of the operation and function of each ATS or trading desk operated by the broker, a clear and detailed description of each algorithm and order type offered by the broker, categories of participant and admission criteria for each ATS or trading desk with which the customer’s order can interact, and internal processes and policies to control dissemination of the institution’s order and trade information and other confidential information.¹⁷¹ Liquidnet also suggested that the Commission amend “Regulation ATS to permit the Commission to delay the effective date of a new ATS commencing operation or of an existing ATS implementing a material business change if the Commission believes that information in the ATS filing is unclear or incomplete or raises an issue of potential non-compliance with applicable law or regulation,” and expressed support for making publicly available ATS filings with the Commission.¹⁷²

In 2010, the Commission issued a Concept Release that, among other things, solicited comment on whether trading centers offering undisplayed liquidity are subject to appropriate regulatory requirements for the type of business they conduct.¹⁷³ Specifically, the Commission asked, among other things, for comment on the following:¹⁷⁴

- Do investors have sufficient information about dark pools to make informed decisions about whether in fact they should seek access to dark pools? Should dark pools be required to provide improved transparency on their trading services and the nature of their participants? If so, what disclosures

¹⁷⁰ See Liquidnet letter #1, *supra* note 166, at D–5–6, 11.

¹⁷¹ See Liquidnet letter #1, *supra* note 166, at D–5–6.

¹⁷² *Id.* at D–11.

¹⁷³ See 2010 Equity Market Structure Release, *supra* note 124, at 3614.

¹⁷⁴ See *id.*

should be required and in what manner should ATSs provide such disclosures?

- Are there any other aspects of ATS regulation that should be enhanced for dark pools or for all ATSs, including ECNs?

- Are there any ways in which Regulation ATS should be modified or supplemented to appropriately reflect the significant role of ATSs in the current market structure?

The Commission received 20 comment letters that addressed these questions as they relate to the proposal.¹⁷⁵ The 20 comment letters offered contrasting views.

Five commenters expressed support for Commission action to address the regulatory disparity between national securities exchanges and ATSs, particularly where such trading venues perform similar functions. Security Traders Association of New York noted that it has “called for the harmonization of regulatory oversight and the need for similar rules across venues, including exchanges, ATSs and other liquidity sources that are connected through the

¹⁷⁵ See letters from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated October 24, 2014 (“SIFMA letter #2”); Richie Prager, Hubert De Jesus, Supurna Vedbrat, and Joanne Medero, BlackRock, Inc., dated September 12, 2014 (“Blackrock letter”); Micah Hauptman, Consumer Federation of America, dated September 9, 2014 (“Consumer Federation of America letter”); Christopher Nagy and Dave Lauer, KOR Group LLC, dated April 4, 2014 (“KOR Group letter”); Bill Neuberger, Andrew Silverman, Paul Fitzgerald, and Sapna Patel, Morgan Stanley, dated March 7, 2011 (“Morgan Stanley letter”); Raymond M. Tierney III and Gary Stone, Bloomberg Tradebook LLC, dated June 28, 2013 (“Bloomberg Tradebook letter”); Greg Tusar, Goldman Sachs Execution & Clearing, L.P., and Matthew Lavicka, Goldman Sachs & Co., dated June 25, 2010 (“Goldman Sachs letter”); Jeffrey S. Wecker, Lime Brokerage LLC, dated May 21, 2010 (“Lime Brokerage letter”); Andrew C. Small, Scottrade, dated May 19, 2010 (“Scottrade letter”); Kimberly Unger, The Security Traders Association of New York, Inc., dated May 10, 2010 (“Security Traders Association of New York letter”); Stuart J. Kaswell, Managed Funds Association, dated May 7, 2010 (“Managed Funds Association letter”); Raymond M. Tierney III, Bloomberg L.P., dated May 7, 2010 (“Bloomberg L.P. letter”); James J. Angel, Georgetown University, McDonough School of Business, dated January 16, 2011 (“Angel letter”); Joan C. Conley, Nasdaq OMX Group, Inc., dated April 30, 2010 (“Nasdaq OMX letter”); Ann Vlcek, Securities Industry and Financial Markets Association, dated April 29, 2010 (“SIFMA letter #1”); Joseph M. Velli, BNY ConvergeX Group, LLC, dated April 29, 2010 (“BNY ConvergeX Group letter”); O. Mason Hawkins, Richard W. Hussey, Deborah L. Craddock, Jeffrey D. Engelberg, and W. Douglas Schrank, Southeastern Asset Management, Inc., dated April 28, 2010 (“Southeastern Asset Management letter”); Janet M. Kissane, NYSE Euronext, dated April 23, 2010 (“NYSE Euronext letter #2”); David C. Cushing, Wellington Management Company, LLP, dated April 21, 2010 (“Wellington Management Company letter”); Seth Merrin, Howard Meyerson, and Vlad Khandros, Liquidnet, Inc., dated March 26, 2010 (“Liquidnet letter #2”).

Reg. NMS regulatory framework.”¹⁷⁶ Nasdaq OMX expressed the view that the “Commission has flexibility to adopt a more principles-based regulatory structure” which it could use to “level the competitive playing field between ATSS and exchanges,” and that “[i]n areas where ATS and exchange activities overlap, differences in [regulatory] approach should persist only if there is a clear policy basis for those differences.”¹⁷⁷ NYSE Euronext opined that the “lighter regulatory oversight for ATSS puts transparent, regulated markets at a competitive disadvantage, to the potential detriment of investors” and that “now that ATSS represent a significant share of trading volume in NMS stocks, . . . the Commission should address the regulatory disparity between registered exchanges and ATSS that engage in trading activities analogous to traditional exchange trading.”¹⁷⁸ Wellington Management Company expressed the view that “regulatory requirements for types of venues should differ only to the extent the differentiated requirements are specifically designed to address clearly identifiable and compelling needs” and that “material disparities in regulatory requirements could make it difficult for exchanges to compete with ATSS and broker-dealers and could threaten their long-term survival.”¹⁷⁹ Liquidnet stated that “[t]o the extent that an exchange conducts the equivalent business function as a broker or an ATS, regulators should ensure that levels of regulation are consistent.”¹⁸⁰

However, three commenters expressed the view that in order to rectify the regulatory disparity, the Commission should lessen regulatory burdens on exchanges, rather than enhance its regulation of ATSS. Goldman Sachs urged the Commission to “consider expanding the types of rule changes that exchanges . . . can propose on an immediately effective basis,” which “would help to level the playing field between exchanges and ATSS.”¹⁸¹ Wellington Management Company opined that “the burden of regulation should be shared fairly by execution venues” and that “exchanges should be granted the ability to make certain rule changes in a manner similar to ATSS (*i.e.*, as a notification with SEC veto authority, and not as part of a

lengthy notice, comment, and approval process).”¹⁸² Liquidnet stated that “regulators should not impose unnecessary burdens on ATSS and brokers, but rather should remove unnecessary regulatory burdens from exchanges, to the extent that they exist.”¹⁸³

Ten commenters expressed the view that ATSS and broker-dealers should be required to provide more enhanced disclosures regarding their operations, and described specific disclosures that the Commission should require of ATSS. SIFMA stated that the Commission “should require broker-dealers to publish on their Web sites, on a monthly basis, a standardized disclosure report that provides an overview of key macro issues that are of interest to clients,” including, among other things, “order types supported on the broker-dealer’s ATS (if applicable).”¹⁸⁴ Blackrock, Inc. expressed the view that although some ATSS voluntarily publish their Form ATS filings and supplemental materials, the “particular operational features specified and degree of detail lack consistency from one [Form ATS] submission to another” and that “[a]dditional standardization and information are required in disclosures about ATS practices.”¹⁸⁵ Blackrock further stated that “[m]andatory ATS disclosures should include greater detail on how the platform calculates reference prices, determines order priority, matches orders between client segments, monitors execution quality, advertises orders, interacts with affiliates and is compensated by subscribers.”¹⁸⁶ The Consumer Federation of America stated that Form ATS should require ATSS to provide “critical details about an ATS’s participants, segmentation, and fee structure” because the “information will allow market participants, regulators, and third party analysts to assess whether an ATS’s terms of access and service are such that it makes sense to trade on that venue.”¹⁸⁷ The Consumer Federation of America further opined that “the Commission should undertake an exhaustive investigation of the current order types, requiring exchanges and all ATSS, including dark pools, to disclose in easily understandable terms what their purpose is, how they are used in practice, who is using them, and

why they are not discriminatory or resulting in undue benefit or harm to any traders.”¹⁸⁸

Bloomberg Tradebook LLC noted that buy-side representatives with whom it met at a workshop for members of equity trading desks of asset managers stated that although they periodically send questionnaires to their brokers regarding order handling and internalization (dark pool) matching protocols, because the buy-side representatives might not be customers of all ATSS, they could not assess order interaction that occurs across the market structure.¹⁸⁹ Bloomberg Tradebook also recommended that the Commission ask exchanges and ATSS to complete a questionnaire with “Yes” and “No” checkboxes that would provide an overview of each exchange’s or ATS’s operations, and which Bloomberg Tradebook suggested could be posted on the Commission’s Web site. Bloomberg Tradebook provided a sample questionnaire that included questions relating to, among other things, affiliations, riskless principal trades, trades effected in a proprietary capacity, sharing of orders or order information with affiliates or other trading venues and compensation for such sharing, operation of a smart order router and whether it gives preference to the exchange or ATS or an affiliate, priority rules, order types that enable customers to gain preference, and special fees or rebates which lead to a preference of one order over another.¹⁹⁰

Goldman Sachs recommended an enhanced disclosure regime for exchanges and ATSS consisting of four components. First, exchanges and ATSS would be required to “provide descriptions of the types of functionalities that they provide, such as types of orders (*e.g.*, flash/pinging orders, conditional orders), services (*e.g.*, co-location, special priority), and data (*e.g.*, depth-of-book quotations, per order information).” Second, they would “disclose the basis upon which members/subscribers access the type of order, service or data,” and “whether only a certain class of market participants has access.” Third, they would be required to disclose how commonly the functionality is used. Fourth, the exchanges and ATSS would disclose more market quality statistics “so that investors and other market

¹⁷⁶ Security Traders Association of New York letter, *supra* note 175, at 2.

¹⁷⁷ Nasdaq OMX letter, *supra* note 175, at 13, 16.

¹⁷⁸ NYSE Euronext letter #2, *supra* note 175, at 7.

¹⁷⁹ Wellington Management Company letter, *supra* note 175, at 3.

¹⁸⁰ Liquidnet letter #2, *supra* note 175, at F-7.

¹⁸¹ Goldman Sachs letter, *supra* note 175, at 10.

¹⁸² Wellington Management Company letter, *supra* note 175, at 3.

¹⁸³ Liquidnet letter #2, *supra* note 175, at F-7.

¹⁸⁴ SIFMA letter #2, *supra* note 175, at 13.

¹⁸⁵ Blackrock letter, *supra* note 175, at 4.

¹⁸⁶ *Id.*

¹⁸⁷ Consumer Federation of America letter, *supra* note 175, at 22.

¹⁸⁸ *Id.* at 37-38.

¹⁸⁹ Bloomberg Tradebook letter, *supra* note 175, at 1.

¹⁹⁰ *Id.* at 2-3.

participants could better gauge execution quality.”¹⁹¹

Lime Brokerage, LLC recommended that the Commission should require “transparency around pricing, access criteria and membership of dark pools.”¹⁹² Managed Funds Association stated that “as long as co-location is available to investors, traders and larger brokers on an equal basis, the secondary market for such services to smaller customers from their brokers should be competitive and thus, fairly priced,” and therefore, “we believe market centers should disclose if they or third parties offer co-location services on a priority basis other than first available.”¹⁹³ SIFMA stated its belief that “added disclosure about co-location and other market access arrangements would be beneficial to market participants,” and that “[s]uch disclosure might describe standard, high speed, co-location, or other means by which members may access an exchange or ATS, and provide market participants with details regarding the categories of market participants that use each means of access, the data capacity associated with each arrangement, and the quotation and transaction volume attributable to each arrangement.”¹⁹⁴

Southeastern Asset Management, Inc. commented that brokers and trading venues should disclose to investors information such as payments, rebates, and fees related to execution venues, venue rankings by routing brokers and routing venues, and the inputs that create the routing rankings, and the transparency of customer specific order routing and execution available to the specific customer.¹⁹⁵ Liquidnet recommended that institutional ATSs make similar disclosures to those it recommended when commenting on the Regulation of Non-Public Interest proposing rules and amendment to joint-industry plans.¹⁹⁶

In addition to the ten commenters that provided specific Form ATS disclosure recommendations, one commenter provided some examples of customer questions and requests specific to dark pools that it received. Such questions and requests related to, among other things, whether the commenter’s dark pool is truly dark, categorization or tagging of order flow, whether participants may opt out of or into

interaction with certain flow, proprietary orders interaction with the dark pool, priority rules, requests to exclude certain types of venues for routing of orders, maintenance of confidential trading information, use of direct market data feeds by the dark pool’s servers and algorithmic strategies, and co-location of servers and algorithmic strategies to exchange and ATS servers.¹⁹⁷ The commenter also provided some sample questions for its clients to ask of their dark pool providers. These included questions relating to the dark pools methods of access, client/subscriber base, types of orders permitted, matching of dark pool orders at the NBBO, price improvement, interaction of the dark pool’s principal and proprietary orders with client orders on the dark pool, categorization or tagging of order flow, and order types.¹⁹⁸ The commenter also included several questions that clients should ask dark pools about the sell-side broker-dealers and exchanges that the dark pools access.

In response to the questions the Commission raised in the Equity Market Structure Release, one commenter raised questions relating to the transparency of ATSs’ operations. The commenter asked, among other things, whether:

- Form ATS filings provide the Commission with complete and timely information about the operation of ATSs, and whether such filings are sufficiently frequent and detailed to allow the Commission to understand planned system changes by ATSs;
- the Commission has adequate tools to respond to concerns about the operations of ATSs;
- the Commission has adequate information about the relationships between ATSs and their subscribers, including how “toxicity” ratings are assigned to subscribers, and their impact on individual subscriber’s access and fees, and whether it is acceptable that ATS subscribers can assign such ratings to counterparties within and outside the ATS without disclosing objective criteria;
- the Commission has adequate information about ATS pricing, noting

¹⁹⁷ See Morgan Stanley letter, *supra* note 175, at 12–14. Additionally, representatives from Morgan Stanley met with staff from the Commission’s Division of Trading and Market to discuss market structure issues. During that meeting, Morgan Stanley provided, among other things, examples of frequently asked questions that it believes could be standardized to provide mandated transparency about how orders are handled on dark pools. See Memorandum from the Division of Trading and Markets regarding an October 1, 2015, meeting with representatives of Morgan Stanley, <https://www.sec.gov/comments/s7-02-10/s70210.shtml>.

¹⁹⁸ See Morgan Stanley letter, *supra* note 175.

that but for the Rule 3a1–1 exemption from exchange registration, ATSs would be required to charge fees that are fair and not unreasonably discriminatory; and

- the Commission receives enough information from ATSs about their access policies to make comprehensive assessment about competitive dynamics at work in the market.¹⁹⁹

The commenter stated its belief that responding to the Commission’s questions in the Equity Market Structure Release with the commenter’s own responsive questions was “entirely appropriate” because the “public cannot comment on the adequacy of Form ATS filings,” and therefore, “the Commission and its staff are uniquely qualified to assess whether the requirements of the Form and the content of actual submitted filings provide adequate and timely information.”²⁰⁰

One commenter discussed a May 2009 Opinion Research Corporation survey of 284 executives from NYSE-listed companies, noting that only 17% of the executives were satisfied with the transparency of trading in their company’s stock, and that 69% of the executives “indicated there is inadequate regulatory oversight of non-exchange trading venues, including dark pools.”²⁰¹

Five commenters expressed the view that Form ATS filings should be made publicly available. SIFMA opined that “[t]o enhance transparency and confidence, all ATSs should publish the Form ATS and make their forms available on their Web sites.”²⁰² Blackrock stated that current and historical Form ATS filings for active ATSs “should be made immediately available to the public, subject to appropriate redaction of confidential information,” noting that some ATS operators “have already displayed exemplary transparency by voluntarily publishing their Form ATS filings and supplemental materials.”²⁰³ The Consumer Federation of America stated its support for requiring all ATSs, including dark pools, to publicly disclose their Forms ATS “so that the public can see how these venues operate.”²⁰⁴ KOR Group LLC opined that the fact that “ATS filings are hidden from the public while the burden is on SROs to file publicly . . . does not serve the public interest in any

¹⁹⁹ See Nasdaq OMX letter, *supra* note 175, at 14–16.

²⁰⁰ *Id.* at 16.

²⁰¹ NYSE Euronext letter #2, *supra* note 175, at 7.

²⁰² SIFMA letter #2, *supra* note 175, at 13.

²⁰³ Blackrock letter, *supra* note 175, at 4.

²⁰⁴ Consumer Federation of America letter, *supra* note 175, at 22.

¹⁹¹ Goldman Sachs letter, *supra* note 175, at 9–10.

¹⁹² Lime Brokerage letter, *supra* note 175, at 7.

¹⁹³ Managed Funds Association letter, *supra* note 175, at 27.

¹⁹⁴ SIFMA letter #1, *supra* note 175, at 7.

¹⁹⁵ See Southeastern Asset Management letter, *supra* note 175, at 7.

¹⁹⁶ See Liquidnet letter #2, *supra* note 175, at F–1–F–2; see also *supra* note 129.

way, and makes it easy for media and others to sensationalize and demonize what is occurring in this part of the market," further opining that there "should not be any reasoned argument against" making Form ATS publicly available.²⁰⁵ Goldman Sachs recommended disclosing Form ATS publicly because "[s]uch disclosure would provide investors with useful information regarding the business practices of ATSs," and supported a requirement for "ATSs to provide public notice of material changes to their business practices," but also stated its opposition to "any requirement that ATSs disclose information about their matching algorithms or the nature of their subscribers" because such disclosure "could result in information leakage that would detrimentally impact liquidity."²⁰⁶ James J. Angel commented that Form ATS should be publicly available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR").²⁰⁷ As it had done when commenting on the Regulation of Non-Public Interest proposing rules and amendment to joint-industry plans,²⁰⁸ Liquidnet recommended that ATS filings with the Commission be made publicly available.²⁰⁹

Three commenters expressed their opposition to enhanced regulation of ATSs. Scottrade, Inc. stated it believed that ATSs had "brought innovation and better execution quality to the equity markets," and that it "would not be in favor of additional regulation that would reduce competition, raise barriers to entry for ATSs or force orders to be routed to specific destinations."²¹⁰ Bloomberg L.P. stated that it had "heard exchanges argue it would be in the interest of the exchanges to regulate ATSs more aggressively," but that it had "not seen evidence why that which is in the exchanges' interest is necessarily in the public interest," and suggested that the Commission should "look to investors' needs," which Bloomberg L.P. thought "do not . . . justify increasing the regulatory burdens on alternative trading systems."²¹¹ BNY ConvergeEx Group stated its belief that "the current system of ATS regulation works well and structural changes are not necessary," and that because "[d]ark ATSs market their services to

institutional customers and prospective customers on a continuous basis . . . institutions know full well what types of customers each ATS caters to and the services they offer."²¹² BNY ConvergeEx Group acknowledged that "some retail investors may not understand precisely how dark ATSs operate," but opined that "[a]ny perceived lack of information for retail investors about an ATS's trading services would only become an issue if the ATS was to become subject to the Fair Access provisions of Regulation ATS," and that "because retail investors are unlikely to pass the objective credit and other financial standards that would be required under a Fair Access regime to become subscribers of the ATS, this may not be a real issue."²¹³

The Commission received two comment letters on its Market Structure Web site relevant to the Commission's proposal to amend Regulation ATS.²¹⁴

Blackrock submitted the same comment letter to the Market Structure Web site that it submitted with respect to the 2010 Equity Market Structure Release.²¹⁵ Citadel expressed the view that "dark pools should be subject to increased transparency," and that "ATS operational information and filings should be publicly available."²¹⁶

The Commission has considered these comments, and, for the reasons set forth throughout this release, is proposing the amendments to Regulation ATS and Exchange Act Rule 3a1-1 as described herein.

IV. Proposed Amendments to Regulation ATS and Rule 3a1-1 to Heighten Regulatory Requirements for ATSs That Transact in NMS Stocks

A. Proposed Definition of NMS Stock ATS

The Commission is proposing to amend Rule 300 of Regulation ATS to provide for the definition of "NMS Stock ATS" in a new paragraph (k). The purpose of proposed Rule 300(k) is to specify the type of ATS that would be subject to the heightened conditions under Exchange Act Rule 3a1-1, as described further below. Proposed Rule 300(k) would define "NMS Stock ATS"

to mean an "an alternative trading system, as defined in Exchange Act Rule 300(a), that facilitates transactions in NMS stocks, as defined in Exchange Act Rule 300(g)."²¹⁷ Rule 300(g) of Regulation ATS currently provides, and would continue to provide, that the term "NMS stock" has the meaning provided in Exchange Act Rule 600 of Regulation NMS; provided, however, that a debt or convertible debt security shall not be deemed an NMS stock for purposes of Regulation ATS.²¹⁸ Pursuant to Exchange Act Rule 600(b), an NMS stock is any NMS security other than an option,²¹⁹ and an NMS security is "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan."²²⁰ Thus, under the proposed amendment to Regulation ATS, an NMS Stock ATS would include

²¹⁷ See proposed Rule 300(k).

²¹⁸ See 17 CFR 242.300(g).

²¹⁹ See 17 CFR 242.600(b)(47).

²²⁰ See 17 CFR 242.600(b)(46). Transaction reports for securities that are listed and registered, or admitted to unlisted trading privileges on a national securities exchange, are collected, processed, and made available pursuant to the Consolidated Tape Association ("CTA") plan ("CTA Plan") and the OTC/UTP Plan. See, e.g., CTA Plan (dated as of October 1, 2013), <https://www.ctaplan.com/publicdocs/ctaplan/notifications/plans/trader-update/5929.pdf> at 34 (describing the types of securities to which the CTA plan applies).

See also Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchange on an Unlisted Trading Privilege Basis, http://web.archive.org/web/20070114023844/http://www.utpdata.com/docs/UTP_PlanAmendment.pdf at 2, 10-13 ("OTC/UTP Plan") (describing the securities for which transaction information is collected and disseminated as any Nasdaq Global Market or Nasdaq Capital Market security, as defined in then-operative NASDAQ Rule 4200). Nasdaq Rule 5005(a)(26) defines Nasdaq Global Market security as: Any security listed on Nasdaq that (1) satisfies all applicable requirements of the Rule 5100 and 5200 Series and meets the criteria set forth in the Rule 5400 Series; (2) is a right to purchase such security; (3) is a warrant to subscribe to such security; or (4) is an Index Warrant which meets the criteria set forth in Rule 5725(a). Nasdaq Rule 5005(a)(28) defines Nasdaq Capital Market security as: Any security listed on The Nasdaq Capital Market that (1) satisfies all applicable requirements of the Rule 5100, 5200 and 5500 Series but that is not a Nasdaq Global Market security; (2) is a right to purchase such security; or (3) is a warrant to subscribe to such security.

These plans are filed with, and approved by, the Commission in accordance with the requirements of Rule 608 of Regulation NMS, and pursuant to Rule 601 of Regulation NMS, which requires every national securities exchange to "file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed through its facilities" and every national securities association to "file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed by its members otherwise than on a national securities exchange."

²¹² BNY ConvergeEx Group letter, *supra* note 175, at 18, 21.

²¹³ See *id.* at 21.

²¹⁴ See Blackrock letter, *supra* note 175; letter from John C. Nagel, Managing Director and Senior Deputy Counsel, Citadel LLC, dated July 21, 2014 ("Citadel letter"). See also Securities and Exchange Commission Market Structure Web site ("Market Structure Web site"), <http://www.sec.gov/marketstructure/>.

²¹⁵ See Blackrock letter, *supra* notes 175, 185, 186, and 203 and accompanying text.

²¹⁶ See Citadel letter, *supra* note 214, at 4.

²⁰⁵ KOR Group letter, *supra* note 175, at 12.

²⁰⁶ Goldman Sachs letter, *supra* note 175, at 10.

²⁰⁷ See Angel letter, *supra* note 175, at 13.

²⁰⁸ See Liquidnet letter #1 *supra* note 166.

²⁰⁹ See Liquidnet letter #2, *supra* note 175, at F-8.

²¹⁰ Scottrade letter, *supra* note 175, at 4.

²¹¹ Bloomberg L.P. letter, *supra* note 175, at 4-5.

any ATS that effects transactions in securities that are listed on a national securities exchange (other than options, debt or convertible debt). In addition, to meet the definition of an NMS Stock ATS, the organization, association, person, group of persons or system must meet the definition of an alternative trading system under Rule 300(a) of Regulation ATS.²²¹

The Commission requests comment on the proposed definition of NMS Stock ATS. In particular, the Commission solicits comment on the following:

1. Do you believe the Commission should adopt a more limited or expansive definition of NMS Stock ATS? Why or why not? Please support your arguments.

2. Should the Commission create the NMS Stock ATS category? Why or why not? Please support your arguments.

3. Should the Commission modify its proposed definition in any way? If so, in what way and why? If not, why not? Please support your arguments.

B. Rule 3a1-1(a)(2): Proposed Amendments to the Exemption From the Definition of "Exchange" for NMS Stock ATSs

Exchange Act Rule 3a1-1(a) exempts from the definition of "exchange": (1) Any alternative trading system operated by a national securities association,²²² (2) any alternative trading system that complies with Regulation ATS,²²³ and (3) any alternative trading system that under Rule 301(a) of Regulation ATS is not required to comply with Regulation ATS.²²⁴ Most ATSs fall within the second prong of Exchange Act Rule 3a1-1 and thus, must comply with Regulation ATS to qualify for an exemption from the statutory definition of an "exchange."

As discussed in more detail below, the Commission is now proposing to expand the conditions with which NMS Stock ATSs would be required to comply in order to use the exemption from the definition of "exchange." To provide for these new conditions, the Commission is proposing to amend

²²¹ 17 CFR 242.300(a).

As it did in the Regulation ATS Adopting Release, the Commission notes that whether the actual execution of the order takes place on the system is not a determining factor of whether a system falls under Rule 3b-6. A trading system that falls within the Commission's functional definition of "exchange" pursuant to Rule 3b-6 will still be an "exchange," even if it matches two trades and routes them to another system or exchange for execution. See Regulation ATS Adopting Release, *supra* note 7, at 70851-70852.

²²² 17 CFR 240.3a1-1(a)(1).

²²³ 17 CFR 240.3a1-1(a)(2).

²²⁴ 17 CFR 240.3a1-1(a)(3).

Rules 3a1-1(a)(2) and (3) to include proposed Rule 304 within the scope of Regulation ATS.²²⁵ Amended Rule 3a1-1(a)(2) would condition the exemption for any ATS that meets the definition of "NMS Stock ATS" on compliance with Rules 300 through 303 of Regulation ATS (except Rule 301(b)(2)) and proposed Rule 304.²²⁶ The Commission is proposing to amend Rule 3a1-1(a)(3) by changing the reference to Rule 303 to proposed Rule 304. This is merely a conforming change to make clear that an NMS Stock ATS that meets the requirements of Rule 301(a) is not required to comply with Regulation ATS, which would be amended to include proposed Rule 304. Rule 3a1-1(a)(1), which exempts any ATS that is operated by a national securities association, is not impacted by the amendments the Commission is proposing today.

The Commission preliminarily believes that amending the conditions to the Rule 3a1-1(a) exemption would more appropriately calibrate the level of operational transparency between registered national securities exchanges and NMS Stock ATSs, which in many regards, are functionally similar trading centers, while maintaining the regulatory framework that permits NMS Stock ATSs to decide whether to register and be regulated as broker-dealers or as national securities exchanges.²²⁷ The Commission notes, as it has in other contexts,²²⁸ that SRO and non-SRO markets, such as NMS Stock ATSs, are subject to different regulatory regimes, with a different mix of benefits and obligations. Pursuant to this proposal, NMS Stock ATSs would continue to be able to choose to register as national securities exchanges or as broker-dealers. The Commission is proposing, however, to increase the scope of the conditions to the exemption for the purpose of providing more transparency around the operations of NMS Stock ATSs and

²²⁵ In Exchange Act Rules 3a1-1(a)(2) and (3), Regulation ATS is currently defined as "17 CFR 242.300 through 242.303." The Commission is proposing to amend these references to Regulation ATS to define Regulation ATS as "17 CFR 242.300 through 242.304."

²²⁶ See *infra* Section IV.C. Specifically, the Commission is proposing to amend Rule 3a1-1(a)(2) by changing the reference to Rule 303 to proposed Rule 304. Under the proposal, an NMS Stock ATS would not be required to file the reports and amendments that it is currently required to file on Form ATS pursuant to Rule 302(b)(2), unless the ATS also effects transactions in securities other than NMS stock and is not otherwise exempt. See proposed Rule 301(b)(2)(viii).

²²⁷ See Regulation ATS Adopting Release, *supra* note 7, at 70856-70857.

²²⁸ See, e.g., SCI Adopting Release, *supra* note 17, at 72264.

potential conflicts of interest resulting from the unique relationship between the broker-dealer operator and the NMS Stock ATS, as discussed further below. While questions have been raised in other contexts as to whether the broader regulatory framework for national securities exchanges and ATSs should be harmonized,²²⁹ the Commission preliminarily believes that the proposals are an appropriate response to concerns about the need for transparency about the operations of NMS Stock ATSs and potential conflicts of interest resulting from the activities of their broker-dealer operators and the broker-dealer operators' affiliates. The Commission preliminarily believes that the proposals would help market participants make better informed decisions about where to route their orders for execution; the proposed disclosures would also provide the Commission with improved tools to carry out its oversight of NMS Stock ATSs. Moreover, as explained above, the Commission is concerned that market participants have limited information about the increasingly complex operations of NMS Stock ATSs,²³⁰ and need more transparency on NMS Stock ATSs to fully evaluate how their orders are handled and executed on NMS Stock ATSs. The Commission preliminarily believes that the enhanced disclosures about the operations of NMS Stock ATSs elicited by proposed Form ATS-N would provide better information about how NMS Stock ATSs operate and, thereby, enable the Commission to determine whether additional regulatory changes for either or both national securities exchanges and ATSs are necessary.

The Commission has considered the alternative of requiring different levels of disclosure among NMS Stock ATSs based on volume.²³¹ However, the Commission preliminarily believes that it is necessary and appropriate for the protection of market participants to apply the proposed heightened conditions for the Rule 3a1-1(a)(2) exemption to all NMS Stock ATSs. The Commission notes that market participants may subscribe to multiple ATSs and route orders in NMS stocks among various ATSs prior to receiving an execution. The Commission preliminarily believes that because orders in NMS stocks may be routed to any NMS Stock ATS, regardless of the volume traded on the NMS Stock ATS, all market participants would benefit from the disclosures provided pursuant to proposed Rule 304. Accordingly, the

²²⁹ See *id.*

²³⁰ See *supra* Sections III.B and C.

²³¹ See *infra* Section XIII.D.4.

Commission believes that the proposed rules addressing greater operational transparency should apply equally to all NMS Stock ATSs.

The Commission requests comment on the scope of the proposed amendments to Rules 3a1-1(a)(2) and (3), which would apply the proposed new conditions of Rule 304 to all NMS Stock ATSs. In particular, the Commission solicits comment on the following:

4. Do you believe that the current conditions to the exemption from the definition of “exchange” for NMS Stock ATSs are appropriate in light of market developments since Regulation ATS was adopted in 1998? Why or why not? Please support your arguments.

5. Do you believe there is sufficient transparency with respect to the operations of NMS Stock ATSs? If not, what information do you believe should be disclosed regarding the operations of an NMS Stock ATS, how frequently should it be disclosed, and why? Does the need for, and availability of, information about the operations of NMS Stock ATSs vary among market participants? If so, how? Please explain in detail.

6. Do you believe there is sufficient transparency with respect to the activities of the broker-dealer operator and its affiliates in connection with NMS Stock ATSs? If not, what information do you believe should be disclosed regarding the activities of the broker-dealer operator and its affiliates and why? Does the need for, and availability of, information about the activities of the broker-dealer operator and its affiliates vary among market participants? If so, how? Please explain in detail.

7. Should the Commission adopt the proposal to apply the requirements of proposed Rule 304 to all NMS Stock ATSs? Why or why not? Please support your arguments.

8. Do you believe that the Commission should provide any exceptions to the application of proposed Rule 304 to NMS Stock ATSs seeking to operate pursuant to the Rule 3a1-1(a)(2) exemption? Why or why not? For example, should the requirements to comply with proposed Rule 304, including the disclosure requirements of proposed Form ATS-N, only be applicable to NMS Stock ATSs that meet certain thresholds (such dollar volume, trading volume, or number of subscribers)? If so, what should the threshold be, and why? If not, why not? Please support your arguments.

9. Do you believe that the Commission should require different levels of disclosure for any proposed

Form ATS-N items based on the NMS Stock ATS's volume? If so, why, what should the different thresholds be, and which items on proposed Form ATS-N should depend on an NMS Stock ATS's volume? If not, why not? Please support your arguments.

At this time, the Commission preliminarily believes that the above operational transparency conditions to the exemption to Exchange Act Rule 3a1-1(a) should only apply to NMS Stock ATSs. The Commission, however, requests comment and data on whether its preliminary view is warranted for each category of non-NMS stock ATS.

First, approximately 27 ATSs that currently have a Forms ATS on file with the Commission disclose that they exclusively trade fixed income securities, such as corporate or municipal bonds, and approximately 2 ATSs effect transactions in both fixed income securities and other securities, including NMS stocks.²³² Based on Commission experience, the equity markets, which are generally highly automated trading centers that are connected through routing networks, operate and execute orders at rapid speeds using a variety of order types. Unlike the complex trading centers of the equity markets, the Commission preliminarily believes that fixed income markets currently rely less on speed, automation, and electronic trading to execute orders and other trading interest,²³³ although that may be changing in some fixed income markets such as those that trade certain government securities.²³⁴ Generally, fixed income ATSs offer less complex order types to their subscribers than those offered by NMS Stock ATSs, sometimes restricting incoming orders to limit orders, and the execution of matched interest involves negotiation or a process. In addition, the municipal and corporate fixed income markets tend to be less liquid than the equity markets, with slower execution times and less complex routing strategies.²³⁵

Furthermore, market participants trading fixed income securities are typically not comparing transparent trading venues against non-transparent trading venues in the same manner as market participants seeking to execute NMS stock orders. Although two affiliated national securities exchanges

operate electronic systems for receiving, processing, executing, and reporting bids, offers and executions in fixed income debt securities,²³⁶ the Commission preliminarily believes that the majority of trading in fixed income securities occurs on the bilateral market.²³⁷ As such, ATSs that effect trades in fixed income securities primarily compete against other trading venues with limited or no operational transparency requirements or standards. By contrast, NMS Stock ATSs, which provide limited information to market participants about their operations, compete directly with national securities exchanges, which are required to publicly disclose information about their operations in the form of proposed rule changes and a public rule book. Accordingly, the Commission preliminarily believes that any proposed revisions to the disclosure requirements for fixed income ATSs under Regulation ATS should be specifically tailored to the attributes of the fixed income market and, therefore, may require different changes to the current Regulation ATS regime and Form ATS than those being proposed herein, which are in direct response to specific transparency concerns related to the operational complexities of NMS Stock ATSs and market participants' general inability to compare NMS Stock ATSs to one another and to national securities exchanges.

The Commission recognizes, however, that trading on fixed income ATSs continues to evolve as fixed income securities are increasingly being traded on ATSs and that trading is occurring in an automated manner. Furthermore, while the specific conflicts of interest that might arise on NMS Stock ATSs operated by multiservice broker dealers may not be identical to the potential conflicts of interest that might arise on

²³² Data compiled from Forms ATS and ATS-N submitted to the Commission as of November 1, 2015.

²³³ See SCI Adopting Release, *supra* note 17, at 72270.

²³⁴ See October 15 Staff Report, *infra* note 247 at 35-36.

²³⁵ See SCI Adopting Release, *supra* note 17, at 72270.

²³⁶ See Securities Exchange Act Release Nos. 55496 (March 20, 2007) 72 FR 14631 (March 28, 2007) (NYSE-2006-37) (approving the establishment of NYSE Bonds as an electronic order-driven matching system for debt securities, including, but not limited to corporate bonds (including convertible bonds), international bank bonds, foreign government bonds, U.S. government bonds, government agency bonds, municipal bonds, and debt-based structured products under NYSE Rule 86) and 58839 (October 23, 2008) 73 FR 64645 (October 30, 2008) (NYSEALTR-2008-03) (notice of filing and immediate effectiveness of the Exchange's proposal to relocate the Exchange's debt trading and adopt NYSE Alternext Equities Rule 86 (now NYSEMKT—Equities Rule 86) in order to facilitate trading on the system NYSE Alternext Bonds system (now NYSEMKT Bonds)).

²³⁷ For interdealer trading for “benchmark” U.S. Treasury securities, however, trading occurs mainly on centralized electronic trading platforms using a central limit order book, namely ATSs. See October 15 Staff Report, *infra* note 247 at 11.

a fixed income ATS,²³⁸ the current operations of fixed income ATSs may give rise to potential conflicts of interest between the non-ATS operations of a broker-dealer operator, or its affiliates, and the fixed income ATS. Accordingly, the Commission seeks comment on the following:

10. Do you believe that market participants have sufficient information about the operations of fixed income ATSs to evaluate such ATSs as potential trading venues? Why or why not? Please support your arguments.

11. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to fixed income ATSs, or some subset of fixed income ATSs? Why or why not? If proposed Rule 304 should be applied only in part to fixed income ATSs, which parts should be applied and why? What, if any, specific modifications or additions to proposed Rule 304 should be made in any application of it to fixed income ATSs? Please support your arguments.

12. Do you believe that fixed income ATSs raise the same or similar operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSs? Why or why not? Please support your arguments. If not, do you believe that fixed income ATSs raise other operational transparency concerns that warrant inclusion of fixed income ATSs within the scope of proposed Rule 304? Why or why not? Please support your arguments.

13. Do you believe that there are potential conflicts of interest for broker-dealer operators of fixed income ATSs, or their affiliates, that may warrant inclusion of fixed income ATSs within the scope of proposed Rule 304? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble the potential conflicts of interest for broker-dealer operators of NMS Stock ATSs and their affiliates? Please be specific.

14. Do you believe that the current conditions to the exemption from the definition of “exchange” are appropriate for fixed income ATSs? Why or why not? Please support your arguments.

15. Do you believe that applying proposed Rule 304 to fixed income ATSs would place them at a competitive

disadvantage with respect to non-ATS trading venues that trade fixed income securities and would not be subject to such disclosure requirements? Why or why not? Please support your arguments.

16. Should the Commission adopt a new form that is designed specifically to solicit information about the operations of fixed income ATSs or the operations of certain types of fixed income ATSs? If so, please explain, in detail, the information the new form should require. If not, why not? Please support your arguments. Do you believe that part or all of any new form designed specifically for fixed income ATSs should be made available to the public? Why or why not? Please support your arguments.

As noted above, the Commission recognizes that fixed income securities markets continue to evolve as fixed income securities are increasingly being traded on ATSs in an automated manner. Thus, under the current regulatory requirements, market participants generally do not have information about how fixed income ATSs operate as ATSs are not otherwise required to publicly disclose such information²³⁹ and Forms ATS filed with the Commission by fixed income ATSs are deemed confidential.

As such, the Commission is seeking public comment on whether it should make public current Forms ATS filed by fixed income ATSs. Though the solicitations on current Form ATS are not specifically tailored to fixed income ATSs like proposed Form ATS–N would be tailored to NMS Stock ATSs, market participants could use the information to assess and compare fixed income ATSs when deciding where to trade fixed income securities. The Commission is cognizant, however, that fixed income ATSs currently file Form ATS with the understanding that the Form ATS is deemed confidential and thus, a fixed income ATS may not have chosen to operate as an alternative trading system if its Form ATS filing was originally intended to be made public. In response to any change in the regulatory requirements, a fixed income ATS may change its business model and choose to curtail its activities or cease operating as an ATS.

Accordingly, the Commission seeks comment on the following:

17. Do you believe that the current Forms ATS initial operation report, or parts thereof, filed by fixed income ATSs should be made available to the

public? Why or why not? Please support your arguments.

18. Do you believe that amendments to Form ATS initial operation reports, or parts thereof, filed by fixed income ATSs should be made available to the public? Why or why not? Please support your arguments.

19. Do you believe that current Form ATS is sufficient to elicit useful information about the operations of fixed income ATSs? If so, why? If not, in what ways should Form ATS be modified to better inform the Commission about the operations of fixed income ATSs? Please explain in detail the manner in which Form ATS should be modified for fixed income ATSs.

20. Do you believe that fixed income ATSs may curtail or cease operations if the Commission rescinded the confidential treatment of Form ATS and made Forms ATS filed by fixed income ATSs public? Why or why not? Please support your arguments.

21. Do you believe that if fixed income ATSs curtail or cease operations in response to the Commission rescinding the confidentiality of the Form ATS, the limitation or exit of those ATSs from the fixed income market would impact the quality of the fixed income markets in any way? Why or why not? Please support your arguments.

The questions above relate to all fixed income securities, but the Commission is also interested in learning commenters' specific views about whether ATSs that effect transactions in fixed income securities that are government securities, as defined under the Exchange Act,²⁴⁰ should be subject to increased regulation, operational transparency requirements, or both. Under Rule 301(a)(4) of Regulation ATS, an ATS that solely trades government securities and is registered as a broker-dealer or is a bank is exempt from the requirement to either register as a national securities exchange or comply with Regulation ATS.²⁴¹ If an ATS trades both government securities and non-government securities—such as NMS stocks, corporate or municipal fixed income securities—it must either register as a national securities exchange or comply with Regulation ATS. However, these ATSs are not subject to several requirements under Regulation ATS with regard to their trading in government securities. First, ATSs that

²³⁸ For instance, the Commission preliminarily believes that non-ATS business units of broker-dealer operators of fixed income ATSs may not trade proprietarily on their ATSs to the same extent that proprietarily trading desks, or other business units, of multiservice broker-dealer operators trade on NMS Stock ATSs.

²³⁹ The Commission does note, however, that some ATSs may currently make voluntary public disclosures. See, e.g., *infra* note 156.

²⁴⁰ See 15 U.S.C. 78c(a)(42) (defining “government securities” as, among other things, “securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States”).

²⁴¹ See 17 CFR 242.301(a)(4)(i) and (ii)(A).

do not trade NMS stocks are not subject to the order display and execution access provisions under Rule 301(b)(3).²⁴² Additionally, the government securities activities of ATSs that trade both government and other securities are not subject to either the fair access provisions of Rule 301(b)(5)²⁴³ or the capacity, integrity, and security of automated systems provisions under Rule 301(b)(6).²⁴⁴

Pursuant to the Exchange Act (particularly the provisions of the Government Securities Act of 1986, as amended²⁴⁵) and federal banking laws, brokers and dealers in the government securities market are regulated jointly by the Commission, the United States Department of the Treasury (“U.S. Treasury Department”), and federal banking regulators.²⁴⁶ Recently, staff members from the U.S. Treasury Department, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Commission, and the U.S. Commodity Futures Trading Commission issued a joint report about the unusually high level of volatility and rapid round-trip in prices that occurred in the U.S. Treasury market on October 15, 2014 (the “October 15 Staff Report”).²⁴⁷ The October 15 Staff Report discusses the conditions that contributed to the October 15, 2014 developments and key findings from the analysis of data from that day.

The October 15 Staff Report also provides an overview of the market structure, liquidity, and applicable regulations of the U.S. Treasury market, as well as the broad changes to the structure of the U.S. Treasury market that have occurred over the past two decades.²⁴⁸ For the secondary market in cash U.S. Treasury securities (“Treasury securities”), the October 15 Staff Report explains that trading occurs: (1) In bilateral transactions via voice or a

variety of electronic means; or (2) on centralized electronic trading platforms using a central limit order book.²⁴⁹ The October 15 Staff Report notes that the structure of the U.S. Treasury market has “evolved notably in recent years” and electronic trading has become an increasingly important feature of the modern interdealer market for Treasury securities.²⁵⁰ Like modern-day trading in NMS stocks, the majority of interdealer trading in benchmark Treasury securities,²⁵¹ which is the most liquid type of Treasury security, currently occurs on centralized electronic trading platforms using a central limit order book, namely ATSs.²⁵²

The October 15 Staff Report notes that the growth in high-speed electronic trading has contributed to the growing presence of Principal trading firms (“PTFs”) in the Treasury market, with these firms accounting for the majority of trading and providing the vast majority of market depth.²⁵³ PTFs, which have direct access to electronic trading platforms for Treasury securities, now represent more than half of the trading activity on electronic interdealer trading platforms for Treasury securities.²⁵⁴ Similar to HFTs in the equity markets, PTFs trading on the electronically brokered interdealer market for Treasury securities often employ automated algorithmic trading strategies that rely on speed and allow the PTFs to cancel or modify existing quotes in response to perceived market activity.²⁵⁵ Furthermore, most PTFs trading Treasury securities on electronic platforms also restrict their activities to proprietary trading and do not hold long positions.²⁵⁶

The October 15 Staff Report also notes that increased trading speed due to automated trading in the U.S. Treasury market has challenged the traditional risk management protocols for market participants, trading platforms, and clearing firms.²⁵⁷ The October 15 Staff Report notes that automated trading can occur at speeds that exceed the capacity

of manual detection and intervention, posing a challenge to traditional risk management protocols, and forcing market participants, trading platforms, and clearing firms to develop internal risk controls and processes to manage the potential for rapidly changing market and counterparty risk exposures.²⁵⁸

As indicated in the October 15 Staff Report, the staff of the U.S. Treasury Department, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Commission, and the U.S. Commodity Futures Trading Commission plan to continue to analyze the events of October 15, 2014 and examine changes to the U.S. Treasury market structure. The October 15 Staff Report identified four areas for further work. One of the four areas includes the continued monitoring of trading and risk management practices across the U.S. Treasury market and a review of the current regulatory requirements applicable to the government securities market and its participants.²⁵⁹ In connection with this, the cross-agency staff expressed support for a review of the current regulatory requirements applicable to the government securities market and its participants and suggested studying the implications of a registration requirement for firms conducting certain types of automated trading in the U.S. Treasury market and for government securities trading venues.²⁶⁰ The staff also recommended an assessment of the data available to the public and to the official sector on U.S. Treasury cash securities markets, which would include efforts to enhance public reporting on U.S. Treasury market venue policies and services.²⁶¹

Based on the rapid and continued evolution of the market for government securities, the Commission is seeking comment on whether as part of its continued cooperation and coordination with other regulators, it should include ATSs whose trading activity is solely in government securities within the scope of current Regulation ATS and amend Regulation ATS to provide for enhanced operational transparency for ATSs that trade government securities.²⁶²

²⁴² See *supra* notes 86–90 and accompanying text.

²⁴³ See *supra* notes 92–94 and accompanying text.

²⁴⁴ See *supra* notes 96–97 and accompanying text.

²⁴⁵ See Public Law 99–571, October 28, 1986, and Public Law 103–202, December 17, 1993.

²⁴⁶ The Government Securities Act authorized the U.S. Treasury Department to promulgate rules governing transactions in government securities by government securities brokers and dealers. See October 15 Staff Report, *infra* note 247, at 9. The Commission, FINRA, and federal bank regulators—in consultation with the U.S. Treasury Department—also have the authority to issue sales practice rules for the government securities secondary market. See *id.*

²⁴⁷ See Joint Staff Report: The U.S. Treasury Market on October 15, 2014 (July 13, 2015) (the “October 15 Staff Report”), http://www.treasury.gov/press-center/press-releases/Documents/Joint_Staff_Report_Treasury_10-15-2015.pdf.

²⁴⁸ See October 15 Staff Report, *supra* note 247, at 8–14, 35–44.

²⁴⁹ See *id.* at 11.

²⁵⁰ See *id.* at 35.

²⁵¹ Benchmark issues are the most recently issued nominal coupon securities. See *id.* at 11. Nominal coupon securities pay a fixed semi-annual coupon and are currently issued at original maturities of 2, 3, 5, 7, 10, and 30 years. See *id.* at 11, n.6.

²⁵² See *id.* at 11, 35–36. The October 15 Staff Report also notes that the majority of interdealer trading of “seasoned” Treasury securities and the majority of dealer-to-customer trading is via bilateral transactions. See *id.* at 11, 35–36 n.31.

²⁵³ See *id.* at 36.

²⁵⁴ See *id.*

²⁵⁵ See *id.* at 32, 35–36, 39.

²⁵⁶ See *id.* at 38.

²⁵⁷ See *id.* at 36.

²⁵⁸ See *id.* at 36–37.

²⁵⁹ See *id.* at 45.

²⁶⁰ See *id.* at 47.

²⁶¹ See *id.* at 48.

²⁶² Prior to adopting any changes to Regulation ATS with regard to ATSs that trade government securities, the Commission would, as appropriate, consult with and consider the views of the Secretary of the Treasury and any other appropriate regulatory agencies. See 15 U.S.C. 78o(c)(2)(E).

Specifically, the Commission seeks comment on the following:

22. Do you believe that market participants have sufficient information about the operations of ATSs that effect transactions in government securities in order to evaluate such ATSs as potential trading venues? Why or why not? Please support your arguments.

23. Do you believe that the Commission should adopt amendments to Regulation ATS to remove the exemption under Rule 301(a)(4)(ii)(A) of Regulation ATS for ATSs whose trading activity is solely in government securities? Why or why not? Please support your arguments. If so, do you believe that the Commission should make public Form ATS filings or otherwise increase the transparency requirements under Regulation ATS for ATSs whose sole trading activity is in government securities? Why or why not? Please support your arguments.

24. Do you believe that the Commission should adopt amendments to Regulation ATS to enhance the transparency requirements applicable to ATSs that effect transactions in both government securities and non-government securities? Why or why not? If so, how? Please support your arguments.

25. Do you believe that ATSs that effect transactions in government securities raise the same operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSs? Why or why not? Please support your arguments. If not, do you believe that ATSs that effect transactions in government securities raise other operational transparency concerns that warrant expanding the scope of Regulation ATS to encompass ATSs whose sole trading activity is in government securities or increasing the transparency requirements for ATSs that effect transactions in both government securities and non-government securities? Why or why not? Please support your arguments.

26. Do you believe that there are potential conflicts of interest for broker-dealer operators of ATSs, or their affiliates, that effect transactions in government securities that may justify greater operational transparency for ATSs that effect transactions in government securities? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble the potential conflicts of interest for broker-dealer operators of NMS Stock ATSs and their affiliates? Please be specific.

27. Do you believe that current Form ATS is sufficient to elicit information about the operations of ATSs that effect transactions in government securities? If not, in what ways should Form ATS be modified to better inform the Commission about the operations of ATSs that effect transactions in government securities? Please explain in detail the manner in which Form ATS should be modified. Do you believe that the current Forms ATS, or parts thereof, for ATSs that effect transactions in government securities and non-government securities should be made available to the public? Why or why not? Please support your arguments.

28. Do you believe that the Commission should adopt amendments to existing rules under Regulation ATS, including, Rules 301(b)(3) (order display and execution access), 301(b)(5) (fair access), and 301(b)(6) (capacity, integrity, and security of automated systems), to make those rules applicable to trading in government securities on ATSs? Why or why not? If so, how? Please provide support for your arguments. Should the Commission adopt amendments to Rule 301(b)(3) of Regulation ATS to require ATSs that trade government securities to report quotes and/or trade information for public dissemination after crossing certain volume thresholds in a government security? Should such information be reported only after a delay? Why or why not? Please support your arguments.

29. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to ATSs that effect transactions in government securities? Why or why not? Please support your arguments.

30. Do you believe that the Commission should adopt a new form that is specifically designed to solicit information about the operations of ATSs that effect transactions in government securities? If so, please explain, in detail, the information the new form should require from ATSs that effect transactions in government securities. If not, why not? Please support your arguments. Do you believe that any new form designed specifically for ATSs that effect transactions in government securities should be made available to the public? Why or why not? Please support your arguments.

31. Do you believe that broker-dealers that effect transactions in government securities may modify their business models in order to need not comply with Regulation ATS in response to enhanced regulatory or operational transparency requirements for ATSs that effect transactions in government

securities? Why or why not? Please support your arguments.

There are also ATSs whose activity is solely the facilitation of trading in OTC Equity Securities.²⁶³ At this time, the Commission preliminarily believes that many of its specific concerns related to the current operations of NMS Stock ATSs, which proposed Rule 304 and proposed Form ATS-N seek to address directly, are not equally applicable to OTC Equity Securities ATSs. The Commission preliminarily believes that OTC Equity Securities ATSs do not currently operate with the same complexities as NMS Stock ATSs. Additionally, trading in OTC Equity Securities is almost always facilitated through ATSs, through inter-dealer quotation systems that are not ATSs,²⁶⁴ or elsewhere in the bilateral market. Accordingly, trading in the market for OTC Equity Securities is typically facilitated by platforms or amongst market participants that are not subject to operational transparency requirements comparable to those imposed on national securities exchanges (*i.e.*, the self-regulatory organization rule filing process). The Commission also preliminarily believes that OTC Equity Securities ATSs are evolving and, therefore, the Commission seeks comment on the following:

32. Do you believe that market participants have sufficient information about the operations of OTC Equity Securities ATSs to evaluate such ATSs as potential trading venues? Why or why not? Please support your arguments.

33. Do you believe that OTC Equity Securities ATSs raise the same operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSs? Why or why not? Please support your arguments. If not, do you believe that OTC Equity Securities ATSs raise other operational transparency concerns that warrant inclusion of OTC Equity

²⁶³ For the purposes of this analysis and request for comment, the Commission is using the term "OTC Equity Security" as it is defined in FINRA's 6400 rule series for quoting and trading in OTC Equity Securities. FINRA defines OTC Equity Security as "any equity security that is not an 'NMS stock' as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term 'OTC Equity Security' shall not include any Restricted Equity Security," which FINRA defines as "any equity security that meets the definition of 'restricted security' as contained in Securities Act Rule 144(a)(3)." See FINRA Rules 6420(f), (k).

²⁶⁴ FINRA Rule 6420 defines an interdealer quotation system as "any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers." See FINRA Rule 6420(c). An example of an interdealer quotation system is the OTC Bulletin Board that FINRA operates.

Securities ATSS within the scope of proposed Rule 304? Why or why not? Please support your arguments.

34. Do you believe that there are potential conflicts of interest for broker-dealer operators of ATSS, and their affiliates, that facilitate transactions in OTC Equity Securities that may justify greater operational transparency for OTC Equity Securities ATSS? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble the potential conflicts of interest for broker-dealer operators of NMS Stock ATSS and their affiliates? Please be specific.

35. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to OTC Equity Securities ATSS? Why or why not? Please support your arguments.

36. Do you believe that applying proposed Rule 304 to OTC Equity Securities ATSS would place them at a competitive disadvantage with respect to other trading venues that facilitate transactions in OTC Equity Securities in the bilateral market, which would not be subject to such disclosure requirements? Why or why not? Please support your arguments.

37. Do you believe that current Form ATS is sufficient to elicit relevant information about the operations of OTC Equity Securities ATSS? If so, why? If not, in what ways should Form ATS be modified to better inform the Commission about the operations of OTC Equity Securities ATSS? Please explain in detail the manner in which Form ATS could be modified. Do you believe that the current filed Forms ATS, or parts thereof, for OTC Equity Securities ATSS should be made available to the public? Why or why not? Please support your arguments.

38. Do you believe that the Commission should adopt a new form that is designed specifically for OTC Equity Securities ATSS to promote operational transparency of such ATSS? If so, please explain, in detail, the information the new form should require. If not, why not? Please support your arguments. Do you believe that any new form designed specifically for OTC Equity Securities ATSS should be made available to the public? Why or why not? Please support your arguments.

Additionally, the Commission notes that there are active ATSS that trade in securities other than NMS stocks, fixed income securities, or OTC Equity Securities.²⁶⁵ For example, an ATSS

might help match orders for options contracts or facilitate trades in cooperative interests or membership units in limited liability companies. At this time, the Commission does not believe that these ATSS raise the same operational transparency concerns as NMS Stock ATSS. The products traded on these ATSS are not traded on national securities exchanges and, therefore, these ATSS are not competing against platforms with greater transparency requirements. Furthermore, the Commission preliminarily believes that ATSS that trade in securities other than NMS stocks, fixed income securities, or OTC Equity Securities do not currently operate with the same complexities as NMS Stock ATSS. For such ATSS, however, the Commission seeks comment on the following:

39. Do you believe that market participants have sufficient information about the operations of ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities as potential trading venues? Why or why not? Please support your arguments.

40. Do you believe that ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities raise the same operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSS? Why or why not? Please support your arguments.

41. Do you believe that there are potential conflicts of interest for broker-dealer operators of ATSS, and their affiliates, that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities that may justify greater operational transparency for ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble the potential conflicts of interest for broker-dealer operators of NMS Stock ATSS and their affiliates? Please be specific.

42. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? Why or why not? Please support your arguments. If so, please

explain the types of ATSS to which proposed Rule 304 should apply and why. If not, why not? Please support your arguments.

43. Do you believe that Form ATS is sufficient to elicit useful information about the operations of ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? If so, why? If not, in what ways should Form ATS be modified to better inform the Commission about the operations of ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? Please explain in detail the manner in which Form ATS could be modified. Do you believe that current filed Forms ATS, or parts thereof, for ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities should be made available to the public? Why or why not? Please support your arguments.

44. Do you believe that the Commission should adopt a new form specifically designed for ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities in order to promote operational transparency of such ATSS? If so, please explain, in detail, the information the new form should elicit from ATSS that effect or facilitate transactions in such securities. If not, why not? Please support your arguments. Do you believe that any new form designed specifically for ATSS that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities should be made available to the public? Why or why not? Please support your arguments.

C. Proposed Rule 304: Enhanced Filing Requirements for NMS Stock ATSS

1. Application of Existing Requirements to NMS Stock ATSS

Proposed Rule 304(a) would require that, unless not required to comply with Regulation ATS pursuant to Rule 301(a) of Regulation ATS, an NMS Stock ATSS must comply with Rules 300 through 304 of Regulation ATS (except Rule 301(b)(2), as discussed in Section IV.C.2 below) to be exempt from the definition of an exchange pursuant to Rule 3a1-1(a)(2).²⁶⁶ The Commission is not proposing to change Rule 301(a) as part of this proposal, but is simply making

²⁶⁵ The Commission notes that, based on information provided on Forms ATS and ATS-R as

of November 1, 2015, 5 ATSS may trade such securities.

²⁶⁶ As discussed above, the Commission is proposing to amend Rule 3a1-1(a) to provide for modified conditions to the exemption set forth in proposed Rule 304. See *supra* Section IV.B.

clear that Rule 301(a) continues to apply to NMS Stock ATSs, unless otherwise exempt.²⁶⁷ Thus, NMS Stock ATSs would still be required to comply with the existing requirements of Rules 300 through 303 of Regulation ATS, and would additionally be required to comply with proposed Rule 304.

The Commission also notes that the requirements of Rule 301(b) (except Rule 301(b)(2)) of Regulation ATS²⁶⁸ would continue to apply to NMS Stock ATSs. As discussed above, Rule 301(b) sets forth the conditions with which an ATS must comply to benefit from the exemption provided by Exchange Act Rule 3a1-1(a).²⁶⁹ The Commission continues to believe that compliance by NMS Stock ATSs with the provisions of Rule 301(b) of Regulation ATS (except Rule 301(b)(2)), as amended, is a necessary and appropriate condition to the Rule 3a1-1(a)(2) exemption from the definition of exchange in that the purpose of such condition is the protection of investors.²⁷⁰ The Commission would no longer require an NMS Stock ATS to comply with the reporting and amendment requirements of Rule 301(b)(2) because such conditions would be replaced with the more specific disclosure requirements of proposed Rule 304 for NMS Stock ATSs, discussed in further detail below. The Commission is also proposing to make non-substantive amendments to Rule 301(b)(2)(i) and Rule 301(b)(2)(vii)²⁷¹ to delete outdated references to dates for phased in compliance with Regulation ATS for ATSs that were operational as of April 21, 1999, and to update the

name of the Division of Trading and Markets, respectively.²⁷²

The Commission requests comment generally on all aspects of proposed Rule 304(a).

2. Rule 301(b)(2) and Form ATS; ATSs That Trade in Non-NMS Stocks

The Commission is proposing Rule 301(b)(2)(viii) to provide that an NMS Stock ATS shall file the reports and amendments required by proposed Rule 304 and would not be subject to the requirements of Rule 301(b)(2). Existing Rule 301(b)(2) requires an ATS to file with the Commission a Form ATS initial operation report, amendments to the Form ATS initial operation report, and cessation of operations reports on Form ATS, all of which are “deemed confidential when filed.”²⁷³ Because the Commission is proposing rules to govern the content and manner in which an NMS Stock ATS would be required to disclose information to the public and the Commission on proposed Form ATS-N, existing Rule 301(b)(2), which applies, and will continue to apply, to ATSs that do not effect transactions in NMS stocks would be duplicative of the proposed amendments.²⁷⁴

Proposed Rule 301(b)(2)(viii) would also provide that an ATS that effects transactions in both NMS stocks and non-NMS stocks would be subject to the requirements of proposed Rule 304 with respect to NMS stocks and Rule 301(b)(2) with respect to non-NMS stocks. The Commission recognizes that some existing ATSs that would meet the definition of NMS Stock ATS also transact in securities other than NMS stocks. For these ATSs to be eligible for the exemption under Rule 3a1-1(a)(2), the Commission preliminarily believes that it is not necessary to mandate compliance with the heightened transparency requirements under proposed Rule 304 with respect to their non-NMS stock operations. Based on Commission experience, these ATSs are designed so that the platform on which non-NMS stock order flow interacts and executes differs from the platform on which NMS stock order flow interacts and executes. Furthermore, as explained above, the Commission preliminarily believes that the operational transparency concerns for NMS Stock

ATSs do not apply equally to the markets for non-NMS stocks.²⁷⁵ As such, the Commission has tailored proposed Form ATS-N to address the specific operational transparency concerns raised by the current functionalities of the ATS platforms on which NMS stock order flow interacts and executes. Additionally, the Commission preliminarily believes that applying proposed Rule 304 to the non-NMS stock operations of ATSs that trade both NMS stocks and non-NMS stocks would impose unequal regulatory burdens across ATSs that transact in non-NMS stocks. Under such a rule, ATSs that trade both NMS stocks and non-NMS stocks would be required to meet the heightened standards of proposed Rule 304 to be eligible for the exemption under Rule 3a1-1(a)(2) with regard to their non-NMS stock operations, whereas ATSs that only trade non-NMS stocks would not be subject to the standards under proposed Rule 304.

The Commission also proposes to amend Rule 301(b)(9),²⁷⁶ which requires an ATS to report transaction volume on Form ATS-R on a quarterly basis and within 10 calendar days after it ceases operation. The Commission proposes to amend Rule 301(b)(9) to require an ATS that trades both NMS stocks and non-NMS stocks to separately report its transactions in NMS stocks on one Form ATS-R, and its transactions in non-NMS stocks on another Form ATS-R. The information filed on Form ATS-R permits the Commission to monitor trading on an ATS.²⁷⁷ As noted above, the Commission proposes to require each ATS with both NMS stock and non-NMS stock operations to file a Form ATS-N for its NMS stock operations and a separate Form ATS for its non-NMS stock operations. Because the proposed Form ATS-N and Form ATS filings of such ATSs would describe separate functionalities—the functionalities for the trading of NMS stocks and those for the trading of non-NMS stocks, respectively—the Commission preliminarily believes that these ATSs should file a separate Form ATS-R to report the trading activity for each functionality to avoid confusion and for regulatory efficiency. Accordingly, the Commission is proposing to require that these ATSs file a Form ATS-R to report transaction volume resulting from their NMS stock operations, as disclosed on a Form ATS-N, and a separate Form ATS-R to

²⁶⁷ Pursuant to Rule 301(a), certain ATSs that are subject to other appropriate regulations are not required to comply with Regulation ATS. These ATSs include those that are: Registered as an exchange under Section 6 of the Exchange Act; exempt from exchange registration based on limited volume; operated by a national securities association; registered as a broker-dealer, under Sections 15(b) or 15C of the Exchange Act, or that is a bank, that limits its securities activities to certain instruments; or exempted, conditionally or unconditionally, by Commission order, after application by such alternative trading system from one or more of the requirements of Rule 301(b). See 17 CFR 242.301(a). See also Regulation ATS Adopting Release, *supra* note 7, at 70859–63.

²⁶⁸ See 17 CFR 242.301(b)(1), (b)(3)–(11).

²⁶⁹ See *supra* Section II.B.

²⁷⁰ See, e.g., Regulation ATS Adopting Release, *supra* note 7, at 70856. In adopting the existing conditions in Rule 301, the Commission determined that the exemption in Rule 3a1-1 was consistent with the protection of investors because the Commission believed that investors would benefit from the conditions governing an alternative trading system, in particular Regulation ATS’s enhanced transparency, market access, system integrity, and audit trail provisions. See *id.*

²⁷¹ See proposed Rules 301(b)(2)(i) and (vii), respectively.

²⁷² See 17 CFR 242.301(b)(2)(i) and (vii), respectively.

²⁷³ See 17 CFR 242.301(b)(2).

²⁷⁴ See *supra* Section IV.B. (discussing the proposed conditions to the exemption in Rule 3a1-1(a) for ATSs that trade NMS stocks, as compared to the conditions for ATSs that trade other securities or that trade NMS stocks as well as other securities).

²⁷⁵ See *supra* Section IV.B.

²⁷⁶ See 17 CFR 242.301(b)(9).

²⁷⁷ See Regulation ATS Adopting Release, *supra* note 7, at 70878.

report transaction volume resulting from their non-NMS stock operations, as disclosed on Form ATS. The Commission notes that Form ATS-R would continue to be deemed confidential.

The Commission requests comment on the proposed amendments to Rules 301(b)(2) and 301(b)(9). In particular, the Commission solicits comment on the following:

45. Should the Commission require ATSs that trade both NMS stocks and non-NMS stocks to make filings on both proposed Form ATS-N, with respect to its NMS stock operations, and Form ATS, with respect to its non-NMS stock operations? Why or why not? Please support your arguments.

46. Should the Commission require ATSs that trade both NMS stocks and non-NMS stocks to file a Form ATS-R with respect to their NMS stock operations and a separate Form ATS-R with respect to their non-NMS stock operations? Why or why not? Please support your arguments.

47. Do you believe that ATSs that trade both NMS stocks and non-NMS stocks should be subject to proposed Rule 304, in whole or in part, for both their NMS stock operations and non-NMS stock operations? Why or why not? Please support your arguments.

Do you believe that ATSs that trade both NMS stocks and non-NMS stocks should be required to disclose their NMS stock and non-NMS stock operations solely on proposed Form ATS-N? If so, why, and what additional disclosures should be required on proposed Form ATS-N to reflect non-NMS stock operations? If not, why not? Please support your arguments.

3. Proposed Rule 304(a)(1)(i) and (ii): Filing and Review of Form ATS-N

Proposed Rule 304(a)(1)(i) would provide that no exemption from the definition of “exchange” is available to an NMS Stock ATS pursuant to Exchange Act Rule 3a1-1(a)(2) unless the NMS Stock ATS files with the Commission a Form ATS-N and the Commission declares the Form ATS-N effective. The Commission preliminarily believes that an NMS Stock ATS that is not operating on the effective date of proposed Rule 304 should not be permitted to commence operations until the Commission has had the opportunity to assess whether the NMS Stock ATS qualifies for the Rule 3a1-1(a)(2) exemption. As discussed above,²⁷⁸ the current requirements of the Rule 3a1-1(a)(2) exemption mandate that an ATS only provide notice of its

operation on a Form ATS initial operation report 20 days prior to commencing operations.²⁷⁹ The Commission’s review of Form ATS-N would help ensure that an NMS Stock ATS’s disclosures comply with the requirements of proposed Rule 304 and that a consistent level of information is made available to market participants in evaluating NMS Stock ATSs.²⁸⁰

Proposed Rule 304(a)(1)(i) is also designed as a transition for currently operating ATSs that meet the proposed definition of NMS Stock ATS. Proposed Rule 304(a)(1)(i) would require an existing ATS that facilitates transactions in NMS stocks and that operates pursuant to a previously filed initial operation report on Form ATS as of the effective date of proposed Rule 304 (*i.e.*, a “legacy NMS Stock ATS”) to file a Form ATS-N with the Commission no later than 120 calendar days after the effective date of proposed Rule 304. In other words, the effectiveness of an existing Form ATS would not suffice for a legacy NMS Stock ATS to retain its exemption from the definition of “exchange” with respect to its Rule 3b-16 activity in NMS stocks beyond the transition period following the effectiveness of proposed Rule 304. The Commission is also proposing in Rule 304(a)(1)(i) that a legacy NMS Stock ATS may continue to operate pursuant to a previously filed initial operation report on Form ATS pending the Commission’s review of the filed Form ATS-N.²⁸¹ This provision would allow the NMS Stock ATS to continue its current operations without disruptions to the NMS Stock ATS or its current subscribers and provide the NMS Stock ATS with sufficient time to make an orderly transition from compliance under the current Regulation ATS requirements to compliance with the proposed requirements of Rule 304. The Commission notes that during the Commission’s review of the filed Form ATS-N, the NMS Stock ATS would continue to operate pursuant to its existing Form ATS initial operation report and would continue to be required to file amendments on Form

²⁷⁹ 17 CFR 242.301(b)(2).

²⁸⁰ The Commission notes, however, that Form ATS-N is intended to provide regulatory and public transparency. As such, its review of Form ATS-N will be focused on an evaluation of the completeness and accuracy of the disclosure thereon, and compliance with federal securities laws. Even if the Commission declares a Form ATS-N effective, the Commission would not be precluded from later determining that an NMS Stock ATS had violated the federal securities laws or the rules and regulations thereunder. *See infra* Section IV.C.8.

²⁸¹ The NMS Stock ATS would be required to continue to comply with Regulation ATS.

ATS to provide notice of changes to the operations of its system.²⁸²

The Commission considered the alternative of allowing an existing ATS that engages in Rule 3b-16 activity in NMS stocks to retain its exemption from the definition of “exchange” by virtue of its existing Form ATS, and to require only a new NMS Stock ATS to file Form ATS-N. However, the Commission preliminarily believes that this alternative would not be appropriate as it would create a significant competitive disparity between a “new” and “legacy” NMS Stock ATS, with the latter benefitting from substantially lighter disclosure requirements. More importantly, it would perpetuate the problem of limited information being available to market participants. Nevertheless, the Commission preliminarily believes that it would be appropriate to provide existing ATSs that engage in Rule 3b-16 activity with regard to NMS stocks an adjustment period after the effective date of proposed Rule 304 to file a Form ATS-N. The Commission preliminarily believes that 120 calendar days is sufficient time for a legacy NMS Stock ATS to respond to the disclosure requirements on the new Form ATS-N because an ATS that is currently operating should be knowledgeable about the operations of its system and the activities of its broker-dealer operator and its affiliates.

Proposed Rule 304(a)(1)(ii)(A) would provide that the Commission declare a Form ATS-N filed by an NMS Stock ATS operating as of the effective date of proposed Rule 304 effective or ineffective no later than 120 calendar days from filing with the Commission. Similarly, Proposed Rule 304(a)(1)(ii)(B) would provide that the Commission declare a Form ATS-N filed by an NMS Stock ATS that was not operating as of the effective date of proposed Rule 304 effective or ineffective no later than 120 calendar days from filing with the Commission. The disclosures required by proposed Form ATS-N are more comprehensive than those required on current Form ATS, particularly in terms of volume, complexity, and detail. Based on its experience over the past seventeen years of receiving and reviewing notices on Form ATS, the Commission preliminarily believes that it would receive a large amount of information provided in Form ATS-N filings. The Commission preliminarily believes that 120 calendar days would provide the Commission adequate time to carry out its oversight functions with respect to its review of Forms ATS-N

²⁸² 17 CFR 242.301(b)(2)(ii) through (iv).

²⁷⁸ *See supra* Section IV.B.

filed by legacy and new NMS Stock ATSs, including its responsibilities to protect investors and maintain fair, orderly, and efficient markets.²⁸³

Proposed Rule 304(a)(1)(ii)(A) would further provide a process for the Commission to extend the review period for Forms ATS–N filed by NMS Stock ATSs operating as of the effective date of proposed Rule 304: (1) An additional 120 calendar days, if the Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-day review period and will briefly describe the reason for the determination that additional time for review is required; or (2) any extended review period to which the NMS Stock ATS agrees in writing. Proposed Rule 304(a)(1)(ii)(B) would include a similar provision for NMS Stock ATSs not operating as of the effective date of proposed Rule 304, except that the Commission could extend its review period up to 90 calendar days. The proposed disclosure requirements require more detailed disclosures regarding the operations of an NMS Stock ATS than do the current requirements; thereby increasing the amount of information for the Commission to review. The Commission preliminarily believes that the additional time provided by the proposed rule is appropriate because it would allow Commission and its staff to conduct a thorough review of certain lengthy, novel, or complex Form ATS–N filings and provide sufficient opportunity to discuss the filing with the NMS Stock ATS if necessary.

Request for Comment

48. Do you believe the Commission should adopt a rule in which it is required to declare a Form ATS–N filed by an NMS Stock ATS effective or ineffective within 120 calendar days of filing? Do you believe this is an appropriate time frame in light of the amount and nature of information to be submitted on Form ATS–N? Why or why not? Does any experience with Exchange Act Rule 19b–4 filings by self-regulatory organizations, either in draft or in formal submission, inform the appropriate time frame?

49. Should the Commission adopt a process to further extend the period of review under certain circumstances? If

²⁸³ As discussed above, a legacy NMS Stock ATS would be able continue to operate pursuant to a previously filed initial operation report on Form ATS pending the Commission's review of the filed Form ATS–N.

so, what circumstances and why? Please support your arguments.

50. If the Commission does not declare a Form ATS–N filing effective or ineffective within 120 calendar days from filing with the Commission, or any extension of the 120-day period pursuant to proposed Rule 304(a)(1)(ii), do you believe the Form ATS–N should be automatically deemed effective? Why or why not? Please support your arguments.

51. If the Commission does not declare a Form ATS–N filing effective or ineffective within 120 calendar days from filing with the Commission, or any extension of the 120-day period pursuant to proposed Rule 304(a)(1)(ii), do you believe the Form ATS–N should be automatically deemed ineffective? Why or why not? Please support your arguments.

4. Proposed Rule 304(a)(1)(iii): Declarations of Effectiveness or Ineffectiveness of Form ATS–N

Proposed Rule 304(a)(1)(iii) would provide that the Commission will declare effective a Form ATS–N if the NMS Stock ATS qualifies for the Rule 3a1–1(a)(2) exemption. Proposed Rule 304(a)(1)(iii) would also provide that the Commission will declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.²⁸⁴

Under the proposal, the Commission would use Form ATS–N to evaluate whether an entity qualifies for an exemption under Rule 3a1–1(a)(2).²⁸⁵ For the Commission to declare a Form ATS–N effective, it would evaluate, among other things, whether the entity satisfies the definition of ATS,²⁸⁶ and

²⁸⁴ A submitted Form ATS–N that contains technical deficiencies, such as missing pages or one in which the entity does not respond to all questions, including all sub-questions, would not be complete and would be returned to the NMS Stock ATS. See also 17 CFR 240.0–3. Return of a Form ATS–N would not prejudice any decision by the Commission regarding effectiveness or ineffectiveness should the NMS Stock ATS resubmit a Form ATS–N. The Commission notes an NMS Stock ATS also can choose to withdraw a filed Form ATS–N.

²⁸⁵ An NMS Stock ATS would also be required to comply with other requirements of Rules 300 through 303 of Regulation ATS (except Rule 301(b)(2)) and proposed Rule 304.

²⁸⁶ Regulation ATS defines an ATS as any organization, association, person, group of persons, or system that constitutes a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Exchange Act Rule 3b–16, and does not set rules governing the conduct of subscribers, other than the conduct of such subscribers' trading on such organization, association, person, group of persons,

more specifically, the definition of NMS Stock ATS.²⁸⁷ The Commission preliminarily believes that whether an entity meets the definition of “NMS Stock ATS” should be a threshold requirement for the Commission to declare a Form ATS–N effective, and therefore for the ATS to qualify for the Rule 3a1–1(a)(2) exemption. Proper classification of an entity would clearly indicate to market participants, as well as the Commission, the functions that entity performs and the regulatory framework and attendant obligations that attach to that entity.²⁸⁸ Thus, if the proposed category of NMS Stock ATS is adopted, the Commission preliminarily believes it needs to mitigate concerns that market participants may be confused or misled about whether an entity in fact meets the definition of an NMS Stock ATS. If an entity does not meet the definition, market participants may hold false expectations about how their orders may interact or be matched with other orders or they may not fully understand whether the entity with which they are doing business is required to comply with Regulation ATS. For these reasons, the Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that the Form ATS–N was filed by an entity that does not meet the functional test under Exchange Act Rule 3b–16, does not perform functions commonly performed by a stock exchange, or

or system, or discipline subscribers under the Exchange Act other than by exclusion from trading. See 17 CFR 242.300(a).

Under Exchange Act Rule 3b–16, an organization, association, or group of persons shall be considered to constitute, maintain, or provide “a marketplace or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,” if such organization, association, or group of persons: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. See *supra* note 48 and accompanying text. See also *supra* Section IV.A (discussing the proposed definition of “NMS Stock ATS”).

²⁸⁷ See proposed Rule 300(k). See also *supra* Section IV.A (discussing the proposed definition of NMS Stock ATS).

²⁸⁸ For example, an ATS that is not an NMS Stock ATS would be subject to different conditions to be eligible for the Rule 3a1–1(a)(2) exemption. Similarly, depending on the facts and circumstances, an entity that is not an ATS may be subject to requirements as a broker-dealer, but not the conditions of Regulation ATS, or may be required to register as an exchange.

exercises SRO powers.²⁸⁹ Similarly, the Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that the Form ATS–N was filed by an entity that does not meet the proposed definition of “NMS Stock ATS.”

The Commission also preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that one or more disclosures on Form ATS–N are materially deficient with respect to their accuracy, currency, or completeness. The requirements of proposed Form ATS–N are set forth in proposed Rule 304(c)(1), which provides that an NMS Stock ATS must respond to each item on Form ATS–N, as applicable, in detail and disclose information that is accurate, current, and complete. The Commission preliminarily believes that market participants would use information disclosed on Form ATS–N to evaluate whether a particular NMS Stock ATS would be a desirable venue to which to route their orders. In addition, the Commission intends to use the information disclosed on the Form ATS–N to exercise oversight over and monitor developments of NMS Stock ATSs. Given these potential uses, the Commission preliminarily believes that it is important that Form ATS–N contain detailed disclosures that are accurate, current, and complete.²⁹⁰

The following non-exhaustive examples are provided to illustrate various applications of proposed Rule 304(a)(1)(iii) that could cause the Commission to declare a Form ATS–N ineffective because it contains one or more disclosures that appear to be materially deficient.²⁹¹ For instance, if

²⁸⁹ See *supra* Section IV.A. (discussing the definition of NMS Stock ATS and the underlying definition of ATS).

The entity would not fall within the definition of an “exchange” under Section 3(a)(1) of the Exchange Act and the exemption provided in Exchange Act Rule 3a1–1 would not be applicable.

²⁹⁰ Proposed Form ATS–N is designed to provide market participants and the Commission with, among other things, current information about the operations of the NMS Stock ATS and the activities of the broker-dealer operator and its affiliates. Accordingly, an NMS Stock ATS would be required to provide information on proposed Form ATS–N that reflects the operations of the NMS Stock ATS at the time its Form ATS–N is declared effective by the Commission. Any changes in the operations of the NMS Stock ATS must be disclosed by the NMS Stock ATS in a Form ATS–N Amendment.

²⁹¹ The Commission notes that these are some, but not necessarily all, of the types of circumstances

an NMS Stock ATS discloses an order type on Form ATS–N but does not describe the key attributes of the order type, such as time-in-force limitations that can be placed on the ability to execute the order, the treatment of unfilled portions of orders, or conditions for cancelling orders in whole or in part, the Form ATS–N would not be sufficiently detailed. Likewise, if an NMS Stock ATS generally describes some of its priority rules, but fails to describe conditions or exceptions to its priority rules, or fails to describe any priority overlays,²⁹² the Form ATS–N would lack sufficient detail. If a Form ATS–N states that the NMS Stock ATS has only one class of subscribers but the Commission or its staff learns through discussions (during the review period) with the NMS Stock ATS or otherwise that the NMS Stock ATS in fact has several classes of subscribers, or if the Form ATS–N states that two classes of subscribers are charged the same trading fees but the Commission or its staff learns through discussions with the NMS Stock ATS or otherwise that in fact one class receives more favorable fees than the other, the Form ATS–N would not be accurate. If a Form ATS–N includes inconsistent information, such as a statement in one part of the form that the entity uses private feeds to calculate the NBBO, but in another part of the form it indicates that it uses the Securities Information Processor (“SIP”), the Form ATS–N would not be accurate.

The Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that one or more disclosures reveals non-compliance with federal securities laws, or the rules or regulations thereunder, including Regulation ATS. The Commission notes that the responsibility for accurate, current, and complete disclosures on Form ATS–N lies with the NMS Stock ATS.²⁹³ The Commission’s review of Form ATS–N would focus on an evaluation of the

that could result in the Commission declaring a Form ATS–N ineffective under the proposed rule.

²⁹² In other words, if the NMS Stock ATS fails to describe which order would receive priority when two or more orders are otherwise on par, such as whether customer orders receive priority in a price priority system if a customer and non-customer order are at the same price, the disclosure would not be sufficient.

²⁹³ See *infra* Section IV.E. and accompanying discussion. Proposed Rule 304(c)(1) would require NMS Stock ATSs to respond to each item on Form ATS–N, as applicable, in detail and disclose information that is accurate, current, and complete.

completeness and accuracy of the disclosures, and compliance with federal securities laws, including Regulation ATS. The Commission’s evaluation regarding compliance with federal securities laws would involve a “red-flag” review of the Form ATS–N disclosures for apparent non-compliance with federal securities laws, or other rules or regulations thereunder, including Regulation ATS, and would focus on the disclosures made on the Form ATS–N. For example, as a condition to the Rule 3a1–1(a)(2) exemption, Rule 301(b)(1) of Regulation ATS requires that an ATS register as a broker-dealer under Section 15 of the Exchange Act.²⁹⁴ Section 15(b)(8) of the Exchange Act²⁹⁵ prohibits a registered broker or dealer from effecting a transaction unless the broker or dealer is a member of a securities association registered pursuant to Section 15A of the Exchange Act²⁹⁶ or effects transactions solely on a national securities exchange of which it is a member. Therefore, to comply with Regulation ATS, and thus qualify for the Rule 3a1–1(a)(2) exemption, an ATS must become a member of an SRO. If an entity were to file a Form ATS–N before registering as a broker-dealer under Section 15 of the Exchange Act, the entity would not be in compliance with Rule 301(b)(1) of Regulation ATS.²⁹⁷ Moreover, if the entity were to file a Form ATS–N before becoming a member of an SRO, the entity would not be in compliance with Rule 301(b)(1) of Regulation ATS because Section 15(b)(1) provides that a Commission order granting registration is not effective until the broker-dealer has become a member of a national securities association registered pursuant to Section 15A of the Exchange Act,²⁹⁸ and the Commission’s order granting broker-dealer registration would not be effective.²⁹⁹ The Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that a Form ATS–N reveals non-compliance with Regulation ATS because such non-compliance would be inconsistent with proposed Rule 304(a), which requires that an NMS Stock ATS

²⁹⁴ 17 CFR 242.301(b)(1).

²⁹⁵ 15 U.S.C. 78o(b)(8).

²⁹⁶ 15 U.S.C. 78o–3.

²⁹⁷ See 17 CFR 301(b)(1). Rule 301(b)(1) requires an ATS to register as a broker-dealer under Section 15 of the Exchange Act.

²⁹⁸ See 15 U.S.C. 78o(b)(1).

²⁹⁹ See 17 CFR 242.301(b)(1).

comply with Rules 300 through 304 (except Rule 301(b)(2)) as a condition to the exemption from the definition of exchange pursuant to Rule 3a1-1(a)(2).³⁰⁰ As another example, if a Form ATS-N reveals non-compliance with Rule 612 of Regulation NMS, known as the “Sub-Penny Rule,” which prohibits market participants, including ATSs, from displaying, ranking, or accepting orders, quotations, or indications of interest in NMS stock priced in an increment smaller than \$0.01,³⁰¹ the Form ATS-N would not be consistent with the proposed Rule because the NMS Stock ATS would operate in a manner that would violate the federal securities laws.

During its review, the Commission and its staff may provide comments to the entity, and may request that the entity supplement information in the Form ATS-N or revise its disclosures on Form ATS-N.³⁰² An order declaring a Form ATS-N effective would not constitute a finding that the NMS Stock ATS’s operations are consistent with the Exchange Act and the rules and regulations thereunder. Rather, the declaration of effectiveness would only address the issue of whether the NMS Stock ATS has complied with the requirements of Form ATS-N and would focus on the disclosures made on the Form ATS-N. The Commission would not be precluded from later determining that an NMS Stock ATS had violated the federal securities laws or the rules and regulations thereunder.

Request for Comment

52. Should Form ATS-N be deemed immediately effective without Commission action? Why or why not? Please support your arguments.

53. Should Form ATS-N be considered ineffective on filing with the Commission until the Commission affirmatively declares the Form ATS-N

ineffective? Why or why not? Please support your arguments.

54. Should the process for making a Form ATS-N effective for a legacy NMS Stock ATS be different from the process for making a Form ATS-N effective for an NMS Stock ATS that files a Form ATS-N after the effective date of the proposed rule? Why or why not? Please support your arguments. If so, how should the processes for the two categories of NMS Stock ATSs differ?

55. Do you believe that the proposed 120 calendar days after the effective date of proposed Rule 304 is a reasonable amount of time for legacy NMS Stock ATSs to complete and file a Form ATS-N? If so, why? If not, why not, and what amount of time would be reasonable? Please support your arguments.

56. Do you believe that new NMS Stock ATSs would be at a competitive disadvantage if existing NMS Stock ATSs were not required to file a Form ATS-N? Why or why not? Please support your arguments.

57. Do you believe that the proposed 120 calendar day period from filing with the Commission is a reasonable amount of time for the Commission to declare a Form ATS-N filed by an NMS Stock ATS that was not operating as of the effective date of proposed Rule 304 effective or ineffective? Do you believe the review period would place an undue burden on the NMS Stock ATS that filed the Form ATS-N? If yes, what amount of time would be reasonable? Please support your arguments.

58. Should the Commission adopt the proposal to allow a legacy NMS Stock ATS to continue operations pursuant to an existing filed initial operation report on Form ATS pending the Commission’s review of its Form ATS-N? Why or why not? Please support your arguments.

59. Do you believe that if a legacy NMS Stock ATS is allowed to continue operations during the Commission’s review of its Form ATS-N the Commission should make such NMS Stock ATS’s Form ATS-N publicly available upon filing? Why or why not? Please support your arguments.

60. Should the Commission permit existing NMS Stock ATSs to be exempt from the definition of “exchange” by virtue of the NMS Stock ATS’s current Form ATS on file with the Commission and require only new NMS Stock ATSs to file Form ATS-N? Why or why not? Would this raise competitive concerns with respect to disparate regulatory treatment of “new” and “legacy” NMS Stock ATSs? Why or why not? Please support your arguments.

61. Do you believe that the proposed 90 calendar days for the Commission to extend the Form ATS-N review period for new NMS Stock ATSs where the Form ATS-N is unusually lengthy or raises novel or complex issues is reasonable? Do you believe it would place an undue burden on the NMS Stock ATS? If so, why, and what amount of time would be reasonable? Do you believe that the proposed 90 calendar day extension period disproportionately affects new NMS Stock ATSs? Please support your arguments.

62. Should the Commission adopt the proposal to declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors? Please support your arguments.

63. Do you believe that the Commission’s examples of reasons that the Commission might declare a proposed Form ATS-N ineffective are appropriate? If yes, why? If not, why not? Please support your arguments.

64. Do you believe that the Commission should consider any other factors in determining whether a Form ATS-N should be declared effective or ineffective? If so, what are they and why? If not, why not? Please support your arguments.

65. Should the Commission require public notice and comment before declaring a Form ATS-N effective or ineffective? Why or why not? Please support your arguments.

5. Proposed Rule 304(a)(1)(iv): Orders Regarding Form ATS-N Effectiveness

Proposed Rule 304(a)(1)(iv) would provide that the Commission will issue an order to declare a Form ATS-N effective or ineffective. Proposed Rule 304(a)(1)(iv) would also provide that upon the effectiveness of the Form ATS-N, the NMS Stock ATS may operate pursuant to the conditions in proposed Rule 304. Proposed Rule 304(a)(1)(iv) would also provide that if the Commission declares a Form ATS-N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS. Proposed Rule 304(a)(1)(iv) would provide that a Form ATS-N declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS-N.

Proposed Rule 304(a)(1)(iv) is designed to provide notice to the public that the NMS Stock ATS that filed a Form ATS-N qualifies for the exemption provided under Exchange Act Rule 3a1-1(a)(2) and may commence operations, or if the NMS

³⁰⁰ The Commission notes that determining whether an NMS Stock ATS qualifies for the exemption from the definition of “exchange” would be based on information as it appears in Form ATS-N. If the Commission were to learn of different information, that determination may change.

³⁰¹ Specifically, Rule 612(a) of Regulation NMS provides that “no national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than \$0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than \$1.00 per share.” See 17 CFR 242.612(a).

³⁰² The Commission notes, however, that Form ATS-N is intended to provide regulatory and public transparency. As such, its review of Form ATS-N will be focused on an evaluation of the completeness and accuracy of the disclosure thereon, and compliance with federal securities laws.

Stock ATS was operating pursuant to a previously filed Form ATS, may continue to operate as an NMS Stock ATS. For an NMS Stock ATS operating before the effective date of proposed Rule 304 pursuant to a current Form ATS, the Form ATS for that NMS Stock ATS would no longer have any legal effect with respect to the regulatory status of the NMS Stock ATS upon the Commission declaring its Form ATS–N effective. As a result, the effective Form ATS–N would supersede and replace the NMS Stock ATS's previously filed Form ATS; and the NMS Stock ATS would no longer be subject to Rule 301(b)(2) of Regulation ATS and would not be required to file a Form ATS cessation of operation report because the NMS Stock ATS would continue operations under the effective Form ATS–N. Declaring a Form ATS–N ineffective would provide the public with notice that an entity that filed a Form ATS–N does not qualify for the exemption under Exchange Act Rule 3a1–1(a)(2) and would be precluded from operating as an NMS Stock ATS.

Under Proposed Rule 304(a)(1)(iv), an entity that had filed a Form ATS–N that had been declared ineffective by the Commission would be able to subsequently file a new Form ATS–N. This would allow an entity an opportunity to attempt to address any disclosure deficiencies or compliance issues that caused the first Form ATS–N to be declared ineffective.

Request for Comment

66. Do you believe that a Commission order declaring a Form ATS–N ineffective would have an undue prejudicial effect on an entity when it refiles Form ATS–N, even where the Commission declares effective the refiled Form ATS–N? Why or why not? Please support your arguments.

6. Proposed Rule 304(a)(2): Form ATS–N Amendments

The Commission is proposing Rule 304(a)(2) to provide the requirements for filing a Form ATS–N Amendment, which would be a public document that would provide information about the operations of the NMS Stock ATS and the activities of its broker-dealer operator and its affiliates. The information required to be filed on proposed Form ATS–N is designed to enable market participants to make more informed decisions about routing their orders to the NMS Stock ATS. The Commission's proposal to require such public disclosure is designed, in part, to bring operational transparency of NMS Stock ATSs more in line with the operational transparency of national

securities exchanges.³⁰³ Proposed Form ATS–N is also designed to provide information to the Commission that would allow it to monitor developments among NMS Stock ATSs and carry out its oversight functions of protecting investors and the public interest. Given these intended uses, the Commission believes that it is important for an NMS Stock ATS to maintain an accurate, current, and complete.

The Commission is proposing Rule 304(a)(2)(i) to require an NMS Stock ATS to amend an effective Form ATS–N in accordance with the instructions therein: (A) At least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N; (B) within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS–N Amendment; or (C) promptly, to correct information in any previous disclosure on Form ATS–N, after discovery that any information filed under Rule 304(a)(1)(i) or (a)(2)(i)(A) or (B) was inaccurate or incomplete when filed.³⁰⁴

Proposed Rule 304(a)(2)(ii) would provide that the Commission will, by order, if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, declare ineffective any Form ATS–N Amendment filed pursuant to Rule 304(a)(2)(i)(A) through (C) no later than 30 calendar days from filing with the Commission. If the Commission declares a Form ATS–N Amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to

³⁰³ See, e.g., *supra* notes 158–162 and accompanying text (discussing generally differences in disclosure requirements for national securities exchanges and ATSs). The Commission also notes that Rule 19b–4(m)(1) of the Exchange Act (17 CFR 240.19b–4(m)(1)), requires each SRO to post and maintain a current and complete version of its rules on its Web site. This requirement was designed to assure that SRO members and other interested persons have ready access to an accurate, up-to-date version of SRO rules. See Securities Exchange Act Release No. 50486 (October 5, 2004), 69 FR 60287 (October 8, 2004) (adopting amendments to Rule 19b–4 under the Act).

³⁰⁴ The Commission notes that ATSs currently are required to file amendments to the disclosures describing their operations on Form ATS (*see supra* Section II.B describing the current requirements applicable to ATSs), and that national securities exchanges, as SROs, are required to file proposed rule changes with the Commission before implementing such changes, even if such changes are non-controversial (*see generally supra* note 161 and accompanying text).

the ineffective Form ATS–N Amendment. The NMS Stock ATS could, however, continue to operate pursuant to a Form ATS–N that was previously declared effective. A Form ATS–N Amendment declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS–N Amendment that resolves the disclosure deficiency that resulted in the declaration of ineffectiveness.

a. Proposed Rule 304(a)(2)(i)(A): Material Amendments

Proposed Rule 304(a)(2)(i)(A) would, in part, require an NMS Stock ATS to amend an effective Form ATS–N in accordance with the instructions therein at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N. Proposed Rule 304(a)(2)(i)(A) is designed to provide advance notice to the Commission and market participants of a material change to the operations of the NMS Stock ATS and the disclosures regarding the activities of the broker-dealer operator or its affiliates. The Commission notes that under current Rule 301(b)(2)(ii) of Regulation ATS, ATSs are required to file an amendment on Form ATS at least 20 calendar days prior to implementing a material change to the operation of the ATS.³⁰⁵ The Commission is proposing to apply a longer time period of 30 days in proposed Rule 304(a)(2)(i)(A) due to the additional detail and information that would be provided in response to the solicitations on Form ATS–N as compared to Form ATS. As stated in the Regulation ATS Adopting Release, the Commission believes that requiring an ATS to provide the Commission advance notice of certain changes to its operation is a reasonable means for the Commission to carry out its market oversight and investor protection functions.³⁰⁶ The Commission preliminarily believes that the 30 calendar day advance notice period before material changes are implemented would give the Commission the opportunity to make inquiries to clarify any questions that might arise or to take appropriate action, if appropriate, regarding problems that

³⁰⁵ See 17 CFR 242.301(b)(2)(ii).

³⁰⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70864. The Commission also stated that “[i]f a system were only required to provide notice after it commenced operations, the Commission would have no notice of potential problems that might impact investors before the system begins to operate.” *Id.*

may impact market participants, including investors, before the NMS Stock ATS implemented the changes. Because material changes would be publicly disclosed upon filing, the 30 calendar day advance notice would also allow market participants to evaluate the changes before implementation and assess the NMS Stock ATS as a continued, or potential, trading venue.³⁰⁷

The Commission preliminarily believes that a change to the operations of an NMS Stock ATS, or the disclosures regarding the activities of the broker-dealer operator and its affiliates, would be material if there is a substantial likelihood that a reasonable market participant would consider the change important when evaluating the NMS Stock ATS as a potential trading venue. When the Commission adopted Regulation ATS in 1998, it noted that ATSs “implicitly make materiality decisions in determining when to notify their subscribers of changes.”³⁰⁸ The Commission is proposing to modify the conditions to the exemption to the definition of “exchange” under Rule 3a1-1(a)(2) for NMS Stock ATSs, which includes, among other things, the increased disclosure of information required on Form ATS-N. Because proposed Form ATS-N would be a public document, the Commission preliminarily believes that the use of this materiality standard discussed below would be appropriate as it is similar to materiality standards applied in the context of securities disclosures made pursuant to other Commission rules.³⁰⁹

To determine whether a change is material, and thus subject to the 30-day advance notice requirement, an NMS Stock ATS would need to consider all the relevant facts and circumstances, including the reason for the change and how it might impact the NMS Stock ATS and its subscribers, as well as

³⁰⁷ See *infra* Section IV.D (explaining proposed public disclosure requirements for Form ATS-N filings under proposed Rule 304(b)(2)).

³⁰⁸ See *id.* at 70864.

³⁰⁹ See, e.g., Securities Exchange Act Release No. 43154 (August 15, 2000), 65 FR 51716, 51721 (August 24, 2000) (Selective Disclosure and Insider Trading) (stating that to satisfy the materiality requirement, there must be a substantial likelihood that a fact would be viewed by the reasonable investor as having significantly altered the total mix of information made available); see also Regulation C under the Securities Act of 1933, 17 CFR 230.405 (“The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.”).

market participants that may be evaluating the NMS Stock ATS as a potential trading venue. Scenarios that are particularly likely to implicate a material change are (1) a broker-dealer operator or its affiliates beginning to trade on the NMS Stock ATS; (2) a change to the broker-dealer operator’s policies and procedures governing the written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10)(i) of Regulation ATS; (3) a change to the types of participants on the NMS Stock ATS; (4) the introduction or removal of a new order type on the NMS Stock ATS; (5) a change to the order interaction and priority procedures; (6) a change to the segmentation of orders and participants; (7) a change to the manner in which the NMS Stock ATS displays orders or quotes; and (8) a change of a service provider to the operations of the NMS Stock ATS that has access to subscriber confidential subscriber trading information. This list, however, is not intended to be exhaustive, and the Commission does not mean to imply that other changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates could not constitute a material change. Rather an NMS Stock ATS should be expected to consider the facts and circumstances of every change to determine whether advance notice is required.

Request for Comment

67. Do you believe that the Commission’s proposal to require an NMS Stock ATS to file a Form ATS-N Amendment at least 30 calendar days before implementing a material change is reasonable? Why or why not? Please support your arguments. Do you believe that the advance notice period for material change on Form ATS-N should be shorter (e.g., 20 calendar days, as is the case on current Form ATS) or longer (e.g., 45 calendar days)? Please support your arguments. Do you believe it would place an undue burden on the NMS Stock ATS? If so, why, and how much advance notice, if any, would be reasonable? Please support your arguments.

68. Are the enumerated scenarios each particularly likely to constitute a material change, such that the Commission and the public should be provided with 30 calendar days advance notice pursuant to proposed Rule 304(a)(2)(i)(A)? If yes, why? If not, why not? Are there any other scenarios generally likely to constitute a material change? If so, why, and what are those

scenarios? Please support your arguments.

69. Do you believe that the Commission should propose separate tiers of material changes (e.g., based on the significance or number of changes) to the operations of the NMS Stock ATS or disclosures on Form ATS-N and that a different materiality analysis should be applied depending on the tier of change to the operations of the NMS Stock ATS or disclosures on Form ATS-N? Why or why not? Please support your arguments.

70. Do you believe that any types of material changes to an NMS Stock ATS should be eligible to be implemented immediately upon filing? If so, what are such scenarios (regardless of facts and circumstances)? Please support your arguments.

71. Do you believe that certain changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that would be subject to disclosure on Form ATS-N should always be considered material changes? Why or why not? If so, please explain in detail those changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that would be subject to disclosure on Form ATS-N that should always be considered material changes.

72. Do you believe that certain changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates on Form ATS-N, such as order types, should be subject to Commission approval? Why or why not? If so, please identify such changes and support your argument.

73. Should the Commission require public notice and comment for determinations of ineffectiveness of Form ATS Amendments? Why or why not? Please support your arguments.

74. Do you believe that the Commission should make public on its Web site upon filing a Form ATS-N Amendment for a material change, as proposed? Why or why not? Please support your arguments. Do you believe that there should be a delay in when the Form ATS-N Amendment for a material change is made public? Why or why not? Please support your arguments.

75. Do you believe that making an NMS Stock ATS’s Form ATS-N Amendment public upon filing would affect competition? Why or why not? Please support your arguments. If so, how?

b. Proposed Rule 304(a)(2)(i)(B):
Periodic Amendments

Proposed Rule 304(a)(2)(i)(B) would require an NMS Stock ATS to amend an effective Form ATS–N within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS–N Amendment.³¹⁰ The proposed rule would enable NMS Stock ATSs to update information from the preceding quarter that does not constitute a material change in the NMS Stock ATS's Form ATS–N filing.³¹¹ The Commission preliminarily believes that providing a mechanism for NMS Stock ATSs to disclose changes to their operations or to update information that does not constitute a material change within 30 calendar days after the end of each calendar quarter would tailor the reporting burden on NMS Stock ATSs to the degree of significance of the change in a manner that does not compromise the Commission's oversight of NMS Stock ATSs or its ability to protect investors and the public interest. The Commission preliminarily believes that allowing NMS Stock ATSs to implement such changes immediately would allow Stock ATSs to make periodic changes to their operations without delay, while at the same time provide disclosure about those changes to market participants and the Commission within an appropriate time frame.

Request for Comment

76. Should the Commission require NMS Stock ATSs to file a Form ATS–N Amendment for periodic changes at the end of each calendar quarter? Why or why not? Please support your arguments.

77. Do you believe that the Commission should require an NMS Stock ATS to file a Form ATS–N Amendment before implementing a periodic change? Why or why not? If so, what period of time should an NMS Stock ATS be required to wait before implementing a periodic change? Please explain in detail.

78. Do you believe that 30 calendar days after the end of each calendar quarter is a reasonable amount of time for NMS Stock ATSs to correct

³¹⁰ The Commission notes that this requirement would be substantively identical to the current requirement under Rule 301(b)(2)(iii) of Regulation ATS. See 17 CFR 242.301(b)(2)(iii).

³¹¹ That Form ATS–N Amendment, filed pursuant to proposed Rule 304(a)(2)(i)(B), would become public upon filing. See *infra* Section IV.D (explaining proposed public disclosure requirements for Form ATS–N filings under proposed Rule 304(b)(2)).

information that does not constitute a material change? If so, why? If not, why not, and what amount of time would be reasonable? Please support your arguments. Do you believe there are any processes the Commission should consider for correcting information on a Form ATS–N that does not constitute a material change? If so, what are such processes? Please explain in detail.

79. Do you believe that certain changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that would be subject to disclosure on Form ATS–N should always be considered periodic changes? Why or why not? If so, please explain in detail those changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that should always be considered periodic changes.

Do you believe that the Commission should make public on its Web site upon filing a Form ATS–N Amendment for a periodic change? Why or why not? Please support your arguments. Do you believe that there should be a delay in when the Form ATS–N Amendment for a periodic change is made public? Why or why not? Please support your arguments.

c. Proposed Rule 304(a)(2)(i)(C):
Amendment To Correct Information on
Previously Filed Form ATS–N

Proposed Rule 304(a)(2)(i)(C) would require an NMS Stock ATS to amend an effective Form ATS–N promptly to correct information in any previous disclosure on Form ATS–N after discovery that any information filed in a Form ATS–N or Form ATS–N Amendment was inaccurate or incomplete when filed.³¹² For example, if an NMS Stock ATS discovers that information that it previously disclosed on Form ATS–N was incorrect, such as an address or contact information, or that information it previously disclosed was incomplete, such as where the NMS Stock ATS failed to fully describe the characteristics of an order type, it would be required to promptly amend its Form ATS–N. Although the Commission recognizes that a change disclosed on a Form ATS–N Amendment that is reported pursuant to proposed Rule 304(a)(2)(i)(C) would likely be already

³¹² The Commission notes that this requirement would be substantively identical to Rule 301(b)(2)(iv) of Regulation ATS that an ATS “promptly file an amendment on Form ATS correcting information previously reported on Form ATS after discovery that any information filed” in a Form ATS initial operation report or amendment “was inaccurate when filed.” See 17 CFR 242.301(b)(2)(iv).

implemented by the NMS Stock ATS, the Commission believes that it would benefit market participants to receive accurate and complete information about the NMS Stock ATS so they can use the information in deciding where to route their orders.³¹³

Request for Comment

80. Do you believe that making amendments “promptly” is a reasonable requirement for NMS Stock ATSs to correct information that was inaccurate or incomplete when filed? If so, why? If not, why not, and what amount of time would be reasonable? Please support your arguments.

81. Do you believe there are any other processes the Commission should consider for correcting information on Form ATS–N that was inaccurate at the time it was filed? If so, what are such processes? Please explain in detail.

82. Do you believe that the Commission's proposal to provide an NMS Stock ATS the opportunity to correct information that was inaccurate or incomplete when filed creates an unreasonable risk to market participants that an NMS Stock ATS might fail to provide accurate, current, and complete information on Form ATS–N when filing the form? Why or why not? Please support your arguments.

d. Proposed Rule 304(a)(2)(ii):
Commission Review of Form ATS–N
Amendments

The Commission is proposing Rule 304(a)(2)(ii) to provide that the Commission will, by order, if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, declare ineffective any Form ATS–N Amendment filed pursuant to Rule 304(a)(2)(i)(A) through (C) no later than 30 calendar days from filing with the Commission.³¹⁴ The Commission could, for example, declare ineffective a Form ATS–N Amendment if one or more disclosures on the amended Form ATS–N are materially deficient with respect to their accuracy, currency, completeness, or fair presentation. The Commission is concerned that an NMS Stock ATS whose Form ATS–N filing was declared effective could file a Form

³¹³ That Form ATS–N Amendment, filed pursuant to proposed Rule 304(a)(2)(i)(C), would become public upon filing. See *infra* Section IV.D (explaining proposed public disclosure requirements for Form ATS–N filings under proposed Rule 304(b)(2)).

³¹⁴ A filed Form ATS–N Amendment that contains technical deficiencies, such as missing pages or one in which the entity does not respond to all questions, including all sub-questions, would not be complete and would be returned to the NMS Stock ATS. See also 17 CFR 240.0–3.

ATS–N Amendment that contains materially deficient disclosures. The Commission is also concerned that market participants could use this information in connection with their evaluation of an NMS Stock ATS and potentially be confused or misinformed about the operations of an NMS Stock ATS. The Commission preliminarily believes that a filed Form ATS–N should contain detailed disclosures that are accurate, current, and complete and therefore is proposing a mechanism for it to declare amendments ineffective as appropriate.³¹⁵

The Commission could also declare ineffective a Form ATS–N Amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because the amendment describes a change that, under a “red flag” review, would not comply with the federal securities laws or the rules or regulations thereunder, including Regulation ATS. The Commission preliminarily believes that it would be hindered in protecting investors and maintaining fair and orderly markets if an NMS Stock ATS were allowed to implement or continue the use of a service, functionality, or procedure that does not comply with the federal securities laws or the rules or regulations thereunder, including Regulation ATS.

Under proposed Rule 304(a)(2)(ii), the Commission could declare a Form ATS–N Amendment ineffective within 30 calendar days from filing with the Commission. During its review of a Form ATS–N Amendment, the Commission and its staff may provide comments to the NMS Stock ATS, and may request that the NMS Stock ATS supplement information in the Form ATS–N Amendment or revise its disclosures on the Form ATS–N Amendment. Like the Commission’s review of a Form ATS–N initially filed by an entity with the Commission,³¹⁶ the Commission notes that its review of a Form ATS–N Amendment would focus on the disclosures made on the Form ATS–N. The Commission would not be precluded from later determining that an NMS Stock ATS had violated the federal securities laws or the rules and regulations thereunder. The Commission preliminarily believes that the 30 calendar day review period would provide the Commission with adequate time to review the Form ATS–N Amendment, discuss the changes with the broker-dealer operator as explained above and decide whether

to declare the Form ATS–N Amendment ineffective.

Under proposed Rule 304(a)(2)(ii), if the Commission declares a Form ATS–N Amendment ineffective, the NMS Stock ATS would be prohibited from operating pursuant to the ineffective Form ATS–N Amendment. As discussed above, under proposed Rule 304(a)(2)(i), an NMS Stock ATS must amend its Form ATS–N at least 30 days before implementing a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N, or within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS–N Amendment. The Commission preliminarily believes the proposed rule strikes a proper balance between, on the one hand, providing an NMS Stock ATS with the flexibility to implement a change to its operations without unnecessary delay, and on the other hand, giving the Commission time to adequately review Form ATS–N Amendments and carry out its oversight functions and responsibilities.³¹⁷

Under proposed Rule 304(a)(1)(iv), an NMS Stock ATS that had filed a Form ATS–N Amendment that has been declared ineffective would be able to subsequently file a new Form ATS–N Amendment. This would allow an NMS Stock ATS to attempt to address any disclosure deficiencies or compliance issues that caused a Form ATS–N Amendment to be declared ineffective.

Request for Comment

83. Should the Commission adopt the proposal to declare ineffective any Form ATS–N Amendment if it finds that such action is necessary or appropriate in the

³¹⁷ The Commission also preliminarily believes that the proposed process that would permit the Commission to declare Form ATS–N Amendments ineffective, even if the change disclosed in the Form ATS–N Amendments has already been implemented, would be consistent with better aligning the Commission’s oversight of NMS Stock ATSs with its oversight of national securities exchanges. The Commission notes, for example, that pursuant to Section 19(b)(3)(C) of the Exchange Act, the Commission, at any time within the 60-day period beginning on the date of filing of a proposed rule change filed by a national securities exchange, “summarily may temporarily suspend the change in the rules of the [SRO] made thereby, 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].” 15 U.S.C. 78s(b)(3)(C). As a result, the Commission may suspend a national securities exchange’s proposed rule change, even if the change was eligible to be effective upon filing with the Commission.

public interest, and is consistent with the protection of investors? Why or why not? Please support your arguments.

84. Do you believe that the Commission should affirmatively declare material amendments to Form ATS–N effective? Why or why not? If so, do you believe the Commission should declare material changes to Form ATS–N effective before the NMS Stock ATS implements the material change? Why or why not? Please support your arguments.

85. Do you believe that the Commission should provide a longer time period for the Commission to review material amendments to Form ATS–N (e.g., 45 calendar days) and a shorter period of time for the NMS Stock ATS to be able to implement the material change (e.g., 10, 20, or 30 calendar days)? Why or why not? Please support your arguments. Do you believe that a longer Commission review period coupled with a shorter advance notice period would balance the burdens on an NMS Stock ATS that would be required to provide advance notice of a material change to the operations of the NMS Stock ATS with the time necessary for the Commission to review a Form ATS–N material amendment? Why or why not? Please support your arguments. Do you believe a longer Commission review period coupled with a shorter advance notice period would lead to practical challenges (e.g., confusion among market participants or difficulty to NMS Stock ATSs to unwind a change)? Please support your arguments.

86. Do you believe that a Form ATS–N Amendment should become effective by operation of rule if the Commission does not affirmatively declare it ineffective? Why or why not? Please support your arguments.

87. Do you believe that the proposed 30 calendar days from filing with the Commission is a reasonable time period for the Commission to declare a Form ATS–N Amendment ineffective? Do you believe it would place an undue burden on the NMS Stock ATS that filed the Form ATS–N Amendment? If so, why, and what would be a reasonable amount of time? Please support your arguments. Do you believe that a longer period of time (e.g., 45 days) for the Commission to declare a Form ATS–N Amendment ineffective would be reasonable? Why or why not? Please support your arguments. Do you believe that a longer period of time would place an undue burden on the NMS Stock ATS that filed the Form ATS–N Amendment? Why or why not? Please support your arguments.

³¹⁵ See proposed Rule 304(c)(1).

³¹⁶ See *supra* Section IV.C.

88. Do you believe the Commission should adopt a process to extend its review period for a Form ATS–N Amendment similar to the processes being proposed under proposed Rule 304(a)(1)(ii) for initial Form ATS–N filings? Why or why not? Please support your arguments. If so, how long should the extension of the review period be (e.g., 10, 15, 20, or 30 calendar days) and should the process apply to material amendments, periodic amendments, amendments to correct information in any previous Form ATS–N filing that was inaccurate or incomplete when filed, or all categories of Form ATS–N Amendments? Should the process differ depending on the category of amendment? Please be specific.

89. Should the Commission adopt the proposal that a Form ATS–N Amendment should become effective without the Commission issuing an order declaring effective the relevant Form ATS–N Amendment? Do you believe that the lack of a Commission order declaring a Form ATS–N Amendment ineffective within 30 calendar days from filing would provide an NMS Stock ATS sufficient notice that a Form ATS–N Amendment has become effective? Why or why not? Please support your arguments.

90. Do you believe that a determination of ineffectiveness of a Form ATS–N Amendment should be subject to notice and hearing, as is the case with initial determinations about Form ATS–N? Why or why not? Please support your arguments.

7. Proposed Rule 304(a)(3): Notice of Cessation

Proposed Rule 304(a)(3) would require an NMS Stock ATS to notice its cessation of operations on Form ATS–N at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS.³¹⁸ The notice of cessation would cause the Form ATS–N to become ineffective on the date designated by the NMS Stock ATS. Requiring an NMS Stock ATS to file a Form ATS–N notice of cessation at least 10 business days before the date the NMS Stock ATS ceases operations would provide notice to the public and the Commission that the NMS Stock ATS intends to cease operations. By making the notices of cessation public, as discussed herein,³¹⁹ the Commission preliminarily believes that all market

³¹⁸ The Commission would post a notice of cessation upon completing its review for accuracy and completion.

³¹⁹ See *infra* Section V (discussing public disclosure of filings on Form ATS–N, including cessation of operation reports).

participants that had routed orders to the NMS Stock ATS would be able to make arrangements to select alternative routing destinations for their orders. Regulation ATS currently requires an ATS to “promptly file a cessation of operations report on Form ATS” upon ceasing to operate.³²⁰ Proposed Rule 304(a)(3) would require an NMS Stock ATS to disclose on Form ATS–N the date it will cease operating at least 10 business days before doing so. The Commission preliminarily believes that the proposal to require NMS Stock ATSs to provide notice at least 10 business days before the date an NMS Stock ATS ceases to operate is a reasonable period for the NMS Stock ATS to provide market participants and the Commission with notice that it intends to cease operations, as market participants would have adequate time to find and select other routing destinations for their orders.

Request for Comment

91. Should the Commission require an NMS Stock ATS to give notice that it intends to cease operations 10 business days or more before ceasing operations as an NMS Stock ATS? If so, why and how much advance notice is appropriate? If not, why not? Please support your arguments.

92. Should the Commission allow an NMS Stock ATS to notice its cessation of operations after it has ceased operations, as is currently the requirement under Regulation ATS, or at the same time that it ceases operations? If so, why and how long after the NMS Stock ATS has ceased operations? If not, why not? Please support your arguments.

93. Should the Commission create a process to revoke the exemption from Rule 3a1–1(a)(2) if the NMS Stock ATS reports no volume for two consecutive quarters, four consecutive quarters, eight consecutive quarters, or over some other time period? Why or why not? Are there any other circumstances under which the Commission should revoke the exemption if the NMS Stock ATS appears to be inactive? Please support your arguments.

8. Proposed Rule 304(a)(4): Suspension, Limitation, or Revocation of the Exemption From the Definition of Exchange

To rely on an exemption from the Exchange Act or the rules and regulations thereunder granted by the Commission, the person seeking the exemption must comply with the conditions to the exemption established

by the Commission. A person that fails to comply with those conditions would therefore fall outside of the scope of the exemption.³²¹ In adopting Exchange Act Rule 3a1–1(a)(2) and Regulation ATS, the Commission established conditions under which an ATS would be exempt from the definition of “exchange,” and therefore would not be required to register as a national securities exchange. Rule 3a1–1(a)(2) provides that a system that meets the criteria of Rule 3b-16 is exempt from the definition of “exchange” on condition that the system complies with Regulation ATS. As discussed above, the Commission is proposing to expand the set of conditions that an NMS Stock ATS would need to satisfy to qualify for the exemption provided under Rule 3a1–1(a)(2).

The Commission is proposing to amend Regulation ATS to include proposed Rule 304(a)(4), to provide a process for the Commission to suspend for a period not exceeding twelve months,³²² limit, or revoke an NMS Stock ATS’s exemption from the definition of the term exchange pursuant to Rule 3a1–1(a)(2) under certain circumstances. Regulation ATS currently does not provide a process for the Commission to suspend, limit, or revoke the exemption under which an ATS operates other than pursuant to the Commission’s general enforcement authority.³²³ The Commission is proposing Rule 304(a)(4)(i), which would provide that the Commission will, by order, if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, suspend for

³²¹ See proposed Rule 304(a)(4)(iv).

³²² The proposed limitation on the time frame for suspension is consistent with federal securities law provisions pursuant to which the Commission may suspend the activities or registration of a regulated entity. See, e.g., Section 15(b)(4) (15 U.S.C. 78o(b)(4)) and 15B(c)(2) (15 U.S.C. 78o–4(c)(2)).

³²³ See generally Exchange Act Section 21C (15 U.S.C. 78u–3). Use of the proposed process whereby the Commission could suspend, limit, or revoke an NMS Stock ATS’s Rule 3a1–1(a)(2) exemption would not preclude the Commission from using its general enforcement authority, or other specific enforcement authority that may be applicable such as, for example, pursuant to Section 15(b)(4) and 15(c) (15 U.S.C. 78o(b)(4); 15 U.S.C. 78o(c)). Rather, it would provide an additional means of helping to ensure that NMS Stock ATSs that no longer qualify for the Rule 3a1–1(a)(2) exemption are unable to take advantage of it. For example, if an NMS Stock ATS failed to file a Form ATS–N Amendment to disclose material changes to the operation of the NMS Stock ATS, the Commission could invoke the process to suspend, limit or revoke the NMS Stock ATS’s exemption, but would not be precluded from bringing an action against the broker-dealer operator of the NMS Stock ATS for failing to comply with Rule 304(a)(2), or violating the antifraud provisions of the federal securities laws.

³²⁰ 17 CFR 242.301(b)(2)(v).

a period not exceeding twelve months, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" pursuant to Rule 3a1-1(a)(2).³²⁴ Proposed Rule 304(a)(4)(ii) would make clear that if an NMS Stock ATS's exemption is suspended or revoked pursuant to proposed Rule 304(a)(4)(i), the NMS Stock ATS would be prohibited from operating pursuant to the exemption from the definition of "exchange" provided under Rule 3a1-1(a)(2); if an NMS Stock ATS's exemption is limited pursuant to proposed Rule 304(a)(4)(i), the NMS Stock ATS would be prohibited from operating in a manner inconsistent with the terms and conditions of the Commission order.

The Commission preliminarily believes that it is appropriate to provide a process by which the Commission may, by order, suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" if the NMS Stock ATS is operating in a manner such that the exemption from the definition of "exchange" for the NMS Stock ATS is not necessary or appropriate in the public interest, or consistent with the protection of investors. For example, in making a determination as to whether suspension, limitation, or revocation of an NMS Stock ATS's exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors, the Commission would take into account whether the entity no longer meets the definition of NMS Stock ATS under Rule 300(a)(k), does not comply with the conditions to the exemption (in that it fails to comply with any part of Regulation ATS, including proposed Rule 304), or otherwise violates any provision of federal securities laws.

The Commission preliminarily believes, for example, that it would be appropriate to provide for the suspension, limitation, or revocation of an NMS Stock ATS's exemption from the definition of "exchange" pursuant to Rule 3a1-1(a)(2) if the Commission finds that an NMS Stock ATS no longer meets the definition of "NMS Stock ATS."³²⁵ If a system does not meet the functional test of an "exchange" under Rule 3b-16, it would not be eligible for

the exemption from the definition of "exchange" pursuant to Rule 3a1-1(a)(2) as it is not an "exchange" in the first instance.³²⁶ If an NMS Stock ATS no longer meets the criteria of Rule 3b-16—or meets the criteria of Rule 3b-16 but no longer effects transactions in NMS stocks—or otherwise does not meet the definition of an alternative trading system, it would not continue to be eligible for the exemption in Rule 3a1-1(a)(2) even if it had met the definition of an NMS Stock ATS at the time that the Commission declared its Form ATS-N effective. Permitting a system to operate that does not otherwise meet the definition of an NMS Stock ATS would deny investors appropriate regulatory protection and could also be misleading to investors.

The Commission also preliminarily believes that it would be appropriate to provide for the suspension, limitation, or revocation of an NMS Stock ATS's exemption from the definition of exchange pursuant to Rule 3a1-1(a)(2) if, for example, the Commission finds that an NMS Stock ATS fails to comply with any part of Regulation ATS, including proposed Rule 304. As discussed in the Regulation ATS Adopting Release, instead of imposing requirements applicable to national securities exchanges, the Commission adopted enhanced regulation for ATSs that would provide more protections for investors who used the systems.³²⁷ To the extent that an NMS Stock ATS fails to comply with the conditions set forth in Regulation ATS, investors would no longer be protected by the conditions of Regulation ATS or the protections afforded by the provisions of the Exchange Act and the rules thereunder that apply to national securities exchanges. For example, pursuant to proposed Rule 304(a)(4)(i), the Commission would suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because the NMS Stock ATS is no longer a registered broker-dealer, which is a requirement of Regulation ATS.³²⁸ The Commission would also suspend, limit, or revoke an NMS Stock ATS's exemption if the Commission finds, after notice and opportunity for hearing, that such action is necessary or

appropriate in the public interest, and is consistent with the protection of investors, because, for example, the ATS's Form ATS-N contains inaccurate or incomplete responses. Proposed Form ATS-N would be a public reporting document that is designed to provide the Commission and market participants with information about the operations of the NMS Stock ATS and the circumstances under which the activities of the broker-dealer operator of the NMS Stock ATS and its affiliates may give rise to potential conflicts of interest. The Commission preliminarily believes that market participants would likely use the information provided on Form ATS-N to make decisions about where to route orders. The Commission is concerned that information provided on Form ATS-N that is inaccurate or incomplete could misinform or mislead market participants about the operations of the NMS Stock ATS or the activities of the broker-dealer operator, including how their orders may be handled and executed, and impact their decisions about where they should route their orders. To prevent an NMS Stock ATS from potentially misinforming or misleading market participants about the operations of the system, proposed Rule 304(a)(4) would provide a process for the Commission to suspend, limit, or revoke the NMS Stock ATS's Rule 3a1-1(a)(2) exemption.

Additionally, the Commission preliminarily believes that it would be appropriate to provide for the suspension, limitation, or revocation of an NMS Stock ATS's exemption from the definition of exchange pursuant to Rule 3a1-1(a)(2) if, for example, the Commission finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because that NMS Stock ATS has violated or is violating any provision of the federal securities laws. The Commission is concerned that market participants may be harmed by an NMS Stock ATS that is, for example, providing false or misleading information to market participants, and preliminarily believes that such an NMS Stock ATS should not be able to continue to operate pursuant to an exemption provided by the Commission.

Pursuant to proposed Rule 304(a)(4)(ii), an NMS Stock ATS whose exemption had been suspended or revoked would be prohibited from operating pursuant to the Rule 3a1-1(a)(2) exemption; and if an NMS Stock ATS were to continue to engage in Rule 3b-16 activity in NMS stocks without the exemption, it would be an

³²⁴ See proposed Rule 304(a)(4)(i).

³²⁵ The Commission preliminarily believes that a determination as to whether to suspend, limit, or revoke an NMS Stock ATS's exemption would depend on the particular facts and circumstances; however, the Commission also preliminarily believes that revocation would be the appropriate course of action if the Commission finds that an entity no longer meets the definition of NMS Stock ATS or otherwise satisfies the criteria of the functional test under Rule 3b-16.

³²⁶ See *supra* Section IV.A. (discussing the definition of NMS Stock ATS and the availability of the Rule 3a1-1(a)(2) exemption).

³²⁷ See Regulation ATS Adopting Release, *supra* note 7, at 70857.

³²⁸ See 17 CFR 242.301(b)(1).

unregistered exchange because it would no longer qualify for the exemption from the exchange definition.³²⁹ If an NMS Stock ATS's exemption was limited pursuant to proposed Rule 304(a)(4)(iv), the NMS Stock ATS would be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order, and if it did operate in a manner inconsistent with the terms and conditions of the order, would risk operating as an unregistered national securities exchange. The exemption provided under Rule 3a1-1(a)(2) is conditional upon initial and ongoing compliance with Regulation ATS. The proposed process for suspending, limiting, or revoking an NMS Stock ATS's exemption, in the event the Commission finds, for example, that there is a failure to adhere to the conditions of the exemption and that suspending, limiting, or revoking the exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors, is designed to protect investors in the case of potential non-compliance by an NMS Stock ATS with the conditions with which the NMS Stock ATS must adhere in order to continue to qualify for an exemption from the statutory definition of "exchange."

The Commission also preliminarily believes that providing a process by which the Commission can determine to suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" would provide appropriate flexibility to address the specific facts and circumstances of an NMS Stock ATS's failure to comply with Regulation ATS or the nature of the violation of federal securities laws, and the possible harm to investors as a result of the non-compliance or violation. For example, the Commission preliminarily believes that providing a process by which the Commission could limit the exemption provided in Rule 3a1-1(a)(2) would provide flexibility to address specific

³²⁹ If the Commission revoked the exemption of an NMS Stock ATS and the NMS Stock ATS wished to continue operations, the entity could do so only if it was registered as a national securities exchange pursuant to Section 6 of the Exchange Act or was exempted by the Commission from such registration based on the limited volume of transactions effected on such exchange, or seeks another exemption. See 17 CFR 242.301(a)(1)-(2). The NMS Stock ATS would not be prohibited from filing a new Form ATS-N, pursuant to proposed Rule 304(a)(1).

An NMS Stock ATS that has had its exemption suspended or limited may, depending on the facts and circumstances, be able to file a Form ATS-N Amendment or revise its operations to come into compliance with the conditions of the exemption or the provision of any other federal securities law that may have been the basis of the Commission's findings.

disclosures or activities that are the cause of the non-compliance with Regulation ATS or that violate federal securities laws. For illustration, if the Commission found that an NMS Stock ATS implemented a material change to its operations, but failed to disclose the material change on its Form ATS-N, the Commission could determine to allow the NMS Stock ATS to continue to operate as disclosed on its Form ATS-N, but prohibit the NMS Stock ATS from engaging in the undisclosed activity until the NMS Stock ATS properly amends its Form ATS-N in accordance with proposed Rule 304(a)(2). If the Commission found that an NMS Stock ATS offered an order type that resulted in violations of the Commission's rules restricting the acceptance and ranking of orders in impermissible sub-penny increments, the Commission could allow the NMS Stock ATS to continue to operate but prohibit the NMS Stock ATS from offering the order type, if it found that doing so was necessary or appropriate in the public interest, and consistent with the protection of investors. The Commission preliminarily believes that, depending on the facts and circumstances, it may be more appropriate in the public interest, and consistent with the protection of investors, to limit the scope of an NMS Stock ATS's exemption, instead of revoking or suspending the exemption and causing the NMS Stock ATS to cease operations. In comparison, the Commission preliminarily believes it would be more appropriate to revoke the exemption of an NMS Stock ATS that no longer meets the definition of NMS Stock ATS or is no longer a registered broker-dealer, as these conditions are fundamental to the exemption. Additionally, the Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to revoke the exemption of an NMS Stock ATS if, for example, the ATS is found to be violating the antifraud provisions of the federal securities laws. Nonetheless, the entry of an order revoking an NMS Stock ATS's exemption would not prohibit the broker-dealer operator of the NMS Stock ATS from continuing its other broker-dealer operations.

The Commission is also proposing that prior to issuing an order suspending, limiting, or revoking an NMS Stock ATS's exemption pursuant to proposed Rule 304(a)(4)(i), the Commission would provide notice and opportunity for hearing to the NMS Stock ATS, and make the findings

specified in proposed Rule 304(a)(4)(i) described above, that, in the Commission's opinion, the suspension, limitation or revocation is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission preliminarily believes that the proposed process of providing an NMS Stock ATS with notice and opportunity for hearing provides the NMS Stock ATS with adequate opportunity to respond before the Commission determines that the NMS Stock ATS's exemption from the definition of "exchange" is no longer appropriate in the public interest or consistent with the protection of investors. The Commission also preliminarily believes that the possibility that the Commission may suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" would not be unduly burdensome because an NMS Stock ATS would be given advance notice and have an opportunity to respond, and, depending on the facts and circumstances, revise its operations or disclosures on Form ATS-N to bring its operations or disclosures into compliance with Regulation ATS or federal securities laws. The Commission preliminarily believes that proposed Rule 304(a)(4) would provide the Commission with an appropriate tool, which is subject to notice and hearing safeguards, to protect the investing public and the public interest from an NMS Stock ATS that fails to comply with Regulation ATS or otherwise violates any provision of the federal securities laws.

Request for Comment

94. Do you believe the proposed process for the Commission to suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" is necessary or appropriate to protect investors and other market participants and maintain fair and orderly markets? Why or why not? Please support your arguments.

95. What criteria should the Commission use in deciding whether to suspend, limit, or revoke an NMS Stock ATS's exemption as proposed? Are there alternative actions or processes the Commission should consider for suspending, limiting, or revoking the exemption? Please support your arguments and provide details.

96. Should the Commission adopt the proposal to provide flexibility as to whether to suspend, limit, or revoke an NMS Stock ATS's exemption depending on the facts and circumstances and possible harm to investors? If so, why? If not, what other criteria, if any, should

the Commission use in deciding whether to suspend, limit, or revoke the exemption? Please support your arguments.

97. Do you believe there should be a maximum time frame following notice and opportunity for hearing within which the Commission should be required to act? If so, why, and what would be the appropriate time frame? If not, why not? Please support your arguments.

98. Do you believe that 12 months is the appropriate limit on the amount of time by which the Commission could suspend an NMS Stock ATS's exemption? If so, why? If not, why not, and what would be the appropriate time frame? Please support your arguments.

99. Do you believe that the Commission's proposal to declare ineffective a Form ATS-N Amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, is appropriate as a supplement to the proposal that the Commission suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" under proposed Rule 304(a)(4)? Why or why not? Please support your arguments.

100. Do you believe there are other processes by which the Commission should enforce the conditions to the Rule 3a1-1(a)(2) exemption? If so, what are they and why would they be preferable to the proposed process?

D. Rule 304(b): Public Disclosure of Form ATS-N and Related Commission Orders

The Commission is proposing to make public certain Form ATS-N reports filed by NMS Stock ATSs.³³⁰ Commission orders related to the effectiveness of Form ATS-N will also be publicly posted on the Commission's Web site. As discussed above, there currently is limited information available to the public about the operations of ATSs that trade NMS stocks and the activities of their broker-dealer operators and the broker-dealer operators' affiliates.³³¹ Furthermore, as discussed further below, market participants may not be informed about potential conflicts of interest that arise as a result of the other business activities of the broker-dealer operator of the NMS Stock ATS, or its affiliates, such as trading NMS stocks on the NMS Stock ATS or operating multiple trading centers, including

multiple ATSs.³³² The only information the Commission currently makes publicly available regarding ATSs is a list, which is updated monthly, of ATSs with a Form ATS on file with the Commission.³³³ Therefore, the Commission is proposing Rule 304(b) to mandate greater public disclosure of NMS Stock ATS operations through the publication of Form ATS-N and to provide for the posting of Commission orders on the Commission's Web site related to the effectiveness of Form ATS-N.

First, the Commission is proposing Rule 304(b)(1) to provide that every Form ATS-N filed pursuant to Rule 304 shall constitute a "report" within the meaning of Sections 11A, 17(a), 18(a), and 32(a) and any other applicable provisions of the Exchange Act. Because proposed Form ATS-N is a report that is required to be filed under the Exchange Act, it would be unlawful for any person to willfully or knowingly make, or cause to be made, a false or misleading statement with respect to any material fact in Form ATS-N.³³⁴ The Commission notes that proposed Rule 304(b)(1) is nearly identical to current Rule 301(b)(2)(vi),³³⁵ which provides that every notice or amendment filed pursuant to Rule 301(b)(2), including Form ATS, shall constitute a "report" within the meaning of Sections 11A, 17(a), 18(a), and 32(a), and any other applicable provisions of the Exchange Act.³³⁶

Under proposed Rule 304(b)(2), the Commission would make public via posting on the Commission's Web site, each: (i) Order of effectiveness of a Form ATS-N; (ii) order of ineffectiveness of a Form ATS-N; (iii) effective Form ATS-N; (iv) filed Form ATS-N Amendment; (v) order of ineffectiveness of a Form ATS-N Amendment; (vi) notice of cessation; and (vii) order suspending, limiting, or revoking the exemption from the definition of an "exchange" pursuant to Exchange Act Rule 3a1-1(a)(2). Proposed Rule 304(b)(3) would require each NMS Stock ATS to make public via posting on its Web site a direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2).

Once the Commission has declared a Form ATS-N effective, the Commission preliminarily believes that making Form ATS-N public would provide market

participants with important information about the operations of the NMS Stock ATS and its broker-dealer operator and the broker-dealer operator's affiliates. As discussed further below, proposed Form ATS-N would provide information about the broker-dealer operator and the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS, including: Their operation of trading centers and other NMS Stock ATSs; products and services offered to subscribers; arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS; smart order router (or similar functionality) and algorithms used to send or receive orders or other trading interest to or from the ATS; personnel and third parties used to operate the NMS Stock ATS; differences in the availability of ATS services, functionalities, or procedures; and safeguards and procedures to protect subscribers' confidential trading information.³³⁷ Proposed Form ATS-N would also provide market participants with important information about the manner of operations of the NMS Stock ATS, including: subscribers; hours of operation; types of orders; connectivity, order entry, and co-location procedures; segmentation of order flow and notice about segmentation; display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling, and execution procedures; procedures governing suspension of trading and trading during a system disruption or malfunction; opening, re-opening, closing, and after hours procedures; outbound routing services; fees; market data; trade reporting; clearance and settlement; order display and execution access; fair access; and market quality statistics published or provided to one or more subscribers.³³⁸ Accordingly, the Commission proposes to make public—via the public posting of Form ATS-N on the Commission's Web site—information that it preliminarily believes should be easily accessible to all market participants so that market participants may better evaluate how to achieve their investing or trading objectives.

The Commission would not post on its Web site a filed Form ATS-N before the Commission declares that Form ATS-N effective. Under the proposal, an NMS Stock ATS that was not in

³³⁰ See proposed Rule 304(b)(1) (providing that every Form ATS-N filed pursuant to Rule 304 shall constitute a "report" within the meaning of Sections 11A, 17(a), 18(a), and 32(a) and any other applicable provisions of the Exchange Act).

³³¹ See *supra* Section III.C.

³³² See *infra* Section VII.

³³³ See Alternative Trading System ("ATS") List, <http://www.sec.gov/foia/docs/atstlist.htm>.

³³⁴ See 15 U.S.C. 78ff(a).

³³⁵ 17 CFR 242.301(b)(2)(vi).

³³⁶ 15 U.S.C. 78k-1, 78q(a), 78r(a), and 78ff(a). See 17 CFR 242.301(b)(2)(vi).

³³⁷ See *infra* Section VII (discussing proposed disclosure requirements related to broker-dealer operators under Form ATS-N).

³³⁸ See *infra* Section VIII (discussing proposed operational disclosure requirements of Form ATS-N).

operation as of the effective date of proposed Rule 304 may not commence operations as an NMS Stock ATS until the Commission issues an order declaring its Form ATS–N effective.³³⁹ Additionally, if the Commission declares ineffective a Form ATS–N filed by a legacy NMS Stock ATS, that ATS would be prohibited from operating as an NMS Stock ATS going forward.³⁴⁰ Furthermore, while the Commission is reviewing a Form ATS–N prior to declaring it effective or ineffective, Commission staff would likely engage in discussions with the entity regarding its disclosures and could request that the entity revise or augment its disclosures to provide market participants with greater clarity regarding the entity's operations. Accordingly, the Commission preliminarily believes that it would be premature to provide market participants with information regarding an initial Form ATS–N filing until after it is declared effective.

The proposal to make public each Form ATS–N Amendment upon filing with the Commission is to provide market participants with immediate transparency into the operations of an NMS Stock ATS, which would be operational and to which market participants might currently enter—or consider entering—orders for execution. The Commission preliminarily believes that making public Form ATS–N Amendments would benefit market participants by allowing them to obtain current information regarding changes to the operation of an NMS Stock ATS and its relationship with its broker-dealer operator and the broker-dealer operator's affiliates; if it would benefit their investment or trading strategies, market participants would also be able to continually evaluate that NMS Stock ATS as a potential destination to route their orders. The Commission preliminarily believes that, while Form ATS–N Amendments would be publicly posted before the Commission has completed its review, it would be useful to market participants to have immediate access to the disclosures contained in an amendment so market participants may, for example, assess and prepare for upcoming material changes on an NMS Stock ATS or more quickly understand any operational changes that have occurred over the previous quarter on the NMS Stock ATS. The Commission also proposes to make the public aware of which Form ATS–N Amendments filed by NMS

Stock ATSs posted on the Commission's Web site are pending Commission review and could still be declared ineffective. The Commission believes that publicly posting filed Form ATS–N Amendments would strike the right balance of enabling market participants to better understand upcoming or recent changes to an operational NMS Stock ATS in a timely manner, while informing market participants that the Form ATS–N Amendment is pending Commission review and could still be declared ineffective.³⁴¹

The Commission also preliminarily believes that making public each properly filed Form ATS–N notice of cessation would provide the public with notice that the NMS Stock ATS will cease operations and that the organization, association, or group of persons no longer operates pursuant to the exemption provided under Exchange Act Rule 3a1–1(a)(2). The notice of cessation would provide market participants with the date that the NMS Stock ATS will cease operations, as designated by the NMS Stock ATS. Market participants would be able to use this information to make arrangements to select alternative routing destinations for their orders.

Furthermore, the Commission understands that many broker-dealer operators maintain Web sites for their NMS Stock ATSs. The Commission preliminarily believes that market participants would find it helpful for an NMS Stock ATS to make market participants aware that certain of the NMS Stock ATS's Form ATS–N filings are publicly posted on the Commission's Web site. Therefore, to the extent that an NMS Stock ATS has a public Web site, the Commission is proposing that Rule 304(b)(3) require each NMS Stock ATS that has a Web site to post on the NMS Stock ATS's Web site a direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2), which includes the NMS Stock ATS's Form ATS–N filings. The Commission preliminarily believes that this requirement would make it easier for market participants to review an NMS Stock ATS's Form ATS–N filings by providing an additional means for market participants to locate Form ATS–N filings that are posted on the Commission's Web site.

The Commission preliminarily believes that publicly posting Form

ATS–N filings on the timelines described above is important because most market participants do not have access to information that permits them to adequately compare and contrast how some NMS Stock ATSs would handle their orders against how a given national securities exchange or other NMS Stock ATS would handle their orders. Currently, a Form ATS filed with the Commission by an NMS Stock ATS is “deemed confidential when filed” under Rule 301(b)(2)(vi) of Regulation ATS,³⁴² whereas a national securities exchange is required to both (i) make available to the public its entire rule book and (ii) publicly file all proposed rule changes pursuant to Section 19(b) of the Exchange Act.³⁴³ The Commission preliminarily believes that since the adoption of Regulation ATS, the market in execution services for NMS stocks has evolved such that trading functions of NMS Stock ATSs have become more functionally similar to those of national securities exchanges.³⁴⁴ Unless an NMS Stock ATS voluntarily publicizes how those functionalities operate and affect the handling of subscriber orders, there is no publicly available information for market participants to use in order to compare and contrast the trading platform of an NMS Stock ATS with that of a national securities exchange. Accordingly, through Form ATS–N, the Commission proposes to require disclosures that would provide information that market participants could use to compare and contrast the important order handling features, and other important functionalities, of an NMS Stock ATS with those of other NMS Stock ATSs or national securities exchanges. The Commission therefore proposes to make those disclosures public so that market participants would have access to important information when evaluating trading venues.

Additionally, the Commission preliminarily believes that, given changes with respect to NMS Stock ATSs since the adoption of Regulation ATS,³⁴⁵ the reasons given in the past for maintaining the confidentiality of Form ATS filings are no longer justified for NMS Stock ATSs in light of the benefits of operational transparency for NMS Stock ATSs that are discussed above. First, when the Commission adopted Regulation ATS, it chose, at that time, to deem Form ATS confidential because “[i]nformation required on Form ATS

³⁴¹ Market participants would also be made aware if the Commission declares a Form ATS–N Amendment ineffective, because the Commission would also post each order of ineffectiveness of a Form ATS–N Amendment. See proposed Rule 304(b)(2)(E).

³⁴² See 17 CFR 240.301(b)(2)(vii).

³⁴³ See 15 U.S.C. 78s(b).

³⁴⁴ See *supra* Section III.B.

³⁴⁵ See generally *supra* Section III.

³³⁹ See proposed Rule 304(a)(1)(iv).

³⁴⁰ *Id.* Nothing would preclude the NMS Stock ATS from later submitting a new or revised Form ATS–N for consideration by the Commission.

may be proprietary and disclosure of such information could place alternative trading systems in a disadvantageous competitive position.”³⁴⁶ As noted above, the Commission preliminarily believes that NMS Stock ATSs have generally evolved to the point that their trading functionalities often resemble those of national securities exchanges.³⁴⁷ The Commission preliminarily believes that much of the type and level of information that would have to be publicly disclosed by an NMS Stock ATS pursuant to this proposal is very similar to information that national securities exchanges must publicly disclose. For instance, proposed Form ATS-N would require an NMS Stock ATS to disclose, among other things, information about available order types and modifiers, hours of operations, connectivity, order entry, co-location, order display, matching methodologies, and order interaction procedures, all of which must be publicly disclosed by national securities exchanges. Accordingly, the Commission preliminarily believes that, in the current market environment, the disclosures mandated by Form ATS-N would not place NMS Stock ATSs at a competitive disadvantage with respect to national securities exchanges.³⁴⁸

Second, when the Commission adopted Regulation ATS, it sought to “encourage candid and complete filings in order to make informed decisions and track market changes,” and believed that keeping the reports filed on Form ATS confidential would “provide[] respondents with the necessary comfort to make full and complete filings.”³⁴⁹ Based on Commission experience, however, many Form ATS filings currently provide only rudimentary and summary information about the manner of operation of NMS Stock ATSs, which often requires the Commission and its staff to ask the ATSs follow-up questions, and results in ATSs filing follow-up amendments, to fully disclose how they operate. Thus, the Commission preliminarily believes that maintaining the confidentiality of Form ATS filings with regard to NMS Stock ATSs has not resulted uniformly in ATSs “mak[ing] full and complete filings.”

Request for Comment

101. Do you believe market participants currently have access to information about the operations of

NMS Stock ATSs and the activities of their broker-dealer operators and the broker-dealer operators’ affiliates, either through private disclosures from NMS Stock ATSs, from NMS Stock ATSs that voluntarily make their Forms ATS public, or from NMS Stock ATSs that issue frequently asked questions about their operations, including changes to their operations, that is sufficient to help market participants select the markets to which to route and execute their orders? Why or why not? Please support your arguments.

102. Do you believe the Commission should adopt the proposal to make public certain Form ATS-N filings by NMS Stock ATSs? Why or why not? Please support your arguments.

103. Do you believe the Commission should adopt the proposal to require an NMS Stock ATS to post on the NMS Stock ATS’s Web site a direct URL hyperlink to the Commission’s Web site that contains the documents enumerated in proposed Rule 304(b)(2)? Why or why not? Please support your arguments.

104. Do you believe the Commission should require each NMS Stock ATS to directly post its Form ATS-N filings on the NMS Stock ATS’s Web site? If so, why, and which Form ATS-N filings? If not, why not? Please support your arguments.

105. Do you believe the Commission should require each NMS Stock ATS to directly post Commission orders related to the effectiveness or ineffectiveness of the NMS Stock ATS’s Form ATS-N, Form ATS-N Amendments, or both on the Web site of the NMS Stock ATS? If so, why, and which orders should NMS Stock ATSs be required to post? If not, why not? Please support your arguments.

106. Do you believe that the Commission should make public on its Web site the Form ATS-N of an NMS Stock ATS that was not in operation as of the effective date of proposed Rule 304 during the Commission’s review period and prior to declaring the Form ATS-N effective or ineffective? Why or why not? Please support your arguments.

107. Do you believe that the Commission should make public on its Web site a Form ATS-N that it has declared ineffective? Why or why not? Please support your arguments.

108. Do you believe that the Commission should make public on its Web site a Form ATS-N filed by a legacy NMS Stock ATS during the Commission’s review period and prior to its declaring the Form ATS-N effective or ineffective? Why or why not? Please support your arguments?

109. Do you believe that the Commission should adopt the proposal to make public on its Web site all Form ATS-N Amendments during the Commission’s review period and prior to its determination as to whether a Form ATS-N Amendment should be declared ineffective? If so, why? If not, why not? Please support your arguments.

110. Do you believe that the Commission should adopt the proposal whereby the Commission would continue to make public on its Web site a Form ATS-N Amendment that it has declared ineffective? Why or why not? Please support your arguments.

111. Do you believe the Commission’s current practice of making publicly available a list of ATSs with a Form ATS on file with the Commission puts market participants on sufficient notice of the regulatory status of NMS Stock ATSs with which they may do business? Why or why not? Please support your arguments.

112. Does the Commission’s current practice of making publicly available a list of ATSs with a Form ATS on file with the Commission create the potential for market participants to misunderstand the operations of the market? If so, how? If not, why not? Please support your arguments.

113. Do you believe that market participants currently have sufficient information regarding the activities of an NMS Stock ATS’s broker-dealer operator and its affiliates as they relate to the ATS, including changes to such activities, to evaluate conflicts of interest that may arise out of the position that the broker-dealer occupies as the operating entity of the NMS Stock ATS? Why or why not? Please support your arguments.

114. Do you believe the Commission’s proposal to make public certain Form ATS-N filings would better enable market participants to evaluate conflicts of interest that may arise out of the position that the broker-dealer occupies as the operating entity of the NMS Stock ATS? Why or why not? Please support your arguments.

115. Do you believe that making public Form ATS-N filings would place NMS Stock ATSs at a competitive disadvantage with respect to other trading centers, including national securities exchanges? Why or why not? Please support your arguments.

116. Do you believe that making public Form ATS-N filings would incentivize NMS Stock ATSs to make more accurate, current, and complete disclosures? Why or why not? Please support your arguments.

³⁴⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70864.

³⁴⁷ See *supra* Section III.B.

³⁴⁸ See *infra* Section XIII.C.2.

³⁴⁹ See Regulation ATS Adopting Release, *supra* note 7, at 70864.

117. Do you believe the Commission should continue to make public a Form ATS–N or Form ATS–N Amendments where the Commission has suspended, revoked, or limited the NMS Stock ATS's exemption pursuant to Rule 304(a)(4)? Why or why not? Please support your arguments.

118. Do you believe that responding to questions on proposed Form ATS–N would require an NMS Stock ATS to disclose proprietary information that could place the NMS Stock ATS or its broker-dealer operator's other business activities at a competitive disadvantage? If so, please identify the question on the Form ATS–N and specify what information in response to that question would result in the disclosure of proprietary information and describe why the disclosure could create a competitive disadvantage for the NMS Stock ATS or its broker-dealer operator's other business activities.

119. In light of the information that national securities exchanges, which compete with NMS Stock ATSs, are required to disclose regarding their operations, should NMS Stock ATSs continue to be eligible for the exemption from the definition of exchange without having to disclose such information? Why or why not? Please explain in detail.

E. Rule 304(c)(1) and (2): Proposed Form ATS–N Requirements

Proposed Rule 304(c)(1) would require NMS Stock ATSs to respond to each item on Form ATS–N, as applicable, in detail and disclose information that is accurate, current, and complete. The Commission preliminarily believes that market participants would use information disclosed on proposed Form ATS–N to evaluate whether a particular NMS Stock ATS would be a desirable venue to which to route their orders. In addition, the Commission intends to use the information disclosed on the Form ATS–N to exercise oversight over and monitor developments of NMS Stock ATSs. Given these potential uses, the Commission preliminarily believes that it is important that the Form ATS–N contain detailed disclosures that are accurate, current, and complete.

The Commission notes that Regulation ATS requires NMS Stock ATSs to be registered as broker-dealers with the Commission, which entails becoming a member of FINRA and fully complying with the broker-dealer regulatory regime. FINRA Rule 3130 requires each member to designate and specifically identify to FINRA one or more principals to serve as a chief compliance officer and each member to

have its chief executive officer certify annually that the member has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulations, and that the chief executive officer(s) has conducted one or more meetings with the chief compliance officer(s) in the preceding 12 months to discuss such processes.³⁵⁰ The Commission requests comment on whether the certification required under FINRA Rule 3130 will help ensure that the broker-dealer operator of the NMS Stock ATS complies with proposed Rule 304, including proposed Rule 304(c)(1), which would require the accurate, current, and complete disclosures on Form ATS–N.

Request for Comment

120. Do you believe that the certification required under FINRA Rule 3130 will help ensure an NMS Stock ATS's compliance with proposed Rule

³⁵⁰ See FINRA Rule 3130(b). FINRA Rule 3120(c) sets forth the following:

The certification shall state the following:
The undersigned is/are the chief executive officer(s) (or equivalent officer(s)) of (name of member corporation/partnership/sole proprietorship) (the "Member"). As required by FINRA Rule 3130(b), the undersigned make(s) the following certification:

1. The Member has in place processes to:
 - (A) establish, maintain and review policies and procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulations;
 - (B) modify such policies and procedures as business, regulatory and legislative changes and events dictate; and
 - (C) test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with FINRA rules, MSRB rules and federal securities laws and regulations.
2. The undersigned chief executive officer(s) (or equivalent officer(s)) has/have conducted one or more meetings with the chief compliance officer(s) in the preceding 12 months, the subject of which satisfy the obligations set forth in FINRA Rule 3130.
3. The Member's processes, with respect to paragraph 1 above, are evidenced in a report reviewed by the chief executive officer(s) (or equivalent officer(s)), chief compliance officer(s), and such other officers as the Member may deem necessary to make this certification. The final report has been submitted to the Member's board of directors and audit committee or will be submitted to the Member's board of directors and audit committee (or equivalent bodies) at the earlier of their next scheduled meetings or within 45 days of the date of execution of this certification.
4. The undersigned chief executive officer(s) (or equivalent officer(s)) has/have consulted with the chief compliance officer(s) and other officers as applicable (referenced in paragraph 3 above) and such other employees, outside consultants, lawyers and accountants, to the extent deemed appropriate, in order to attest to the statements made in this certification.

304, including the requirement that disclosures on Form ATS–N are accurate, current, and complete? Why or why not? Please support your arguments.

Proposed Rule 304(c)(2) would provide that any report required to be filed with the Commission under proposed Rule 304 of Regulation ATS must be filed electronically on Form ATS–N, and include all information as prescribed in proposed Form ATS–N and the instructions thereto. The Commission's proposal contemplates the use of the electronic form filing system ("EFFS") to file a completed Form ATS–N. Based on the widespread use and availability of the Internet, the Commission preliminarily believes that filing Form ATS–N in an electronic format would be less burdensome and a more efficient filing process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing paper forms to the Commission. The proposed Form ATS–N would require an electronic signature to help ensure the authenticity of the filing. The Commission preliminarily believes these proposed requirements would expedite communications between the Commission and its staff and the broker-dealer operator concerning the NMS Stock ATS and help to ensure that only personnel authorized by the NMS Stock ATS are filing required materials. This proposed requirement is intended to provide a uniform manner in which the Commission would receive—and the broker-dealer operator would file—the Form ATS–N made pursuant to proposed Rule 304 of Regulation ATS. Also, NMS Stock ATSs would be able to review how other filers that were allowed to become effective responded to the same questions on Form ATS–N for guidance on how to respond. Additionally, the consistent framework would make it easier and more efficient for the Commission and market participants reviewing the disclosures to promptly review, analyze, and respond, as necessary, to the information proposed to be provided.³⁵¹

Further, the Commission also is proposing that documents filed through the EFFS system must be in a text-searchable format without the use of optical character recognition. The Commission believes that proposing to require documents to be filed in a text-searchable format would allow the Commission and its staff and market

³⁵¹ This proposed requirement is consistent with electronic-reporting standards set forth in Form SCI. See SCI Adopting Release, *supra* note 17, at 72357 (discussing electronic filing requirements of Form SCI).

participants to efficiently review and analyze information provided on proposed Form ATS–N. In particular, a text-searchable format would allow the Commission and its staff to better gather, analyze, and use data filed as exhibits, whereas a non-text-searchable format filing would require significantly more steps and labor to review and analyze data.

The Commission is proposing that proposed Form ATS–N be filed with the Commission in a structured format. The Commission preliminarily believes that proposing Form ATS–N to be filed with the Commission in a structured format could allow the Commission and market participants to better search and analyze information about NMS Stock ATSs. The Commission is proposing that Parts I (Name) and II (Broker-Dealer Operator Registration and Contact Information) of proposed Form ATS–N would be provided as fillable forms on the Commission’s EDFS system. The Commission is proposing that Part III (Activities of the Broker-Dealer Operator and Affiliates) of proposed Form ATS–N would be filed in a structured format whereby the filer would provide checkbox responses to certain questions and narrative responses that are block-text tagged by Item. The Commission is proposing that Part IV (The NMS Stock ATS Manner of Operations) of proposed Form ATS–N would also be filed in a structured format in that the filer would block-text tag narrative responses by Item. The Commission is proposing that Part V (Contact Information, Signature Block, and Consent to Service) of proposed Form ATS–N would be provided as fillable forms on the Commission’s EDFS system.

The Commission notes that there are a variety of methods by which information can be collected and structured for review and analysis. For example, some or all of the information provided on Form ATS–N could be structured according to a particular standard that already exists, or a new taxonomy that the Commission creates, or as a single machine-readable PDF. Given the Commission’s proposal that information on Form ATS–N be filed in a structured format, the Commission seeks comment on the manner in which proposed Form ATS–N could be structured to better enable the Commission and market participants to collect and analyze the data.

Request for Comment

121. Do you believe that the electronic filing requirement of proposed Rule 304(c)(2) is appropriate? Do you believe that the electronic filing of Form ATS–N would be less burdensome and/

or a more efficient filing process for NMS Stock ATSs compared to delivering the Form ATS–N by mail on paper? Alternatively, would the submission of proposed Form ATS–N via electronic mail to one or more Commission email addresses be a more appropriate way for NMS Stock ATSs to file Form ATS–N with the Commission? Are there other alternative methods that would be preferable? If so, please describe. Is the proposal to require an electronic signature appropriate? If not, why not? Please support your arguments.

122. Should the Commission adopt the proposal that proposed Form ATS–N should be filed with the Commission in a structured format? Why or why not? If so, what standards of structuring should be used for information to be provided on proposed Form ATS–N? Please explain. If not, what format should proposed Form ATS–N take? Please identify the format and explain.

123. Are there any specific aspects of proposed Form ATS–N that should or should not be provided in a structured format? Please identify those aspects of proposed Form ATS–N that should or should not be provided in a structured format and explain why those aspects of the form should or should not be structured.

124. Should the Commission adopt the proposal to require documents to be filed in a text-searchable format on proposed Form ATS–N? Why or why not? Please support your arguments.

V. Proposed Form ATS–N: Submission Type and Part I of Form ATS–N

Proposed Form ATS–N would require that an entity identify the type of filing by marking the appropriate checkbox. The Form ATS–N filing may either be a Form ATS–N, a Form ATS–N Amendment, or a notice of cessation. In addition, proposed Form ATS–N would require the NMS Stock ATS to indicate whether a Form ATS–N Amendment is being submitted as a material amendment, periodic amendment, or correcting amendment. The Commission is also proposing that, for an Form ATS–N Amendment, the NMS Stock ATS provide a brief narrative description of the amendment so market participants can quickly understand the nature of the Form ATS–N Amendment.³⁵² For notices of cessation,

³⁵² For a Form ATS–N Amendment, the NMS Stock ATS would also be required to attach as Exhibit 3A and/or Exhibit 4A a redline(s), showing changes to Part III and/or Part IV of proposed Form ATS–N, respectively, in order to point out the amendment(s) to its prior Form ATS–N filing. The Commission preliminarily believes that requiring NMS Stock ATSs to attach redlines to their Form

proposed Form ATS–N would require the date that the NMS Stock ATS will cease to operate. A Form ATS–N filer may also withdraw a previously filed Form ATS–N.³⁵³

Part I of proposed Form ATS–N would require the name of the broker-dealer operator and the NMS Stock ATS. Rule 301(b)(1) requires that an ATS, including an NMS Stock ATS, register as a broker-dealer under Section 15 of the Exchange Act.³⁵⁴ Today, while some broker-dealers are registered with the Commission for the sole purpose of operating as an ATS, most broker-dealer operators of ATSs engage in brokerage and/or dealing activities in addition to operating an NMS Stock ATS. In some cases, broker-dealers operate multiple NMS Stock ATSs.³⁵⁵ To identify the registered broker-dealer for an NMS Stock ATS and to assist the Commission in collecting and organizing its filings, proposed Form ATS–N would require the name of the registered broker-dealer for the NMS Stock ATS (*i.e.*, the broker-dealer operator), as it is stated on Form BD, in Part I, Item 1 of proposed Form ATS–N. The name of the registered broker-dealer for the NMS Stock ATS would also assist the Commission in ensuring that the NMS Stock ATS has appropriately registered as a broker-dealer as part of its exemption from exchange registration under Exchange Act Rule 3a1–1(a)(2). To the extent that a “DBA” (doing business as) is used to identify the NMS Stock ATS to the public or the Commission, or if a registered broker-dealer operates multiple NMS Stock ATSs, proposed Form ATS–N would require the full name of the NMS Stock ATS under which business is conducted, if any, in Part I, Item 2 of proposed Form ATS–N. Part I, Item 3 of proposed Form ATS–N would require the NMS Stock ATS to provide its Market Participant Identifier (“MPID”) for the NMS Stock ATS.³⁵⁶ The Commission preliminarily

ATS–N Amendments would better enable market participants and the Commission to review Form ATS–N Amendments in a more efficient manner.

³⁵³ Instruction B to proposed Form ATS–N would provide that if an NMS Stock ATS determines to withdraw a Form ATS–N, it must select the appropriate checkbox and provide the correct file number to withdraw the submission.

³⁵⁴ 17 CFR 242.301(b)(1); 15 U.S.C. 78o.

³⁵⁵ A broker-dealer operator would be required to file a separate Form ATS–N for each NMS Stock ATS operated by the broker-dealer. *See* Instruction A of proposed Form ATS–N.

³⁵⁶ An MPID, or other mechanism or mnemonic, is used to identify a market participant for the purposes of electronically accessing a national securities exchange or an ATS. *See, e.g.*, Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010). ATSs are required to use a unique MPID for the ATS when reporting trade information to FINRA. *See* FINRA ATS Reporting Approval, *supra* note 122.

believes that providing the name of the NMS Stock ATS or DBA and its MPID would provide clarity to the public and Commission about the identity under which the business of the NMS Stock ATS is conducted. Proposed Form ATS–N would also require an ATS to identify whether it is currently operating pursuant to a previously filed initial operation report on Form ATS.

Request for Comment

125. Do you believe that Part I of proposed Form ATS–N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part I of proposed Form ATS–N be revised to provide additional clarity? Please explain in detail and support your arguments.

126. Do you believe there is other information that market participants might find relevant or useful with regard to the disclosures in Part I? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

127. Do you believe that the broker-dealer operator should be required to identify the type of Form ATS–N filing (*i.e.*, Form ATS–N, Form ATS–N Amendment, notice of cessation, or withdrawal) by marking the appropriate checkbox, and for notices of cessation, provide the date that the NMS Stock ATS will cease to operate? Why or why not? Please support your arguments.

128. Do you believe that the broker-dealer operator should be required to provide a brief summary of a Form ATS–N Amendment? Why or why not? Please support your arguments.

129. Do you believe that a broker-dealer operator should be allowed to withdraw a previously filed Form ATS–N? Why or why not? Please support your arguments. If so, when should a broker-dealer operator be permitted to withdraw a previously filed Form ATS–N? Please explain.

130. Do you believe that the broker-dealer operator should be required to disclose the date on which it commenced, or intends to commence, operation of the NMS Stock ATS in Part I of Form ATS–N? Why or why not? Please support your arguments.

131. Do you believe that the Commission should require the MPID of the NMS Stock ATS as a required disclosure on proposed Form ATS–N? Why or why not? Please support your arguments.

132. What are the potential costs and benefits of disclosing the information required by Part I of proposed Form ATS–N? Would the proposed

disclosures in Part I of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information? Why or why not? Please support your arguments.

VI. Part II of Proposed Form ATS–N: Broker-Dealer Operator Registration Information

Part II of proposed Form ATS–N would require certain general information regarding the broker-dealer operator and the NMS Stock ATS. With respect to the broker-dealer operator, Part II of proposed Form ATS–N would require registration information including: its SEC File Number, Central Registration Depository (“CRD”) Number, effective date of the broker-dealer operator’s registration with the Commission, the name of the national securities association with which it is a member, and the effective date of broker-dealer operator’s membership with the national securities association (*e.g.*, FINRA). The Commission proposes to require this information to assess whether the NMS Stock ATS has complied with the requirement to register as a broker-dealer pursuant to Rule 301(b)(1) of Regulation ATS. This information also would expedite the Commission’s communications with the broker-dealer operator’s self-regulatory organization as needed.

Additionally, Part II of proposed Form ATS–N would require certain information regarding the legal status of the broker-dealer operator. Specifically, proposed Form ATS–N would require that the broker-dealer operator provide its legal status (*e.g.*, corporation, partnership, sole proprietorship) and except in the case of a sole proprietorship, the date of formation and state or country in which it is formed. The Commission is proposing to require the information related to the broker-dealer operator’s legal status to help ensure that the broker-dealer operator has appropriately filed as a legal entity (except in the case of sole proprietorships).

Proposed Form ATS–N would also require the address of the physical location of the NMS Stock ATS matching system and, if it is different from the physical location, the mailing address of the NMS Stock ATS. If the broker-dealer operator is a sole proprietorship and an address of the NMS Stock ATS is a private residence, the Commission would not make that information available on the Commission’s Web site due to concerns about the confidentiality of personally identifiable information. Furthermore, Part II would require the NMS Stock ATS to provide a URL address for the

Web site of the NMS Stock ATS, and in the signature block in Part V of proposed Form ATS–N, the representative of the broker-dealer operator would also be required to provide his or her business contact information, including the person’s name and title, telephone number, and email address.³⁵⁷ This information would facilitate communication with the broker-dealer operator and the NMS Stock ATS during the Commission’s review of a Form ATS–N and later as necessary as part of the Commission’s ongoing monitoring of the NMS Stock ATS. To the extent the broker-dealer operator’s contact information that is provided in Part II is made publicly available, that information would also facilitate communication between subscribers and the broker-dealer operator.

Part II of proposed Form ATS–N would also require an NMS Stock ATS to attach, as Exhibit 1, a copy of any materials currently provided to subscribers or other persons, related to the operations of the NMS Stock ATS or the disclosures on Form ATS–N.³⁵⁸ The Commission understands that some ATSs may provide to subscribers, or other persons, marketing material or other material containing important information about the ATS’s operations in FIX protocol procedures, rules of engagement/user manuals, or frequently asked questions. These documents may include information regarding, among other things, the order matching procedures, priority rules, order types, and order entry and execution procedures of the ATS, and in some instances, such documents may contain important information about an NMS Stock ATS that may not be specified in the required disclosures under proposed Form ATS–N. The Commission notes that the purpose of proposed Form

³⁵⁷ The Commission would also keep the contact information of the broker-dealer operator’s representative confidential, subject to applicable law.

Consistent with the requirements of proposed Form ATS–N, the signature block in Part V would also require the NMS Stock ATS to consent that service of any civil action brought by, or notice of any proceeding before, the Commission or a SRO in connection with the ATS’s activities may be given by registered or certified mail or email to the contact employee at the primary street address or email address, or mailing address if different, given in Part I. The signatory would further represent that the information and statements contained on the submitted Form ATS–N, including exhibits, schedules, attached documents, and any other information filed, are current, true, and complete.

³⁵⁸ For currently operating NMS Stock ATSs that file a Form ATS–N, each ATS would only be required to provide the materials it currently provides to subscribers or other persons and would not be required to attach materials provided to subscribers or other person in the past.

ATS–N is to provide operational transparency with regard to the NMS Stock ATS. To the extent that the NMS Stock ATS discloses information on standardized materials provided to certain subscribers, whether an individual or on group basis, the Commission preliminarily believes the NMS Stock ATS should make this information available to all subscribers, and therefore the Commission is proposing to require these materials be filed as an attachment to Exhibit 1 to proposed Form ATS–N. The Commission further notes that this requirement is similar to the requirement of subpart (f) of Exhibit F on existing Form ATS.³⁵⁹

Proposed Form ATS–N also would require that the broker-dealer operator attach, as Exhibits 2A and 2B (or provide a link to the relevant URL address where the required documents can be found), a copy of the most recently filed Schedule A of the broker-dealer operator's Form BD disclosing information related to direct owners and executive officers, and a copy of the most recently filed Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners, respectively. The proposed Form ATS–N would require information from the broker-dealer operator's Schedule A and Schedule B of Form BD to help market participants understand the persons and entities that directly and indirectly own the broker-dealer operator. The Commission is requiring that NMS Stock ATSs provide names of the direct and indirect owners of the broker-dealer operator on Form ATS–N, even though the same information is provided on Form BD, because information about the ownership of the broker-dealer operator will enable market participants to understand better any potential conflicts of interest that may arise therefrom, which is one of the central purposes of proposed Form ATS–N. Also, providing this information on Form ATS–N would facilitate the Commission's, as well as market participants', analysis of the ownership and any potential for conflicts arising therefrom by providing this information all on one form. Moreover, the Commission preliminarily believes it is appropriate for NMS Stock ATSs to provide this information using a URL address for these documents in lieu of attaching the actual documents to their Form ATS–N filings.

³⁵⁹ Subpart (f) of Form ATS requires a copy of the ATS's subscriber manual and any other materials provided to subscribers.

Request for Comment

133. Do you believe that Part II of proposed Form ATS–N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part II of proposed Form ATS–N be revised to provide additional clarity? Please explain in detail.

134. Do you believe there is other information that market participants might find relevant or useful with regard to the disclosures in Part II? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

135. Do you believe that the Commission should require the effective date of broker-dealer registration with the Commission as a required disclosure on proposed Form ATS–N? Why or why not? Please support your arguments.

136. Do you believe that the Commission should require the SEC File number of the broker-dealer operator as a required disclosure on proposed Form ATS–N? Why or why not? Please support your arguments.

137. Do you believe that the Commission should require the CRD number of the broker-dealer operator as a required disclosure on proposed Form ATS–N? Why or why not? Please support your arguments.

138. Do you believe that the Commission should require the address of the physical location of the NMS Stock ATS's matching system as a required disclosure on proposed Form ATS–N? Why or why not? Please support your arguments.

139. Do you believe that the Commission should require the mailing address of the NMS Stock ATS as a required disclosure on proposed Form ATS–N? Why or why not? Please support your arguments.

140. Do you believe that the Commission should require the Web site URL of the NMS Stock ATS as a required disclosure on proposed Form ATS–N? Why or why not? Please support your arguments.

141. Do you believe that the Commission should require NMS Stock ATSs to disclose materials provided to subscribers or other persons related to the operations of the NMS Stock ATS on proposed Form ATS–N? Why or why not? Please support your arguments. Do you believe such materials should be provided to the Commission as an Exhibit? Why or why not? Please support your arguments. Do you believe that the NMS Stock ATS should be able to provide a URL where these documents can be found in lieu of

providing the documents as an Exhibit? Why or why not? Please support your arguments.

142. Do you believe it is appropriate for the Commission to not make public the address of the NMS Stock ATS that is a sole proprietorship? Why or why not? Please support your arguments.

143. Do you believe it is appropriate for the Commission to not make public the contact information of the broker-dealer operator's representative? Why or why not? Please support your arguments.

144. Do you believe that there is any information, that would be required to be disclosed in Part II of proposed Form ATS–N that the Commission should not require to be disclosed due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

145. What are the potential costs and benefits of disclosing the information required by Part II of proposed Form ATS–N? Would the proposed disclosures in Part II of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information? Why or why not? Please support your arguments.

146. Do you believe there are there certain types of materials provided to subscribers that would be responsive to Exhibit 1 that should or should not be disclosed on Form ATS–N? If so, what types of materials and why? Do you believe an NMS Stock ATS should provide in response to Exhibit 1 the materials the NMS Stock ATS provides to subscribers such as FIX protocol procedures, rules of engagement/user manuals, frequently asked questions, or marketing materials? Why or why not? Please support your arguments.

147. Do you believe the Commission should require NMS Stock ATSs to provide on Form ATS–N information on Exhibits 2A and 2B, in light of the fact that the information is already provided on Form BD?

148. Do you believe the Commission should require the NMS Stock ATS to provide disclosure about its governance structure and compliance programs and controls to comply with Regulation ATS? Why or why not? If so, what aspects of the NMS Stock ATSs' governance structure and compliance programs and controls to comply with Regulation ATS should the NMS Stock ATS be required to disclose? Please support your arguments.

VII. Part III of Proposed Form ATS–N: Activities of the Broker-Dealer Operator and Its Affiliates

A. The Relationship Between the Broker-Dealer Operator's Operation of the NMS Stock ATS and Its Other Operations

1. Background

The Commission preliminarily believes that to understand the operations of an NMS Stock ATS, it is necessary to understand the relationship and interactions between the NMS Stock ATS and its registered broker-dealer operator as well as the relationship and interactions between the NMS Stock ATS and the affiliates of its broker-dealer operator. As previously noted, Rule 301(b)(1) of Regulation ATS requires that an ATS, including an NMS Stock ATS, register as broker-dealer under Section 15 of the Exchange Act (the “broker dealer operator”).³⁶⁰ The broker-dealer operator of the ATS trading platform is legally responsible for all operational aspects of the ATS and for ensuring that the ATS operates in compliance with applicable federal securities laws and the rules and regulations thereunder, including Regulation ATS. The broker-dealer operator, and in some cases, its affiliates,³⁶¹ controls access to the ATS and provides the technology and systems that support the trading on the ATS.³⁶² Based on Commission experience, the broker-dealer operator, or in some cases, its affiliates, directs the personnel that service the ATS or otherwise manages service providers that may perform certain functions of the ATS. The broker-dealer operator, or in some cases, its affiliates, also determines, among other things: (1) What securities will trade on the ATS; (2) who may become subscribers that will participate on the ATS; (3) whether there will be segmented categories of order flow in the ATS, and if so, how the order flow will be segmented; (4) order matching methodologies and priority rules; (5) the rules governing the interaction and execution of orders; and

(6) the display, if any, of orders and trading interest. Additionally, the broker-dealer operator, or in some cases, its affiliates, determines the means by which orders are entered on and subscribers access the ATS, in many cases, through the use of a smart order router that is owned and operated by the broker-dealer operator or one of its affiliates. The broker-dealer operator, or in some cases, its affiliates, also controls the market data that the ATS uses to prioritize, match, and execute orders and the transmission of and access to confidential order and execution information sent to and from the ATS.³⁶³ Based on Commission experience, the operations of the NMS Stock ATS and the other operations of the broker-dealer operator are usually closely intertwined as the broker-dealer operator generally leverages its information technology, systems, personnel, and market data, and those of its affiliates, to operate the ATS.

The Commission is also aware that most ATSs that currently transact in NMS stocks are operated by broker-dealers that engage in significant brokerage and dealing activities in addition to their operation of an ATS(s).³⁶⁴ These multi-service broker-dealers may offer their customers a variety of brokerage services, often with or through their affiliates, including

algorithmic trading strategy software, agency sales desk support, and automated smart order routing services. Multi-service broker-dealers that also operate an NMS Stock ATS may use the ATS as a complement to the broker-dealer's other service lines and may use the ATS as an opportunity to execute orders “in house” before seeking contra-side interest at other execution venues. For instance, a broker-dealer operator, or its affiliate, may operate, among other things, an OTC market making desk or proprietary trading desks in addition to operating an NMS Stock ATS.³⁶⁵ A multi-service broker-dealer may also execute orders in NMS stocks internally (and not within its respective NMS Stock ATS(s)) by trading as principal against such orders or crossing orders as agent in a riskless principal capacity, before routing the orders to its NMS Stock ATS(s) or another external trading center.³⁶⁶ Consequently, non-ATS trading centers operated by the broker-dealer operator of an ATS (*i.e.*, internal executions by the broker-dealer outside of an ATS), or its affiliates, often compete with the ATS as a trading venue for the execution of transactions in NMS stocks.

2. Potential Conflicts of Interest for the Broker-Dealer Operator or Its Affiliates

Due to the frequent overlap between the operations of the broker-dealer operator or its affiliates outlined above and the operations of ATSs that trade NMS stocks, the Commission preliminarily believes that the interests of the broker-dealer operator or its affiliates sometimes compete with the interests of an ATS's subscribers, or customers of the ATS's subscribers, for executions on the ATS. Accordingly, the Commission preliminarily believes that these competing interests, at times, may give rise to potential conflicts of interest for broker-dealer operators of NMS Stock ATSs or their affiliates. Furthermore, the Commission preliminarily believes that the frequent overlap between the operation of ATSs that trade NMS stocks and the other operations of broker-dealer operators or their affiliates gives rise to the potential for information leakage of subscribers' confidential trading information to other

³⁶³ For example, the broker-dealer operator determines the source of market data that the NMS Stock ATS uses to calculate the NBBO and how the NBBO will be calculated.

³⁶⁴ The Commission notes that, based on Form BD disclosures from June of 2015, all but 7 of the 36 broker-dealer operators whose ATSs trade NMS stocks disclose business activities other than operating an ATS. The other business activities disclosed by broker-dealer operators (and the number of such broker-dealer operators providing such disclosure) include: Retailing corporate equity securities over-the-counter (22); put and call broker or dealer or option writer (18); exchange commission business other than floor activities (18); private placements of securities (17); selling corporate debt securities (17); government securities broker (15); trading securities for own account (15); municipal securities broker (13); exchange member engaged in floor activities (13); non-exchange member arranging for transactions in listed securities by exchange member (12); underwriter or selling group participant (corporate securities other than mutual funds) (13); selling interests in mortgages or other receivables (12); making inter-dealer markets in corporate securities over-the-counter (11); government securities dealer (11); municipal securities dealer (11); solicitor of time deposits in a financial institution (7); investment advisory services (7). This data does not include the business activities of affiliates of the broker-dealer operators. Of the 10 ATSs that traded the most NMS stock measured by total shares executed during the second quarter of 2015, 6 disclose on Form BD that they engage in proprietary trading and making inter-dealer markets in corporate securities OTC, and 7 disclose retailing corporate equities OTC. See FINRA's ATS Transparency Data Quarterly Statistics, 2nd Quarter of 2015, <http://www.finra.org/industry/ats/ats-transparency-data-quarterly-statistics>.

³⁶⁰ 17 CFR 242.301(b)(1); 15 U.S.C. 78o. Additionally, as a registered entity with the Commission, a broker-dealer operating an ATS is subject to applicable federal securities laws, as well as other requirements, including the rules of any SRO of which it is a member.

³⁶¹ The Commission is proposing to define “affiliate” for purposes of Form ATS–N as described and discussed further below. See *infra* note 378 and accompanying text. See also Instruction G of proposed Form ATS–N.

³⁶² Some technology or functions of an ATS may be licensed from a third party. The broker-dealer operator of the ATS is nonetheless legally responsible for ensuring that all aspects of the ATS comply with applicable laws.

³⁶⁵ These non-ATS, OTC activities in NMS stocks may include operating as an OTC market maker, block positioner, or operating an internal broker-dealer system. See 2010 Equity Market Structure Release, *supra* note 124 at 3599–3600. See also *infra* note 387 and accompanying text. Additionally, an affiliate of the broker-dealer operator of an NMS Stock ATS may also operate non-ATS trading centers.

³⁶⁶ 17 CFR 242.600(b)(78).

business units of the broker-dealer operator or its affiliates.³⁶⁷

When evaluating an NMS Stock ATS as a possible trading venue, a market participant would likely want to know about the various activities in which a broker-dealer operator and its affiliates engage that may give rise to conflicts of interests. For example, as noted above, the broker-dealer operator of an NMS Stock ATS may operate multiple trading centers, which operate as competing trading venues for the execution of trades in NMS stocks. Many broker-dealer operators or their affiliates trade proprietarily on the NMS Stock ATS. If a broker-dealer operator that operates an NMS Stock ATS is also able to trade on that NMS Stock ATS, there may be an incentive for the broker-dealer operator to operate its NMS Stock ATS in a manner that favors the trading activity of the broker-dealer operator's business units or affiliates. A broker-dealer operator of an NMS Stock ATS may provide its other business units or affiliates, who may be subscribers to the NMS Stock ATS, with access to certain services of the NMS Stock ATS that are not provided to other subscribers, which may result in trading advantages to those business units or affiliates.³⁶⁸ The Commission preliminarily believes that market participants that subscribe and route orders to NMS Stock ATSs would want to know how a broker-dealer operator of an NMS Stock ATS treats subscriber orders versus orders of its business units or its affiliates. The Commission preliminarily believes that customers of the broker-dealer operator, who may also be subscribers to the NMS Stock ATS, would also want to better understand the circumstances in which the broker-dealer operator may send their orders to its NMS Stock ATS, internalize their orders outside of the NMS Stock ATS, or route to another trading venue.

Concerns regarding potential conflicts of interests involving trading venues that execute securities transactions are

³⁶⁷ In the Regulation ATS Adopting Release, the Commission recognized the potential for abuse involving a broker-dealer that operates an ATS and offers other traditional brokerage services, and expressed concern about the potential for the misuse of confidential trading information. See Regulation ATS Adopting Release, *supra* note 7, at 70879.

³⁶⁸ Such benefits or other advantages could include the NMS Stock ATS providing itself or its affiliates with faster access to the NMS Stock ATS or priority in executions over other subscribers. Unlike registered national securities exchanges, ATSs are not required to have rules that are designed not to permit unfair discrimination; however, the advantages that a broker-dealer operator may provide to itself or its affiliates may not be fully disclosed to subscribers to an ATS.

not novel.³⁶⁹ In the context of national securities exchanges, the Commission has expressed concern that the affiliation of a registered national securities exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.³⁷⁰ Because the Commission reviews the rules of registered national securities exchanges, a process which requires, among other things, that to approve certain rule changes the Commission find that the exchange's proposed rule changes are consistent with the Exchange Act,³⁷¹ each existing national securities exchange has implemented rules that restrict affiliation between the national securities exchange and its members to mitigate the potential for conflicts of interest.³⁷²

³⁶⁹ See, e.g., Securities Exchange Act Release Nos. 50700, 69 FR 71256, 71257 (December 8, 2004) (discussing the inherent conflicts of interest between a self-regulatory organization's regulatory obligations and the interests of its members, its market operations, its listed issuers, and, in the case of a demutualized SRO, its shareholders); 50699, 69 FR 71126 (December 8, 2004) (proposing rules that the Commission believed would help insulate the regulatory activities of an exchange or national securities association from the conflicts of interest that otherwise may arise by virtue of its market operations); 63107, 75 FR 65882 (October 26, 2010) (proposing Regulation MC under the Exchange Act to mitigate conflicts of interest regarding ownership interests and voting rights with respect to security-based swap clearing agencies, security-based swap execution facilities, and security-based swap exchanges pursuant to the Dodd Frank Act, Pub. L. 111–203, Section 765).

³⁷⁰ See, e.g., Securities Exchange Act Release Nos. 66808 (April 13, 2012) 77 FR 23294 (April 18, 2012) (SR–BATS–2012–013) (order approving a proposed rule change by BATS Exchange, Inc. (“BATS Exchange”) relating to its ability to receive inbound routes of equities orders through BATS Trading, Inc., BATS Exchange's routing broker-dealer, from BATS–Y Exchange, Inc.), at 23295 n.16 and accompanying text; 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR–NYSE–2008–120) (order approving a joint venture between NYSE and BIDS Holdings L.P.) (“NYSE/BIDS Order”); 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR–NASDAQ–2006–006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members) (“Nasdaq Affiliation Order”); and 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.) (“NYSE/Arca Order”).

³⁷¹ See 15 U.S.C. 78s(b).

³⁷² For example, registered national securities exchanges have rules that prevent the national securities exchange from being affiliated with a member of the exchange, or with an affiliate of a member of the exchange, absent Commission approval. See, e.g., NYSE Rule 2B, which provides, in part, that: “Without prior SEC approval, the [New York Stock Exchange LLC (“NYSE”)] or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, a member organization shall not be or become an affiliate of the [NYSE], or an affiliate of any affiliate of the [NYSE]” See also Nasdaq Rule 2160, and BZX Rule 2.10. In cases where the Commission has approved exceptions to this prohibition, there

In the context of a national securities exchange's affiliation with one of its members, the Commission's concerns stem from, among other things, the potential for unfair competitive advantages that the affiliated member could have by virtue of informational or operational advantages or the ability to receive preferential treatment.³⁷³ These same concerns are present in the context of trading by the broker-dealer operator, or its affiliates, on the ATS that the broker-dealer operator operates. For example, the potential exists for the broker-dealer operator of an NMS Stock ATS to place its commercial interests, or those of its affiliates, before those of subscribers that route orders to the NMS Stock ATS directly or indirectly through the broker-dealer operator of the NMS Stock ATS or its affiliates. Some of the settled enforcement actions against ATSs that trade NMS stocks highlight this potential.³⁷⁴ Therefore, as

have been limitations and conditions on the activities of the exchange and its affiliated member designed to address concerns about potential conflicts of interest and unfair competitive advantage. See, e.g., Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10–182) (In the Matter of the Application of BATS Exchange, Inc. for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission), at 49502 n.90–94 and accompanying text (approving the affiliation between BATS Exchange and its affiliated member BATS Trading in connection with the provision of routing services by BATS Trading for BATS Exchange and subject to certain limitations and conditions).

³⁷³ See, e.g., Nasdaq Affiliation Order, *supra* note 370, at 42151. The Commission's concern with respect to a national securities exchange's affiliation with one of its members also stemmed from the possible conflicts of interest that could arise between a national securities exchange's self-regulatory obligations and its commercial interest. See *id.* Because ATSs are not SROs, and therefore do not have self-regulatory obligations, this particular concern is not present in the context of ATSs.

³⁷⁴ See, e.g., *In the Matter of ITG Inc. and Alternet Securities Inc.*, Securities Exchange Act Release No. 75672 (Aug. 12, 2015), <https://www.sec.gov/litigation/admin/2015/33-9887.pdf> (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) (“ITG Settlement”); *In the Matter of UBS Securities LLC*, Securities Exchange Act Release No. 74060 (Jan. 15, 2015), <http://www.sec.gov/litigation/admin/2015/33-9697.pdf> (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) (“UBS Settlement”); *In the Matter of Lavaflow, Inc.*, Securities Exchange Act Release No. 72673 (Jul. 25, 2014), <http://www.sec.gov/litigation/admin/2014/34-72673.pdf> (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) (“LavaFlow Settlement”); *In the Matter of Liquidnet, Inc.*, Securities Exchange Act Release No. 72339 (Jun. 6, 2014), <http://www.sec.gov/litigation/admin/2014/33-9596.pdf> (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) (“Liquidnet

explained further below, the Commission proposes to require NMS Stock ATSs to disclose information about certain aspects of the activities of the NMS Stock ATS's broker-dealer operator, and its affiliates, in connection with the NMS Stock ATS, to help market participants assess potential conflicts of interest that may adversely impact their trading on the NMS Stock ATS.

Finally, due to the overlap between the operation of NMS Stock ATSs and the other operations of broker-dealer operators, the Commission is concerned that market participants have limited information about how the operations of the broker-dealer operator's business units or its affiliates may give rise to information leakage of subscribers' confidential trading information among those business units or affiliates. For instance, if a proprietary trading desk of the broker-dealer operator is able to enter orders or other trading interest to the NMS Stock ATS, that trading desk may have means to see the incoming order flow of unaffiliated subscribers to the NMS Stock ATS. Furthermore, as demonstrated by several enforcement actions, a broker-dealer operator may at times provide some subscribers—including its business units or those of its affiliates—access to certain trading information that it does not provide to others.³⁷⁵ Accordingly, the Commission preliminarily believes that the disclosure of certain information about the activities of the broker-dealer operator and its affiliates with respect to the NMS Stock ATS would enable market participants to better assess whether the potential for information leakage exists. The Commission preliminarily believes that such

disclosures would help a market participant independently evaluate whether submitting order flow to a particular NMS Stock ATS aligns with its business interests and would help it achieve its investing or trading objectives.

B. Disclosures Required Under Part III of Proposed Form ATS-N

Part III of proposed Form ATS-N would require that broker-dealer operators of NMS Stock ATSs include, as applicable, disclosures that pertain to the broker-dealer operator and its affiliates of an NMS Stock ATS. The Commission preliminarily believes that these proposed disclosure requirements would help ensure that market participants and the Commission are adequately informed about: (1) The operation of the NMS Stock ATS—regardless of the corporate structure of the NMS Stock ATS and that of its broker-dealer operator, or any arrangements the broker-dealer operator may have made, whether contractual or otherwise, pertaining to the operation of its NMS Stock ATS; and (2) any potential conflicts of interest the broker-dealer operator may have with respect to the operation of its NMS Stock ATS.

The Commission has also considered other alternatives to address the potential conflicts of interest between NMS Stock ATSs and their broker-dealer operators.³⁷⁶ For example, the Commission could require an NMS Stock ATS to operate as a “stand-alone” entity having no affiliation with any broker-dealer that seeks to execute proprietary or agency orders in the NMS Stock ATS. This alternative would eliminate any potential conflicts of interest by requiring a broker-dealer that operates an NMS Stock ATS to have only a single business function—operating the NMS Stock ATS—and eliminating any other functions, such as trading on a proprietary basis or routing customer orders. As another alternative, and short of requiring NMS Stock ATSs to operate on a stand-alone basis, the Commission could continue to permit broker-dealer operators to continue to act as a broker-dealer operator of an NMS Stock ATS and engage in non-ATS functions while imposing new requirements designed to limit potential conflicts.

The Commission preliminarily believes that the above alternatives could be significantly more intrusive and substantially affect or limit the current operations of ATSs that trade

NMS stocks relative to requiring additional disclosures about the operations of the broker-dealer operator and its affiliates, and therefore is not proposing such alternatives at this time. The Commission is instead proposing that NMS Stock ATSs and their broker-dealer operators provide additional disclosures, both to the Commission and the public, about how they interact.

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149. Do you believe that it is necessary to have some understanding of the broader activities of the broker-dealer operator and its affiliates in order to understand and evaluate the operation of an NMS Stock ATS? Why or why not? Please support your arguments.

150. Do you believe that conflicts of interest could arise from a broker-dealer's operation of an NMS Stock ATS? Why or why not? If so, please explain what these conflicts of interest are. Do you believe that potential conflicts of interest should be disclosed to the public? Why or why not? Please support your arguments.

151. Do you believe that certain conflicts of interest arising out of the broker-dealer's operation of the NMS Stock ATS should be prohibited? Why or why not? Please support your arguments.

152. Do you believe that the Commission should adopt an alternative approach, either those described above or any other alternative, such as a prohibition, regarding potential conflicts of interest arising from a broker-dealer's operation of an NMS Stock ATS? Why or why not? Please support your arguments. If so, what approach should the Commission adopt? Please be specific.

153. Do you believe that the Commission should require information barriers between the ATS and non-ATS business units of the broker-dealer operator? Why or why not? Please support your arguments.

154. Do you believe that the Commission should require an NMS Stock ATS to operate as a “stand-alone” entity and have no affiliation with any broker-dealer that seeks to execute proprietary or agency orders in the ATS? Why or why not? Please support your arguments. Do you believe that the proposed disclosures on Form ATS-N would help broker-dealers better assess whether the routing of their customers' orders to a particular NMS Stock ATS fulfills the broker-dealer's duty of best

Settlement”); *In the Matter of eBX, LLC*, Securities Exchange Act Release No. 67969 (Oct. 3, 2012), <http://www.sec.gov/litigation/admin/2012/34-67969.pdf> (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) (“Level Settlement”); *In the Matter of Pipeline Trading Systems LLC, Fred J. Federspiel, and Alfred R. Berkeley III*, Securities Exchange Act Release No. 9271 (Oct. 24, 2011) (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order), <https://www.sec.gov/litigation/admin/2011/33-9271.pdf> (“Pipeline Settlement”); *In the Matter of INET ATS, Inc.*, Securities Exchange Act Release No. 53631 (Apr. 12, 2006), <https://www.sec.gov/litigation/admin/2006/34-53631.pdf> (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order); and *In the Matter of BRUT, LLC*, Securities Exchange Act Release No. 48718 (Oct. 30, 2003), <http://www.sec.gov/litigation/admin/34-48718.htm> (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order).

³⁷⁵ See *id.*

³⁷⁶ See *infra* Section XIII.D.7 for a further discussion of alternatives to address potential conflicts of interest.

execution?³⁷⁷ Why or why not? Please support your arguments.

155. Do you believe that the proposed disclosures on Form ATS–N would help customers of broker-dealers to better evaluate whether their broker-dealer is fulfilling its duty of best-execution with respect to orders routed to NMS Stock ATSs? Why or why not? Please support your arguments.

1. Proposed Definitions of “Affiliate” and “Control”

For the purposes of the proposed disclosures regarding affiliates of the broker-dealer operator, the Commission is proposing to define the term “affiliate” to mean “with respect to a specified person, any person that directly, or indirectly, controls, is under common control with, or is controlled by, the specified person.”³⁷⁸ This proposed definition is consistent with the definition of an “affiliate” for the purposes of Form 1 disclosures,³⁷⁹ and relates closely to the definition of a similar term under Regulation ATS.³⁸⁰

The Commission also proposes to amend the existing definition of the term “control” under Regulation ATS to add the phrase “the broker-dealer of” before the two instances of the phrase “an alternative trading system” and before the phrase “the alternative trading system” in subsections (2) and (3) of the definition.³⁸¹ As proposed to be amended, “control” would mean “the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through the ownership of securities, by contract, or otherwise. A person is presumed to control the broker-dealer of an alternative trading system, if that person (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25% or more of a class of voting securities or has the power to sell or direct the sale of 25% or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive, upon dissolution, 25% or more of the capital of the broker-dealer of the

alternative trading system.”³⁸² The purpose of these amendments to the definition of control under Regulation ATS is to make clear that, because an ATS must register as a broker-dealer, control of the broker-dealer of the ATS is control of the ATS, and that the broker-dealer (also referred to as the broker-dealer operator) is legally responsible for all operational aspects of the ATS and for ensuring that the ATS complies with applicable federal securities laws and the rules and regulations thereunder, including Regulation ATS.

The proposed disclosures of affiliate activities under Part III of proposed Form ATS–N are designed to provide market participants and the Commission with a comprehensive understanding of the potential conflicts of interest that may arise from the broker-dealer operator’s other business activities and its operation of the NMS Stock ATS. Under the proposed definition of “affiliate” and amended definition of “control,” any affiliate of the broker-dealer operator of the NMS Stock ATS would be an affiliate of the NMS Stock ATS.³⁸³ The Commission preliminarily believes that the proposed definition of an “affiliate” and amended definition of “control” would cover entities that have a close relationship with the broker-dealer operator and whose activities could raise potential conflicts of interest, or could otherwise be relevant to market participants in evaluating an NMS Stock ATS. Extending the proposed disclosures to affiliates of the broker-dealer operator could also reduce the potential for an entity to structure its organization in a way that would not provide complete disclosure of information in response to Part III of proposed Form ATS–N. The Commission notes that the proposed disclosures related to affiliates extends to persons that control, are controlled by, or are under common control with the broker-dealer operator, and, as a result, parallels the disclosures related to “control affiliates” that are required in Form BD, to which broker-dealer operators are already subject.³⁸⁴

³⁸² See *id.* and Instruction G to proposed Form ATS–N.

³⁸³ The instructions in proposed Form ATS–N would require an NMS Stock ATS to provide the identity of affiliates and business units of the broker-dealer operator, provide the name under which each affiliate or business unit conducts business (e.g., the formal name under which a proprietary trading desk of the broker-dealer operator conducts business) and the applicable CRD number and MPID(s) under which the affiliate or business unit conducts business.

³⁸⁴ See Form BD at 2 (defining “control affiliate”).

Request for Comment

156. Should the Commission adopt the proposal to define “affiliate” for purposes of proposed Form ATS–N as, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person? Why or why not? Please support your arguments. Do you believe that the Commission should adopt a more limited or expansive definition of an “affiliate”? Why or why not? Please support your arguments. What advantages or disadvantages might result from a more limited or expansive definition of an affiliate? Please support your arguments.

157. Do you believe that the Commission should use the definition of an “affiliated person” as defined in the Exchange Act for purposes of proposed Rule 304?³⁸⁵ Why or why not? Please support your arguments. If so, do you believe that the Commission should require disclosures about the activities of affiliated persons of the NMS Stock ATS, and/or affiliated persons of an affiliated person of an NMS Stock ATS? Why or why not? Please support your arguments.

158. Do you believe that the proposed amendments to the definition of “control” under Regulation ATS are appropriate in this context? Do you believe the Commission should adopt a more limited or expansive definition of “control”? Why or why not? Please support your arguments.

159. Do you believe the voting interest or partnership interest thresholds for “control” of an entity (*i.e.*, 25% or more) should be higher or lower for purposes of Rule 304? For example, should the voting interest or partnership interest threshold for control of an entity to be presumed be 5%, 10%, 15%, 30%, or 50% for purposes of Rule 304? If so, what is the appropriate percentage threshold and why would such alternate percentage threshold be more appropriate? Please support your arguments.

³⁸⁵ Under the Exchange Act, an “affiliated person” of another person means: Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting securities of such other person; any person 5 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; any person directly or indirectly controlling, controlled by, or under common control with, such other person; any officer, director, partner, copartner, or employee of such other person; if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and if such other person is an unincorporated investment company not having a board of directors, the depositor thereof. 15 U.S.C. 78c(a)(19); 15 U.S.C. 80a–2(a)(3).

³⁷⁷ See *supra* notes 36–40 and accompanying text (relating to the duty of best execution).

³⁷⁸ See Instruction G to proposed Form ATS–N.

³⁷⁹ See Instruction B to Form 1; 17 CFR 249.1.

³⁸⁰ See 17 CFR 242.300(c) (defining affiliate of a subscriber as any person that, directly or indirectly, controls, is under common control with, or is controlled by, the subscriber, including any employee).

³⁸¹ 17 CFR 242.300(f).

160. Do you believe that the definition of “control” should deem an affiliate of the broker-dealer of the NMS Stock ATS to be an affiliate of the NMS Stock ATS, such that the ATS would be subject to all of the proposed disclosures relating these entities? Should the definition of “control” be amended? If so, how should it be amended? Please support your arguments.

161. Do you believe that the information required to be filed on proposed Form ATS–N about affiliates of the NMS Stock ATS would provide useful information to market participants? Why or why not? Please support your arguments.

162. Do you believe that the Commission should require that the MPID and/or CRD number for affiliates and business units of the broker-dealer operator be disclosed on proposed Form ATS–N? Would such disclosure help market participants identify the broker-dealer operator’s affiliates and business units? Why or why not? Please support your arguments.

2. Non-ATS Trading Centers of the Broker-Dealer Operator

Part III, Item 1 of proposed Form ATS–N would require an NMS Stock ATS to disclose whether the broker-dealer operator or any of its affiliates operate or control any non-ATS trading center(s)³⁸⁶ that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent (“non-ATS trading centers”),³⁸⁷ and if so, to (1)

³⁸⁶ A trading center is defined under Regulation NMS as a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. 17 CFR 242.600(b)(78). The Commission preliminarily believes that the last two components of the definition of a trading center (*i.e.*, an OTC market maker and any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent) are the trading centers for which conflicts of interests of the broker-dealer operator and its affiliates are relevant, as such trading centers operate as competing venues for the execution of NMS stock over-the-counter.

³⁸⁷ References to non-ATS trading centers, as used herein, encompass all executions that occur off of an exchange and outside of an ATS, including when a broker-dealer is acting as an OTC market-maker, block positioner (*i.e.*, any broker-dealer in the business of executing, as principal or agent, block size trades for its customers), or operation of an internal broker-dealer system. See 17 CFR 242.600(b)(52) (defining “OTC market maker” as any dealer that holds itself out as being willing to buy and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size); 17 CFR 242.600(b)(9) (defining “block size” as an order of at least 10,000 shares or for a quantity of stock having a market value of at least

identify the non-ATS trading center(s); and (2) describe any interaction or coordination between the identified non-ATS trading center(s) and the NMS Stock ATS including: (i) Circumstances under which subscriber orders or other trading interest (such as quotes, indications of interest (“IOI”), conditional orders or messages (hereinafter collectively referred to as “trading interest”)) sent to the NMS Stock ATS are displayed or otherwise made known to the identified non-ATS trading center(s) identified in Item 1(a) before entering the NMS Stock ATS; (ii) circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates may execute, in whole or in part, in the identified non-ATS trading center identified in Item 1(a) before entering the NMS Stock ATS; and (iii) circumstances under which subscriber orders or other trading interest are removed from the NMS Stock ATS and sent to the identified non-ATS trading center(s).³⁸⁸

The Commission is aware that many broker-dealer operators of ATSs that currently trade NMS stocks facilitate the execution of NMS stock outside of their ATSs.³⁸⁹ As discussed above, a broker-dealer operator is permitted to engage in broker or dealer activities independent of its operation of an ATS, such as operating proprietary trading desks; the proposed rules do not eliminate or otherwise restrict such activities. The Commission, however, is proposing to require the public disclosure on proposed Form ATS–N of such activities as they relate to the NMS Stock ATS. As noted above, the Commission preliminarily believes that circumstances could arise whereby a broker-dealer operator of an NMS Stock ATS may place the interests of its or its affiliates’ non-ATS trading center ahead of the interests of the operations of the NMS Stock ATS and its subscribers. The

\$200,000); and 17 CFR 240.17a–3(a)(16)(ii)(A) (defining “internal broker-dealer system” as any facility, other than a national securities exchange, an exchange exempt from registration based on limited volume, or an alternative trading system as defined in Regulation ATS that provides a mechanism, automated in full or in part, for collecting, receiving, disseminating, or displaying system orders and facilitating agreement to the basic terms of a purchase or sale of a security between a customer and the sponsor, or between two customers of the sponsor, through use of the internal broker-dealer system or through the broker or dealer sponsor of such system). See also 2010 Equity Market Structure Release, *supra* note 124, at 3599–3600.

³⁸⁸ See Part III, Item 1 of proposed Form ATS–N.

³⁸⁹ See, e.g., Laura Tuttle, *Over-the-Counter Trading: Description of Non-ATS OTC Trading in National Market System Stocks* (March 2014), <http://www.sec.gov/dera/staff-papers/white-papers/otc-trading-white-paper-03-2014.pdf>.

Commission recognizes the sensitive nature of the confidential trading information of subscribers to an ATS and the potential for its misuse. The Commission preliminarily believes that non-ATS trading centers of a broker-dealer operator of an NMS Stock ATS or its affiliates may have incentives, and the opportunity to access, NMS Stock ATS subscriber orders received by the broker-dealer operator, which may result in information leakage.

Furthermore, the Commission preliminarily believes that subscribers to NMS Stock ATSs currently have limited information about the various non-ATS trading centers operated by an NMS Stock ATS broker-dealer operator, or its affiliates, and the extent to which the operations of these non-ATS trading centers may interact with subscriber orders or other trading interest sent to the NMS Stock ATS. Orders or other trading interest sent by subscribers to the NMS Stock ATS may pass through the broker-dealer operator’s systems or functionality before being entered into the NMS Stock ATS. Such systems and functionalities, which could include a common gateway function, algorithm, or smart order router, may be used to support the broker-dealer operator’s other business units, including any non-ATS trading centers. The broker-dealer operator typically controls the logic contained in these systems or functionality that determines where an order that the broker-dealer receives will be handled or sent. The Commission preliminarily believes that it would be helpful for NMS Stock ATS subscribers to know the extent to which subscriber orders received by the broker-dealer operator may interact, or be handled in any coordinated manner, with a non-ATS trading center of that broker-dealer operator or its affiliates.³⁹⁰

³⁹⁰ As noted above, the Commission is aware that most of the broker-dealer operators of ATSs that currently trade NMS stocks also facilitate the execution of NMS stocks in non-ATS trading centers outside of the NMS Stock ATS. See *supra* note 364 and accompanying text. In October of 2013, the Commission and its staff estimated that about 16.99% of total dollar volume (18.75% of share volume) of NMS stocks is executed over-the-counter (“OTC”) without the involvement of an ATS. In contrast, the Commission and its staff estimated that ATSs comprise 11.31% of total dollar volume (12.04% of share volume). See Tuttle: ATS Trading in NMS Stocks, *supra* note 126, at 2. Given that a greater percentage of OTC executions in NMS stock occur outside of ATSs rather than inside of ATSs, the Commission preliminarily believes that some disclosure of the presence of these non-ATS trading centers is appropriate. Accordingly, to the extent that an NMS Stock ATS subscriber’s orders may execute, be displayed, or otherwise made known in a non-ATS trading center operated by or affiliated with the broker-dealer operator, the Commission preliminarily believes that disclosure of such possibility would be

In addition, Form ATS–N would require the disclosure of circumstances under which subscriber orders or other trading interest received by the broker-dealer operator may execute, in whole or in part, in a non-ATS trading center(s) operated by the broker-dealer operator or its affiliates before entering the NMS Stock ATS; the circumstances under which subscriber orders or other trading interest would be displayed or otherwise made known to the systems or personnel operating the non-ATS trading center(s); and the circumstances under which subscriber orders or other trading interest are removed from the NMS Stock ATS and sent to the non-ATS trading center(s) for execution. To the extent that the broker-dealer operator or its affiliates operate a non-ATS trading center(s), but NMS Stock ATS subscribers' orders could not execute, route, or otherwise be shared with that non-ATS trading center(s), the NMS Stock ATS could note this fact in Part III, Item 1 of proposed Form ATS–N.

The disclosures in Part III, Item 1 of proposed Form ATS–N are designed to reduce information asymmetries between subscribers and the broker-dealer operator regarding the operation of the NMS Stock ATS and competing venues for the execution of NMS stock transactions (*i.e.*, non-ATS trading centers) that the broker-dealer operator operates and the circumstances in which the broker-dealer operator may handle or choose to execute subscriber orders outside of the NMS Stock ATS that might otherwise have been sent to the NMS Stock ATS.

Request for Comment

163. Do you believe the Commission should require the disclosure of the information on Part III, Item 1 of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

164. Do you believe Part III, Item 1 of proposed Form ATS–N captures the information regarding non-ATS trading centers operated or controlled by the broker-dealer operator or any of its affiliates that is most relevant to understanding the operations of the NMS Stock ATS? Why or why not? Please support your arguments.

165. Do you believe there is other information that market participants might find relevant or useful regarding non-ATS trading centers operated or controlled by the broker-dealer operator or any of its affiliates? If so, describe

such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

166. Do you believe that Part III, Item 1 of proposed Form ATS–N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part III, Item 1 of proposed Form ATS–N be revised to provide additional clarity? Please explain in detail.

167. Do you believe that the non-ATS trading centers operated by the broker-dealer operator or its affiliates could raise potential conflicts of interest? Why or why not? If so, do you believe that such potential conflicts of interest should be disclosed? Please support your arguments.

168. Part III, Item 1 of proposed Form ATS–N would require disclosure about the non-ATS trading center activities of affiliates of the broker-dealer operator. Do you believe that disclosure about the activities of the broker-dealer operator's affiliates in this context is necessary? Why or why not? Should disclosure of non-ATS trading center activities extend to more remote affiliates under a revised definition of "affiliate"?³⁹¹ Should disclosure of non-ATS trading center activities apply to a more limited set of affiliates? Why or why not? Please support your arguments.

169. What are the potential costs and benefits of disclosing the information required by Part III, Item 1 of proposed Form ATS–N? Do you believe the proposed disclosures in Part III, Item 1 have the potential to impact innovation? Why or why not? Do you believe that the proposed disclosures in Part III, Item 1 of proposed Form ATS–N would require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

170. Do you believe there is other information that market participants might find relevant or useful regarding the disclosure of non-ATS trading centers operated by the broker-dealer operator or its affiliates? If so, describe such information and explain whether or not such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

171. Do you believe there is any information regarding the non-ATS trading centers of the broker-dealer operator or its affiliates that should not be required to be disclosed on proposed

Form ATS–N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

172. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 1 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 1?

3. Multiple NMS Stock ATS Operations of the Broker-Dealer Operator

Part III, Item 2 of proposed Form ATS–N would require an NMS Stock ATS to state whether the broker-dealer operator, or any of its affiliates, operates one or more NMS Stock ATSs other than the NMS Stock ATS named on the Form ATS–N, and, if so, to (1) Identify the NMS Stock ATS(s) and provide its MPID(s); and (2) describe any interaction or coordination between the identified NMS Stock ATS(s) and the NMS Stock ATS named on the Form ATS–N including: (i) The circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates to be sent to the NMS Stock ATS named on the Form ATS–N may be sent to any identified NMS Stock ATS(s); (ii) circumstances under which subscriber orders or other trading interest to be sent to the NMS Stock ATS named on the Form ATS–N are displayed or otherwise made known in any other identified NMS Stock ATS(s); and (iii) the circumstances under which subscriber orders or other trading interest received by the NMS Stock ATS named on the Form ATS–N may be removed and sent to any other identified NMS Stock ATS(s).³⁹²

The Commission is aware that some broker-dealer operators operate multiple ATSs that trade NMS stocks and that subscriber orders or other trading interest received by such broker-dealer operators could be routed between those NMS Stock ATSs. The Commission preliminarily believes that—similar to the potential conflicts of interest that may arise or information leakage that may occur when a broker-dealer operator, or its affiliate, operates or controls a non-ATS trading center—circumstances might arise whereby a broker-dealer that operates multiple NMS Stock ATSs may place its interests ahead of the interests of subscribers of

relevant to market participants in deciding whether to subscribe or route orders to a particular NMS Stock ATS.

³⁹¹ See, e.g., *supra* note 385 and accompanying text.

³⁹² See Part III, Item 2 of proposed Form ATS–N.

one or more of its NMS Stock ATSs.³⁹³ To the extent that the broker-dealer operator or its affiliates operate multiple NMS Stock ATSs, but the subscribers' orders of the NMS Stock ATS named in the Form ATS-N filing could not execute, route, be displayed, or otherwise made known to the NMS Stock ATS(s) identified in Item 2(a) of proposed Form ATS-N, the NMS Stock ATS could note this fact in Part III, Item 2 of proposed Form ATS-N.

Therefore, under Part III, Item 2 of proposed Form ATS-N, a broker-dealer operator that operates multiple NMS Stock ATSs would be required to disclose how these trading venues interact with one another, if at all. To the extent that a broker-dealer operator could allocate subscriber orders it receives among the various NMS Stock ATSs that it or its affiliates operate, the broker-dealer operator would be required to describe how it determines such allocation in response to Item 2. For example, a broker-dealer operator may send all subscriber orders that it receives first to one of its NMS Stock ATSs, and if there is no execution after a certain period of time, the orders may then be routed directly to a second NMS Stock ATS operated by the broker-dealer operator or its affiliates, or may be returned to the broker-dealer operator (or its SOR or similar functionality), and may then be routed to a non-affiliated NMS Stock ATS for execution. Similarly, an NMS Stock ATS would be required to describe the circumstances under which subscriber orders on the NMS Stock ATS might be removed from the NMS Stock ATS and routed to another NMS Stock ATS that is operated by that broker-dealer operator or its affiliates.³⁹⁴

The Commission preliminarily believes that subscribers to NMS Stock ATSs currently have limited information about the extent to which the operations of other ATSs operated by the same broker-dealer operator, or its affiliates, may interact with their orders sent to the NMS Stock ATS. Specifically, because subscriber orders received by a broker-dealer operator could be sent to multiple NMS Stock ATSs operated by that broker-dealer operator, the Commission preliminarily

believes that subscribers should be provided with a better understanding of how their orders may interact, if at all, with multiple NMS Stock ATSs operated by the same broker-dealer operator or its affiliates. The proposed disclosures in Part III, Item 2 of proposed Form ATS-N are designed to help subscribers evaluate potential conflicts of interest for the broker-dealer operator or the potential for information leakage in connection with multiple NMS Stock ATSs that the broker-dealer operator, or its affiliates, operates.³⁹⁵ Accordingly, the Commission preliminarily believes that the disclosures required under Part III, Item 2 of proposed Form ATS-N would provide market participants with better information about how orders would be handled by a broker-dealer operator that operates multiple NMS Stock ATSs and the potential conflicts of interest and potential for information leakage that might arise as a result of such a business structure.

Request for Comment

173. Do you believe the Commission should require the disclosure of the information on Part III, Item 2 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

174. Do you believe Part III, Item 2 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any other NMS Stock ATSs (other than the one named on the Form ATS-N) operated or controlled by the broker-dealer operator or any of its affiliates? Why or why not? Please support your arguments.

175. Do you believe that Part III, Item 2 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part III, Item 2 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

176. Do you believe that the operation of multiple NMS Stock ATSs by the broker-dealer operator or its affiliates could raise potential conflicts of interest? Why or why not? If so, do you believe that such potential conflicts of

interest should be disclosed? Please support your arguments.

177. Do you believe that the information that would be solicited by Part III, Item 2 of proposed Form ATS-N would be useful to market participants in deciding whether to participate on an NMS Stock ATS? Why or why not? Please support your arguments.

178. Part III, Item 2 of proposed Form ATS-N would require disclosure of whether the affiliates of the broker-dealer operator operate an NMS Stock ATS (other than the NMS Stock ATS filing the Form ATS-N). Do you believe that disclosure about affiliates of the broker-dealer operator in this context is necessary? Why or why not? Should disclosure of affiliates that operate another NMS Stock ATS be extended to more remote affiliates under a revised definition of "affiliate"?³⁹⁶ Should disclosure apply to a more limited set of affiliates? Why or why not? Please support your arguments.

179. What are the potential costs and benefits of disclosing the information required by Part III, Item 2 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 2 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 2 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

180. Do you believe there is other information that market participants might find relevant or useful regarding the operation of multiple NMS Stock ATSs by a broker-dealer operator or its affiliate? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

181. Do you believe that the Commission should require NMS Stock ATSs to disclose the names of any non-NMS stock ATSs that are operated by its broker-dealer operator or one of its broker-dealer operator's affiliates? Why or why not? If so, what information should the NMS Stock ATS be required to disclose about such non-NMS stock ATSs? Please support your arguments.

182. Do you believe there is any information regarding the multiple NMS Stock ATS operations of a broker-dealer operator that the NMS Stock ATS

³⁹³ See *supra* note 368.

³⁹⁴ As is the case with the proposed disclosures under Part III, Item 1 of proposed Form ATS-N in regard to non-ATS trading centers, Part III, Item 2 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether any affiliates of the broker-dealer operator operates an NMS Stock ATS. This disclosure is designed to elicit certain information about the relationship of related NMS Stock ATSs, regardless of the organizational structure of the broker-dealer operator and its affiliates.

³⁹⁵ The Commission notes that a broker-dealer operator may have valid business reasons for operating multiple NMS Stock ATSs, and the Commission is not proposing to limit the ability for a broker-dealer operator to operate multiple NMS Stock ATSs. For example, the broker-dealer operator may establish several NMS Stock ATSs so that each NMS Stock ATS offers subscribers specific trading services (block order executions) or other particular trading functionalities (e.g., an auction mechanism or a limit order book).

³⁹⁶ See, e.g., *supra* note 385 and accompanying text.

should not be required to disclose on proposed Form ATS–N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please explain.

183. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 2 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 2?

4. Products or Services Offered to Subscribers by the Broker-Dealer Operator

Part III, Item 3 of proposed Form ATS–N would require an NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, offer subscribers of the NMS Stock ATS any products or services used in connection with trading on the NMS Stock ATS (e.g., algorithmic trading products, market data feeds). If so, the NMS Stock ATS would be required to describe the products and services and identify the types of subscribers (e.g., retail, institutional, professional) to which such services or products are offered, and if the terms and conditions of the services or products are not the same for all subscribers, describe any differences.³⁹⁷

Based on the Commission's experience, broker-dealer operators of NMS Stock ATSs may, directly or indirectly through an affiliate, offer products or services to subscribers in addition to the trading services of the NMS Stock ATS. For example, a broker-dealer operator may offer subscribers the use of an order management system to allow them to connect to or send orders or other trading interest to the NMS Stock ATS. Some broker-dealer operators may also offer subscribers the use of algorithmic trading strategies, which are computer assisted trading tools that, for instance, may be used by or on behalf of institutional investors to execute orders that are typically too large to be executed all at once without excessive price impact, and divide the orders into many small orders that are fed into the marketplace over time.³⁹⁸ In some cases, a broker-dealer operator offering products or services in

connection with a subscriber's use of the NMS Stock ATS may result in the subscribers receiving more favorable terms from the broker-dealer operator with respect to their use of the NMS Stock ATS. For example, if a subscriber purchases a service offered by the broker-dealer operator of an NMS Stock ATS, the broker-dealer operator might also provide that subscriber more favorable terms for their use of the NMS Stock ATS than other subscribers who do not purchase the service. Such favorable terms could include fee discounts or access to a faster connection line to the NMS Stock ATS. Additionally, a broker-dealer operator of an NMS Stock ATS may only offer certain products and services to certain subscribers or may offer products and services on different terms to different categories of subscribers. The Commission preliminarily believes that market participants would want to know, when assessing an NMS Stock ATS as a potential trading venue, the range of services or products that the broker-dealer operator or its affiliates may offer subscribers of the NMS Stock ATS because such services or products may have an impact on the subscribers' access to, or trading on, the NMS Stock ATS.

Request for Comment

184. Do you believe the Commission should require the disclosure of the information on Part III, Item 3 of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

185. Do you believe Part III, Item 3 of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding other products or services offered to subscribers used in connection with trading on the NMS Stock ATS by the broker-dealer operator or any of its affiliates? Why or why not? Please support your arguments.

186. Do you believe that Part III, Item 3 of proposed Form ATS–N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part III, Item 3 of proposed Form ATS–N be revised to provide additional clarity? Please explain in detail.

187. Do you believe there is other information that market participants might find relevant or useful regarding other products and services offered to subscribers by broker-dealer operators or their affiliates? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed

Form ATS–N. Please support your arguments.

188. Do you believe that the Commission should expand the proposed disclosures in Part III, Item 3 of proposed Form ATS–N to products or services offered by the broker-dealer operator or its affiliates that are offered to subscribers, but not necessarily offered in connection with transacting on the NMS Stock ATS? Why or why not? Please explain. Do you believe there is other information that market participants might find useful regarding the products or services offered to subscribers by the broker-dealer operator or its affiliates? If so, what information should be added to the disclosure requirements? Please explain.

189. What are the potential costs and benefits of disclosing the information required by Part III, Item 3 of proposed Form ATS–N? Do you believe the disclosures in Part III, Item 3 of proposed Form ATS–N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 3 of proposed Form ATS–N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

190. Do you believe there is any information regarding the products or services offered to subscribers by the broker-dealer operator that the NMS Stock ATS should not be required to disclose on proposed Form ATS–N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

191. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 3 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 3?

5. Broker-Dealer Operator Arrangements With Unaffiliated Trading Centers

Part III, Item 4 of proposed Form ATS–N would require an NMS Stock ATS to disclose whether the broker-dealer operator or any of its affiliates have any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center³⁹⁹ regarding access to the NMS Stock ATS,

³⁹⁹ See *supra* note 386 (defining trading center).

³⁹⁷ See Part III, Item 3 of proposed Form ATS–N.

³⁹⁸ See Staff of the Division of Trading and Markets, Commission, "Equity Market Structure Literature Review, Part II: High Frequency Trading," at 5 (March 18, 2014), http://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf.

including preferential routing arrangements. If so, the NMS Stock ATSs would be required to identify the person(s) and the trading center(s) and to describe the terms of the arrangement(s).⁴⁰⁰

Part III, Item 4 of proposed Form ATS–N is designed to inform subscribers and the Commission about arrangements that may impact a subscriber’s experience on the NMS Stock ATS and allow market participants to evaluate potential conflicts of interest of the broker-dealer operator. For example, Part III, Item 4 of proposed Form ATS–N would require an NMS Stock ATS to disclose whether its broker-dealer operator has any arrangement with another unaffiliated NMS Stock ATS pursuant to which the NMS Stock ATS would route orders or other trading interest to the unaffiliated NMS Stock ATS for possible execution prior to routing to any other destination. Similarly, Part III, Item 4 of proposed Form ATS–N would require disclosure of an arrangement pursuant to which any subscriber orders routed out of the unaffiliated NMS Stock ATS would be routed first to the NMS Stock ATS before any other trading center, and would also require disclosure of the terms of the arrangement, for example, whether the NMS Stock ATS was providing monetary compensation or some other brokerage service to the unaffiliated NMS Stock ATS in exchange for the order flow.⁴⁰¹

The Commission preliminarily believes that market participants would consider information about any arrangements between a broker-dealer operator of an NMS Stock ATS and other trading centers relevant to their evaluation of an NMS Stock ATS as a potential trading venue. The disclosure of such arrangements could reveal potential conflicts of interest of the broker-dealer operator or could identify potential sources of information leakage. For example, a potential conflict of interest could arise where an NMS Stock ATS has a preferred routing arrangement with an unaffiliated non-ATS trading center that provides that all orders sent to the NMS Stock ATS would first be routed to the unaffiliated non-ATS trading center before entering the NMS Stock ATS in exchange for monetary compensation. Such an

arrangement could also pose a risk of information leakage in that the non-ATS trading center would know that those orders that it does not execute would be routed to the NMS Stock ATS.⁴⁰² Part III, Item 4 of proposed Form ATS–N would also require disclosure of mutual access arrangements between an NMS Stock ATS and other trading centers whereby, for example, a broker-dealer operator or its affiliates may offer access to its NMS Stock ATS in exchange for access to the NMS Stock ATS of another broker-dealer operator.

The Commission notes that an NMS Stock ATS would not be prohibited from establishing arrangements with other trading centers, provided that such arrangements comply with other applicable laws and rules, including applicable federal securities laws and Regulation ATS. However, the Commission preliminarily believes that market participants could benefit from disclosures about such arrangements and would use such information when determining whether to subscribe, or route orders, to a particular NMS Stock ATS. Additionally, the Commission preliminarily believes that disclosure of such arrangements would help the Commission perform its oversight functions by enabling it to better evaluate an NMS Stock ATS’s compliance with the requirements of Regulation ATS, such as Rule 301(b)(10).

Request for Comment

192. Do you believe the Commission should require the disclosure of the information on Part III, Item 4 of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

193. Do you believe Part III, Item 4 of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any formal or informal arrangement by the broker-dealer operator or any of its affiliates with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center⁴⁰³ regarding access to the NMS Stock ATS, including preferential routing arrangements? Why or why not? Please support your arguments.

194. Do you believe that Part III, Item 4 of proposed Form ATS–N is sufficiently clear with respect to the disclosures that would be required relating to access arrangements and preferred routing arrangements with other unaffiliated trading centers? If not, how should Part III, Item 4 of proposed Form ATS–N be revised to provide additional clarity? Please explain.

195. What are the potential costs and benefits of disclosing the information required by Part III, Item 4 of proposed Form ATS–N? Do you believe the disclosures in Part III, Item 4 of proposed Form ATS–N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 4 of proposed Form ATS–N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

196. Do you believe that the Commission should include access arrangements of affiliates of the broker-dealer operator in Part III, Item 4 of proposed Form ATS–N? Why or why not? Please support your arguments. Conversely, should disclosures of arrangements with other trading centers by affiliates be extended to more remote affiliates under a revised definition of “affiliate”?⁴⁰⁴ Should disclosure apply to a more limited set of affiliates? Why or why not? Please support your arguments.

197. Do you believe that the Commission should expand the proposed disclosure requirements to other arrangements beyond access and preferred routing that the broker-dealer operator or its affiliates might have with other trading centers? If so, what other arrangements do you believe should be disclosed? Please explain in detail.

198. Do you believe that the Commission should limit or expand in any way the proposed disclosure requirements to require disclosure of arrangements regarding access by the broker-dealer operator or its affiliates to both other trading centers and affiliates of those other trading centers? Why or why not? Please support your arguments.

199. Do you believe there is other information that market participants might find relevant or useful regarding the broker-dealer operator or its affiliates’ arrangements with other trading centers? If so, describe such information and explain whether, and if so why, such information should be

⁴⁰⁴ See, e.g., *supra* note 385 and accompanying text.

⁴⁰⁰ See Part III, Item 4 of proposed Form ATS–N.

⁴⁰¹ The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates to have formal or informal arrangements with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center regarding access to the NMS Stock ATS. The Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements.

⁴⁰² Alternatively, if an arrangement between the NMS Stock ATS and unaffiliated trading center provided that any subscriber orders routed out of the NMS Stock ATS would be first routed to the unaffiliated non-ATS trading center, the NMS Stock ATS may have an incentive to remove subscribers’ orders from the NMS Stock ATS and allow the unaffiliated non-ATS trading center the opportunity to execute those orders.

⁴⁰³ See *supra* note 386 (defining trading center).

required to be provided under proposed Form ATS–N. Please support your arguments.

200. Do you believe there is any information regarding the broker-dealer operator or its affiliates' arrangements with other trading centers that the NMS Stock ATS should not be required to disclose on proposed Form ATS–N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

201. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 4 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 4?

6. Trading on the NMS Stock ATS by the Broker-Dealer Operator and Its Affiliates

Part III, Item 5 of proposed Form ATS–N would require certain disclosures related to the trading activity of the broker-dealer operator or its affiliates on the NMS Stock ATS. Specifically, Part III, Item 5 of proposed Form ATS–N would require the NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, enters orders or other trading interest on the NMS Stock ATS. If so, the NMS Stock ATS would be required to: (1) Identify each affiliate and business unit of the broker-dealer operator that may enter orders or other trading interest on the NMS Stock ATS; (2) describe the circumstances and capacity (e.g., proprietary, agency) in which each identified affiliate and business unit enters orders or other trading interest on the NMS Stock ATS; (3) describe the means by which each identified affiliate and business unit enters orders or other trading interest on the NMS Stock ATS (e.g., directly through a FIX connection to the NMS Stock ATS, or indirectly, by way of the broker-dealer operator's SOR (or similar functionality), algorithm, intermediate application, or sales desk); and (4) describe any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates on the NMS Stock ATS.⁴⁰⁵

⁴⁰⁵ The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates to trade on the NMS Stock ATS. The Commission is not proposing to limit the ability for

As noted above, Part III, Item 5(a) of proposed Form ATS–N would require the NMS Stock ATS to identify each affiliate and business unit (e.g., a sales desk or proprietary trading unit) and affiliate of the broker-dealer operator that can enter orders or other trading interest on the NMS Stock ATS. The Commission preliminarily believes that disclosure of whether a broker-dealer operator of an NMS Stock ATS or its affiliates may trade on that NMS Stock ATS would be important to subscribers with respect to the potential conflicts of interest that may arise from the unique position the broker-dealer operator occupies in relation to the NMS Stock ATS. If the person that operates and controls a trading center is also able to trade on that trading center, there may be an incentive to design the operations of the trading center to favor the trading activity of the operator of the trading center or affiliates of the operator.⁴⁰⁶ The operator of a trading center that also trades on the trading center it operates would likely have informational advantages over others trading on the trading center such as a better understanding of the manner in which the system operates or who is trading on the trading center. In the most egregious case, the operator of the trading center might use the confidential trading information of other traders to advantage its own trading on that trading center, which, in context of an ATS, would violate Rule 301(b)(10). Accordingly, the Commission believes that subscribers would benefit from knowing whether and how a broker-dealer operator or its affiliates trade on the NMS Stock ATS to which they may route orders or become a subscriber. Such information would allow market participants to evaluate the extent of the potential conflicts of interest posed by the broker-dealer operator or its affiliates' participation on the NMS Stock ATS and to inquire further about such trading activity if they choose.

Part III, Item 5(b) of proposed Form ATS–N would require an NMS Stock ATS to disclose the circumstances and capacity in which the broker-dealer operator's business units or affiliates may trade on the NMS Stock ATS, such as whether they are trading on a proprietary basis (i.e., for their own accounts) or agency basis or both. This disclosure is meant to provide insight as to the nature of the trading of the broker-dealer operator and/or its affiliates. The Commission preliminarily believes that market participants would

a broker-dealer operator to trade on any such NMS Stock ATS.

⁴⁰⁶ See *supra* note 370 and accompanying text.

find this information useful in evaluating NMS Stock ATSs because they may perceive agency trading by the broker-dealer operator or its affiliates as posing less of a conflict of interest as compared to proprietary trading. For example, market participants may perceive a lesser potential for a conflict of interest if the broker-dealer operator discloses that the broker-dealer operator or its affiliates trade on its own NMS Stock ATS only in an agency capacity with its customers' orders as opposed to trading on the NMS Stock ATS in a principal capacity on a proprietary basis—where the broker-dealer operator or its affiliates may have increased incentives to use their informational advantage in operating the NMS Stock ATS to advance their trading opportunities.⁴⁰⁷ Alternatively, market participants could conclude that the broker-dealer operator's agency trading on its own NMS Stock ATS could nevertheless pose an unacceptable conflict of interest as the broker-dealer operator may be able to advantage its customers' orders to the disadvantage of subscribers to the NMS Stock ATS. The Commission proposes to provide market participants with information regarding the nature of the trading activity of the broker-dealer operator and its affiliates on the NMS Stock ATS so that subscribers (and potential subscribers) can evaluate potential conflicts of interest that may arise from that trading activity.

Part III, Item 5(c) of proposed Form ATS–N would require an NMS Stock ATS to describe the means by which the business units of the broker-dealer operator and its affiliates enter orders or other trading interest into the NMS Stock ATS. Item 5(d) would require a description of any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates. Some NMS Stock ATSs that currently transact in NMS stocks may provide both direct and indirect means for subscribers to enter orders or other trading interest to the ATS. Based on its experience, the Commission understands that subscribers to some NMS Stock ATSs may enter orders or other trading interest directly to the ATS using, for example, a direct FIX connection,⁴⁰⁸ while other subscribers may enter

⁴⁰⁷ See *supra* note 368.

⁴⁰⁸ To the extent that a subscriber to the NMS Stock ATS directly sends an order to the NMS Stock ATS by way of FIX protocol, the NMS Stock ATS should identify and describe any intermediate functionality that the subscriber order may pass through on its way to the NMS Stock ATS as part of the FIX process.

orders or other trading interest indirectly to the ATS using, for example, an algorithm, the broker-dealer operator's smart order router,⁴⁰⁹ or the broker-dealer operator's sales desks. As such, there are a variety of means by which business units of the broker-dealer operator or its affiliates of the broker-dealer operator may connect to, and enter orders on, an NMS Stock ATS. The Commission preliminarily believes that market participants evaluating NMS Stock ATSs may find this information relevant in assessing any potential advantages that the broker-dealer operator or its affiliates may have over other subscribers to the NMS Stock ATS. For example, an NMS Stock ATS may permit orders or other trading interest of all of its affiliates that trade on the NMS Stock ATS to enter through a means that can be used only by the broker-dealer operator or its affiliates and not by non-affiliated subscribers to the NMS Stock ATS (e.g., bypassing the broker-dealer operator's SOR). The Commission preliminarily believes that market participants would want to know these circumstances, as the difference in access or order entry could result in certain advantages, such as the speed at which orders could be entered or cancelled. Moreover, the Commission preliminarily believes that based on how a broker-dealer operator's business units or affiliates access and trade on an NMS Stock ATS—or on other considerations—certain subscribers may not wish to interact with the order flow of the broker-dealer operator or its affiliates. Accordingly, the Commission preliminarily believes that it is important for market participants to have the information to elect whether and how they may avoid trading against orders or other trading interest of the broker-dealer operator or its affiliates on an NMS Stock ATS to achieve their investing or trading objectives.

Overall, the Commission preliminarily believes that the disclosures required under Part III, Item 5 of proposed Form ATS-N would be useful to many market participants. The Commission notes that market participants may vary widely in their decision making process in selecting a particular trading center to effect their trades or route their orders, and therefore, the Commission preliminarily believes that some market participants may not be concerned with the potential conflicts of interest posed by the trading activity of the broker-dealer operator or its affiliates on the NMS Stock ATS.

⁴⁰⁹ See *infra* Section VII.B.7 (discussing the use of smart order routers by broker-dealer operators of NMS Stock ATSs).

However, absent disclosure of this trading activity of the broker-dealer operator or its affiliates, subscribers and potential subscribers that take such information into account when executing their trading or investment strategies likely would neither be aware of such potential conflicts nor able to assess whether the conflicts might impact those strategies. Consequently, the Commission preliminarily believes that it would be useful to market participants for an NMS Stock ATS to be required to disclose the information required in Part III, Item 5 of proposed Form ATS-N.

Request for Comment

202. Do you believe the Commission should require the disclosure of the information on Part III, Item 5 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

203. Do you believe Part III, Item 5 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the trading activity of the broker-dealer operator or its affiliates on the NMS Stock ATS? Why or why not? Please support your arguments.

204. Do you believe that Part III, Item 5 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to the broker-dealer operator and its affiliates trading on the NMS Stock ATS? If not, how should Part III, Item 5 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

205. Do you believe proposed disclosures in Part III, Item 5 of proposed Form ATS-N should be applied to the trading activity on the NMS Stock ATS of affiliates of the broker-dealer operator? Why or why not? Should disclosures of affiliates trading on the NMS Stock ATS be extended to more remote affiliates under a revised definition of "affiliate"?⁴¹⁰ Should disclosures apply to a more limited set of affiliates? Why or why not? Please support your arguments.

206. Do you believe that the Commission should enhance measures to prevent potential conflicts of interest posed by the broker-dealer operator or its affiliates trading on its own NMS Stock ATS, such as prohibiting proprietary trading by the broker-dealer operator or its affiliates on the NMS Stock ATS? If no, why? If yes, what

⁴¹⁰ See, e.g., *supra* note 385 and accompanying text.

measures should the Commission consider? Please explain in detail.

207. What are the potential costs and benefits of disclosing the information required by Part III, Item 5 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 5 of proposed Form ATS-N would have the potential to impact innovation or discourage broker-dealer operators or their affiliates from trading on their own NMS Stock ATS? Why or why not? Would the proposed disclosures in Part III, Item 5 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

208. Do you believe there is other information that market participants might find relevant or useful regarding the trading activity on the NMS Stock ATS by the broker-dealer operator or its affiliates? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

209. Do you believe there is any information regarding the trading activity on the NMS Stock ATS by the broker-dealer operator or its affiliates that the NMS Stock ATS should not be required to disclose on Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

210. Should the Commission require separate disclosures for different types of trading conducted by the broker-dealer operator on the NMS Stock ATS, such as trading by the broker-dealer operator for the purpose of correcting error trades executed on the ATS, as compared to other types of proprietary trading? Why or why not? Please support your arguments. If so, what types of proprietary trading should be addressed separately and why? What disclosures should the Commission require about these types of proprietary trading and why? Please explain in detail.

211. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 5 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 5?

7. Broker-Dealer Operator Smart Order Routers (or Similar Functionalities) and Algorithms

Part III, Item 6 of proposed Form ATS–N would require the NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, use a SOR(s) (or similar functionality), an algorithm(s), or both to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS, and if so, to: (1) Identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR(s) (or similar functionality) or algorithm(s), if other than the broker-dealer operator;⁴¹¹ and (2) describe the interaction or coordination between the identified SOR(s) (or similar functionality) or algorithm(s) and the NMS Stock ATS, including any information or messages about orders or other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person.

Today, most broker-dealers that operate an NMS Stock ATS use some form of SOR (or similar functionality) in connection with the NMS Stock ATS. A SOR (or similar functionality) can generally be understood as an automated system used to route orders or other trading interest among trading centers, including proprietary non-ATS trading centers operated by the broker-dealer operator, to carry out particular trading instructions or strategies of a broker-dealer. Smart order routers (or similar functionalities) have become an integral part of the business of many multi-service broker-dealers, given the increase in the speed of trading in today's equity markets and the large number of trading centers, including national securities exchanges, ATSs, and non-ATS trading centers, that have emerged since the adoption of Regulation ATS. In addition to the SOR (or similar functionality), orders or other trading interest may be entered on an NMS Stock ATS through the use of a trading algorithm, which is a computer assisted trading tool that, for instance, may be used by or on behalf of institutional investors to execute orders that are typically too large to be executed all at once without excessive price impact, and divide the orders into many small orders that are fed into the marketplace over time.⁴¹²

Broker-dealer operators of NMS Stock ATSs or their affiliates may use SORs (or similar functionality) or algorithms in a variety of ways.⁴¹³ For example, the broker-dealer operator may use the SOR (or similar functionality) to route orders on behalf of its customers and proprietary trading desks to different trading venues, or the broker-dealer operator may use the SOR as the primary means of routing subscriber orders or other trading interest to or from the NMS Stock ATS. The Commission understands, based on experience, that for some ATSs that currently transact in NMS stocks, the SOR (or similar functionality) or algorithm of the broker-dealer operator or its affiliates is the only means of access (i.e., all orders or other trading interest entered on, or removed from, the ATS, must pass through the SOR (or similar functionality) or algorithm). A broker-dealer operator may also use a SOR (or similar functionality) or algorithm to handle all order flow received by the broker-dealer operator (or its affiliates), including both orders that a subscriber has specifically directed to the NMS Stock ATS and orders that may not be sent to the NMS Stock ATS, as well as the broker-dealer's own proprietary orders and those of its affiliates. For many orders, the SOR (or similar functionality) or algorithm determines whether to route the order to the NMS Stock ATS, another NMS Stock ATS or non-ATS trading center operated by the broker-dealer operator, another broker-dealer, an unaffiliated NMS Stock ATS, or a national securities exchange. The SOR (or similar functionality) may obtain knowledge of subscriber orders or other trading interest that have been routed to the NMS Stock ATS (and may now be resting on the NMS Stock ATS) and subscriber orders that have been routed out of the NMS Stock ATS. Similarly, the system operating an algorithm used by the broker-dealer operator to enter subscriber orders based on the algorithm's trading strategy may obtain information about subscriber orders sent to the NMS Stock ATS. The broker-

dealer operator (or its affiliates) programs and operates the SOR (or similar functionality) and/or algorithm(s), unless the broker-dealer operator contracts such functions to a third-party vendor, in which case the broker-dealer operator or third-party vendor may have access to information that passes through the SOR(s) (or similar functionality), algorithm(s) or both.

The Commission preliminarily believes that the high likelihood that a SOR (or similar functionality) or algorithm could access subscribers' confidential trading information necessitates disclosure of certain information to subscribers about the use of a SOR (or similar functionality) or algorithm by the broker-dealer operator or its affiliates to route subscriber orders to or out of the NMS Stock ATS. The Commission preliminarily believes that subscribers and the Commission would benefit from increased disclosures about the use of a SOR(s) (or similar functionality) or algorithm(s) by the broker-dealer operator or its affiliates in connection with the NMS Stock ATS because of the potential for information leakage. Existing Form ATS does not specifically inquire about the use of a SOR (or similar functionality) or algorithms in connection with an ATS and based on Commission experience, the Commission is concerned that there is limited information available to subscribers about the interaction between SORs (or similar functionalities) or algorithms and affiliated ATSs that trade NMS stocks, despite the importance of SORs (or similar functionality) or algorithms to the functions and operations of such ATSs. The Commission preliminarily believes that information provided on Form ATS–N would allow market participants to better understand the operation of an NMS Stock ATS and the circumstances that may give rise to potential conflicts of interest and information leakage.

Part III, Item 6(a) of proposed Form ATS–N would require an NMS Stock ATS to identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR (or similar functionality) and algorithm(s). Part III, Item 6(a) of proposed Form ATS–N is designed to provide subscribers with information about who operates the SOR(s) (or similar functionality) or algorithm(s) used in connection with the NMS Stock ATS, which would thereby inform subscribers about who may have access to their confidential trading information or control over the entry and removal of orders or other trading interest to and

Trading," at 5 (March 18, 2014), http://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf.

⁴¹³ The Commission notes that, similar to legacy NMS Stock ATSs, broker-dealer operators are likely to vary in their organizational structures. Accordingly, the Commission proposes to include affiliates of the broker-dealer operator that may operate a SOR(s) (or similar functionality) or algorithm(s) in Part III, Item 6 of proposed Form ATS–N to ensure that SORs (or similar functionalities) or algorithms used in connection with the NMS Stock ATSs are disclosed regardless of whether the SOR(s) (or similar functionality) or algorithm(s) is operated by an affiliate of the broker-dealer operator.

⁴¹¹ See *supra* note 362.

⁴¹² See Staff of the Division of Trading and Markets, Commission, "Equity Market Structure Literature Review, Part II: High Frequency

from the NMS Stock ATS. Information about the persons who operate a SOR(s) (or similar functionality) or algorithm(s) used in connection with the NMS Stock ATS and how the SOR(s) (or similar functionality) or algorithm(s) operates would allow subscribers to assess potential sources of information leakage and conflicts of interest that may arise from the operation of the SOR(s) (or similar functionality) and/or algorithm(s).

Part III, Item 6(b) of proposed Form ATS–N would require an NMS Stock ATS to describe the interaction or coordination between the identified SOR(s) (or similar functionality) or algorithm(s) and the NMS Stock ATS, including any information or messages about orders or other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person. Because the SOR(s) (or similar functionality) or algorithm(s) and NMS Stock ATS are typically operated by the same broker-dealer operator (rather than a third-party vendor), the Commission preliminarily believes subscribers to the NMS Stock ATS are likely to find it important to understand what information about their orders is obtained by a SOR(s) (or similar functionality) or algorithm(s) and the circumstances under which that information may be used by the broker-dealer operator of the NMS Stock ATS, its affiliates, or other persons. The Commission is concerned that without this information, subscribers that send orders to the NMS Stock ATS by way of the broker-dealer operator's SOR (or similar functionality) or algorithm may not be able to understand the conditions under which information about their confidential trading information may be leaked.

The interaction or coordination of the SOR(s) (or similar functionality) or algorithm(s) with the NMS Stock ATS likely varies across NMS Stock ATSs. For instance, a SOR (or similar functionality) or algorithm may check for potential contra-side interest in a particular symbol on the NMS Stock ATS prior to sending the subscriber order or other trading interest into the NMS Stock ATS. Such protocol carried out by the SOR (or similar functionality) or algorithm may send only information about the symbol and side (i.e., buy or sell) of the subscriber's order or other trading interest, but not the size, price, identity of the subscriber or other information. As another example, an NMS Stock ATS that uses IOIs as part of its platform may use its SOR (or

similar functionality) or an algorithm to facilitate the sending of IOIs to relevant persons regarding orders or other trading interest resting on the NMS Stock ATS. The Commission preliminarily believes that the operations and functions of the SOR(s) (or similar functionality) or algorithm(s) in these examples would be relevant to subscribers and helpful in understanding how the NMS Stock ATS operates.

The Commission notes that an ATS may consist of various functionalities or mechanisms that operate collectively as a Rule 3b–16 system to bring together the orders for securities of multiple buyers and sellers using non-discretionary methods.⁴¹⁴ Based on Commission experience, most broker-dealer operators that use a SOR(s) (or similar functionality) or algorithm operate the SOR(s) (or similar functionality) or algorithm(s) separate and apart from their ATS. However, to the extent that a SOR (or similar functionality) or algorithm operates jointly with, or performs a function of, the NMS Stock ATS to bring together the orders for securities of multiple buyers and sellers using established nondiscretionary methods, the SOR (or similar functionality) or algorithm may be considered part of the NMS Stock ATS.⁴¹⁵ For example, a SOR (or similar functionality) or algorithm that is, based on the facts and circumstances, the exclusive means for subscribers to access and enter orders or other trading interest on NMS Stock ATS for execution would be regarded as part of

⁴¹⁴ Under Rule 3b–16 an organization, association, or group of persons shall be considered to constitute, maintain, or provide “a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,” if such organization, association, or group of persons: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. 17 CFR 240.3b–16(a).

⁴¹⁵ The Commission noted in adopting Regulation ATS that the Commission “will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly” and “if an organization arranges for separate entities to provide different pieces of a trading system, which together meet the definition contained in paragraph (a) of Rule 3b–16, the organization responsible for arranging the collective efforts will be deemed to have established a trading facility.” See Regulation ATS Adopting Release, *supra* note 7, at 70852. If the SOR(s) (or similar functionality) or algorithm(s) were operated by an affiliate of the NMS Stock ATS or an entity unaffiliated with the NMS Stock ATS, the SOR(s) (or similar functionality) or algorithm(s) could still be considered a part of the NMS Stock ATS depending on the facts and circumstances.

the operations of the NMS Stock ATS because the SOR (or similar functionality) or algorithm would function as the mechanism for orders or other trading interest to be brought together and interact in the NMS Stock ATS. The Commission preliminarily believes that information provided on proposed Form ATS–N about the use of a SOR (or similar functionality) or algorithm under Part III, Item 6 of proposed Form ATS–N would allow the Commission to better understand the operations and scope of the NMS Stock ATS. That is, the proposed disclosures would assist the Commission in determining if a SOR (or similar functionality) or algorithm is facilitating the bringing together of orders for securities of multiple buyers and sellers using established nondiscretionary methods, and would consequently be part of the NMS Stock ATS for the purposes of Regulation ATS.

Request for Comment

212. Do you believe the Commission should require the disclosure of the information on Part III, Item 6 of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

213. Do you believe Part III, Item 6 of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the use of a SOR or algorithm by the broker-dealer operators, or any of its affiliates, to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS? Why or why not? Please support your arguments.

214. Do you believe that Part III, Item 6 of proposed Form ATS–N is sufficiently clear with respect to the disclosures that would be required relating to the broker-dealer operator and its affiliates' use of SORs (or similar functionality) and algorithms in connection with the NMS Stock ATS? If not, how should Part III, Item 6 of proposed Form ATS–N be revised to provide additional clarity? Please explain in detail.

215. Do you believe it is appropriate for the Commission to require disclosure about the use of SORs (or similar functionalities) and algorithms by the broker-dealer operator, or its affiliates, to send or receive orders or other trading interest to or from the NMS Stock ATS? Why or why not? Please support your arguments. If so, what level of detail should be disclosed about how SORs (or similar functionalities) and algorithms determine whether to send or receive

orders or other trading interest to the NMS Stock ATS? Please be specific.

216. What are the potential costs and benefits of disclosing the information required by Part III, Item 6 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 6 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 6 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) about their structure and operations? Why or why not? Please support your arguments.

217. Do you believe the proposed disclosures in Part III, Item 6 of proposed Form ATS-N related to the use of SORs (or similar functionality) and algorithms should be applied to affiliates of the broker-dealer operator? Why or why not? Please support your arguments.

218. Do you believe there is other information that market participants might find relevant or useful regarding broker-dealer operators or their affiliates' SORs (or similar functionalities) and algorithms? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

219. Do you believe there is any information regarding broker-dealer operators or their affiliates' SORs (or similar functionality) and algorithms that the NMS Stock ATS should not be required to disclose on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

220. Do you believe that most subscribers to ATSs that transact in NMS stock access the ATSs through the SOR (or similar functionality) or algorithm of the broker-dealer operator (or its affiliates), or do they connect directly to the ATS through some other means, or both? Please explain in detail.

221. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 6 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 6?

8. Shared Employees of NMS Stock ATS

Part III, Item 7 of proposed Form ATS-N would require an NMS Stock

ATS to state whether any employee of the broker-dealer operator that services the operations of the NMS Stock ATS also services any other business unit(s) of the broker-dealer operator or any affiliate(s) of the broker-dealer operator ("shared employee") and, if so, to (1) identify the business unit(s) and/or the affiliate(s) of the broker-dealer operator to which the shared employee(s) provides services and identify the position(s) or title(s) that the shared employee(s) holds in the business unit(s) and/or affiliate(s) of the broker-dealer operator; and (2) describe the roles and responsibilities of the shared employee(s) at the NMS Stock ATS and the business unit(s) and/or affiliate(s) of the broker-dealer operator.⁴¹⁶

Part III, Item 7 of proposed Form ATS-N is designed to provide information to market participants and the Commission about circumstances that might give rise to a potential conflict of interest and potential information leakage involving shared employees of the broker-dealer operator. Responses to Part III, Item 7 of proposed Form ATS-N would require an NMS Stock ATS to describe the roles and responsibilities of the shared employees with the NMS Stock ATS and the other business units of the broker-dealer operator or affiliates. Responses to Part III, Item 7 of proposed Form ATS-N would be required to be sufficiently detailed to provide a comprehensive understanding of the full range of the shared employee's responsibilities with the NMS Stock ATS and each relevant entity, and include disclosure of responsibilities that could enable the employee to view subscribers' confidential trading information. The Commission preliminarily believes that market participants would find information about the multiple roles or functions of shared employees disclosed in Part III, Item 7 of proposed Form ATS-N important in evaluating whether to route orders to a particular ATS. For example, to identify and understand potential sources of information leakage, market participants would likely want to know if an employee of the broker-dealer operator that is responsible for the operations of a system supporting the NMS Stock ATS is also responsible for the proprietary trading activity of an affiliate of the broker-dealer operator that trades on the NMS Stock ATS. In this example, market participants might also be interested in understanding conflicts of interest that may result from the shared employee performing multiple roles, as the shared employee could have an incentive to alter the

operations of the NMS Stock ATS to benefit the broker-dealer operator or an affiliate of the NMS Stock ATS.⁴¹⁷

The Commission would preliminarily view any personnel that service the trading functions of the NMS Stock ATS, such as those performing information technology, programming, testing, or system design functions as employees that "service the operations of the NMS Stock ATS." Other employees of the NMS Stock ATS that are otherwise necessary for the trading functions of the NMS Stock ATS would also be included in the disclosure requirement of Part III, Item 7 of proposed Form ATS-N. Clerical employees or those performing solely administrative duties such as the payroll functions for the employees of the NMS Stock ATS would preliminarily not be included within the proposed disclosure.

Request for Comment

222. Do you believe the Commission should require the disclosure of the information on Part III, Item 7 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

223. Do you believe Part III, Item 7 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to "shared employees"? Why or why not? Please support your arguments.

224. Do you believe that Part III, Item 7 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to shared employees of the broker-dealer operator? If not, how should Part III, Item 7 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

225. Do you believe that it is sufficiently clear who would be considered a "shared employee" under Part III, Item 7 of proposed Form ATS-N? Why or why not? Is the scope of "shared employees" provided under Part III, Item 7 reasonable? Why or why not? Please explain.

226. Do you believe there is any information contained in the proposed disclosures in Part III, Item 7 of proposed Form ATS-N regarding shared employees of the broker-dealer operator that the NMS Stock ATS should not be required to disclose on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade

⁴¹⁷ The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates having shared employees, and the Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements.

⁴¹⁶ See Part III, Item 7 of proposed Form ATS-N.

secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

227. What are the potential costs and benefits of disclosing the information required by Part III, Item 7 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 7 of proposed Form ATS-N would have the potential to impact innovation or the manner in which NMS Stock ATSs and broker-dealer operators use their employees? Why or why not? Would the proposed disclosures in Part III, Item 7 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

228. Do you believe there is other information that market participants might find relevant or useful regarding shared employees of the broker-dealer operator? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

229. Do you believe that the Commission should expand the proposed disclosures in Part III, Item 7 of proposed Form ATS-N to other employees, personnel, or independent contractors of the broker-dealer operator? Why or why not? If so, which employees, personnel, or independent contractors should be included and what information about such persons should be solicited? Please explain.

230. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 7 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 7?

9. Service Providers to the NMS Stock ATS

Part III, Item 8 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether any operation, service, or function of the NMS Stock ATS is performed by any person(s) other than the broker-dealer operator of the NMS Stock ATS, and if so to: (1) Identify the person(s) (in the case of a natural person, to identify only the position or title) performing the operation, service, or function and note whether this service provider(s) is an affiliate of the broker-dealer, if applicable; (2) describe the operation, service, or function that the identified

person(s) provides and describe the role and responsibilities of that person(s); and (3) state whether the identified person(s), or any of its affiliates, may enter orders or other trading interest on the NMS Stock ATS and, if so, describe the circumstances and means by which such orders or other trading interest are entered on the NMS Stock ATS.⁴¹⁸

The Commission notes that Part III, Item 8 of proposed Form ATS-N expands on the disclosure requirements of Exhibit E on current Form ATS, which requires ATSs to disclose the name of any entity other than the ATS that will be involved in the operation of the ATS, including the execution, trading, clearing and settling of transactions on behalf of the ATS; and to provide a description of the role and responsibilities of each entity.⁴¹⁹ Part III, Item 8 of proposed Form ATS-N would require more detailed information about service providers to the NMS Stock ATS than is currently required by Form ATS, including whether affiliates of service providers may trade on the NMS Stock ATS.⁴²⁰

Under Part III, Item 8(a) of proposed Form ATS-N, the NMS Stock-ATS must identify any entity that performs any operation, service, or function for the NMS Stock ATS.⁴²¹ For example, an NMS Stock ATS may engage a third-party service provider to provide market data for the NMS Stock ATS to, among other things, calculate reference prices (such as the NBBO). Responses to Part III, Item 8(a) of proposed Form ATS-N would be required to include the name of the company that provides the market data. Part III, Item 8(b) of proposed Form ATS-N would require an NMS Stock ATS to provide, in detail, information about the operations, service, or function of the NMS Stock ATS that is provided by the identified third-party in Part III, Item 8(a) of proposed Form ATS-N and its roles and responsibilities with respect to that operation, service, or function. For

⁴¹⁸ See Part III, Item 8 of proposed Form ATS-N.

⁴¹⁹ See Item 7 of Form ATS (describing the requirements for Exhibit E to Form ATS).

⁴²⁰ The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates to have functions of the NMS Stock ATS performed by person(s) other than the broker-dealer operator of the NMS Stock ATS. The Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements.

⁴²¹ The Commission is not proposing to require than an NMS Stock ATS provide any personally identifiable information about any natural person in Part III, Item 8(a) of proposed Form ATS-N. Part III, Item 8(a) of proposed Form ATS-N is designed to solicit sufficient information to identify the entity or person providing the service, operation, or function to the NMS Stock ATS, such as the position or title in the case of a natural person acting as a service provider.

example, a broker-dealer operator may engage a third party to host and maintain the trading platform of the NMS Stock ATS. Part III, Item 8(b) of proposed Form ATS-N would require a description of those services and the specific role and responsibilities of the company and its employees. Responses to Part III, Item 8(b) of proposed Form ATS-N would be required to be sufficiently detailed such that market participants and the Commission could understand what functions are performed by a person other than an employee of the broker-dealer operator and what those services include. As guidance for completing this proposed disclosure item, the Commission would view an NMS Stock ATS simply stating that a third-party provides technology or hardware services to the NMS Stock ATS as not sufficiently responsive to the required disclosure. Responses to Part III, Item 8(b) of proposed Form ATS-N, in the example above, would require a detailed description of information technology services, including both hardware and software that may be provided, as well as any programming, ongoing maintenance, monitoring, and other functions the service provider would perform with respect to the NMS Stock ATS. As additional guidance, responses to Item 8 would also be required to include any service provider that provides, for example, such functions as consulting relating to the trading systems or functionality, cyber security, regulatory compliance, and record keeping services or functions of the NMS Stock ATS. Additionally, an NMS Stock ATS would be required to identify and describe the services of any service provider engaged for the purposes of the clearance and settlement of trades for the NMS Stock ATS.⁴²²

The Commission intends that the proposed disclosure requirements of Items 8(a) and (b) of Part III of proposed Form ATS-N would apply to any operation, service, or function performed by any person outside of the NMS Stock ATS entity, including affiliates of the broker-dealer operator.⁴²³ However, services provided

⁴²² The Commission notes that the examples listed above are not intended to be an exhaustive list of the types of services, and the level of detail about those services, that would be required by Part III, Item 8 of proposed Form ATS-N. The Commission preliminarily believes that the appropriate disclosure would be driven by the particular facts and circumstances of operational structure of the NMS Stock ATS.

⁴²³ If, for example, the SOR of an affiliate of the broker-dealer operator is used to route orders to and from the NMS Stock ATS, the SOR would need to be disclosed in Part III, Item 8 of proposed Form

to the NMS Stock ATS by employees of the broker-dealer operator would not need to be disclosed in Part III, Item 8 of proposed Form ATS-N. The activities of such persons, to the extent they are shared employees, would be disclosed pursuant to Part III, Item 7 of proposed Form ATS-N.⁴²⁴ The Commission also notes that it does not intend that the proposed disclosure requirements of Part III, Item 8 of proposed Form ATS-N would extend to operations, services, or functions that are administrative in nature and do not pose a significant risk of information leakage of confidential trading information, such as payroll functions servicing employees of the NMS Stock ATS or email services provided by an outside provider, because the Commission preliminarily believes that information about the services of such third-party services providers and their employees would not be relevant to market participants' evaluation of an NMS Stock ATS as a trading venue and would not be necessary for the Commission's oversight functions.

Items 8(a) and (b) of Part III of proposed Form ATS-N are designed to provide market participants and the Commission with information about how the NMS Stock ATS operates, potential conflicts of interest, and the potential for information leakage. In particular, the Commission preliminarily believes that this information would inform market participants, as well as the Commission, about what aspects of the NMS Stock ATS's operations are performed by third-parties that may or may not be under the control of the broker-dealer operator. For example, an NMS Stock ATS whose trading system is operated or supported by a third-party service provider may have business interests that are aligned with those of the service provider. Additionally, depending on the role and responsibilities of the third-party service provider, market participants may want to evaluate the robustness of the NMS Stock ATS's safeguards and procedures to protect confidential subscriber information.

Lastly, Part III, Item 8(c) of proposed Form ATS-N would require an NMS Stock ATS to state whether any person identified in Part III, Item 8(a) of proposed Form ATS-N or any of its

ATS-N and would likely also need to be disclosed in Part III, Item 6 of proposed Form ATS-N, which relates to SORs used by the broker-dealer operator or its affiliates.

⁴²⁴ See *supra* Section VII.B.8 (discussing proposed requirements for disclosure pertaining to NMS Stock ATS employees that are shared employees with other business units of the broker-dealer operator or its affiliates).

affiliates may enter orders or other trading interest on the NMS Stock ATS and if so, to describe the circumstances and means by which such orders or other trading interests are entered on the NMS Stock ATS. The purpose of these disclosures is to provide market participants and the Commission with information about the potential for conflicts of interest that may result from a service provider, or its affiliates, trading on the NMS Stock ATS and the potential for information leakage. For example, the Commission preliminarily believes that a subscriber or potential subscriber likely would want to know whether a person that is not an employee of the broker-dealer operator, but is contracted to service the trading platform that contains the NMS Stock ATS's book of orders, could enter orders or other trading interest on the NMS Stock ATS. Similarly, the Commission preliminarily believes that a subscriber or a potential subscriber would also want to know whether an affiliate of the service provider could enter orders or other trading interest on the NMS Stock ATS as well and whether its means of access differ from other subscribers. Under both of these scenarios, a potential conflict of interest could result if the service provider has business interests that compete with the trading interests of other subscribers to the NMS Stock ATS.

Request for Comment

231. Do you believe the Commission should require the disclosure of the information on Part III, Item 8 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

232. Do you believe Part III, Item 8 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any operation, service, or function of the NMS Stock ATS performed by any person other than the broker-dealer operator? Why or why not? Please support your arguments.

233. Do you believe that Part III, Item 8 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to service providers of the NMS Stock ATS? If not, how should Part III, Item 8 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

234. What are the potential costs and benefits of disclosing the information required by Part III, Item 8 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 8 of proposed Form ATS-N would have the

potential to impact innovation or discourage arrangements with other service providers? Why or why not? Would the proposed disclosures in Part III, Item 8 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

235. Do you believe that any of the information in the proposed disclosure requirements of Part III, Item 8 of proposed Form ATS-N regarding service providers to the NMS Stock ATS should not be required to be disclosed on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

236. Do you believe the Commission should adopt a more limited or expansive definition of "affiliate" for purposes of this disclosure item? Why or why not? Please support your arguments.

237. Do you believe there is other information that market participants might find relevant or useful regarding any operation, service, or function of the NMS Stock ATS performed by any person other than the broker-dealer operator? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

238. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 8 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 8?

10. Differences in Availability of Services, Functionality, or Procedures

Part III, Item 9 of proposed Form ATS-N would require an NMS Stock ATS to identify and describe any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS. The purpose of this disclosure is to alert market participants to the existence of system, functionality, or trading features that the broker-dealer operator or its affiliates may have that

other subscribers do not.⁴²⁵ For example, an NMS Stock ATS may employ different procedures governing how orders entered on the NMS Stock ATS by the broker-dealer operator's business units or affiliates are segmented than it does for other subscribers. The Commission preliminarily believes that the disclosure of those differences in procedures would allow market participants to evaluate whether such differences might put them at a disadvantage when competing against the broker-dealer operator or its affiliates for an execution on the NMS Stock ATS and thus, better enable market participants to decide whether submitting order flow to that NMS Stock ATS aligns with their trading or investment objectives.

The Commission notes that a significant difference between national securities exchanges and NMS Stock ATSs is the extent to which each trading center allows access to its services by its users. Section 6(b)(2) of the Exchange Act generally requires registered national securities exchanges to allow any qualified and registered broker-dealer to become a member of the exchange—a key element in assuring fair access to national securities exchange services.⁴²⁶ In contrast, the access requirements that apply to ATSs are much more limited. Because NMS Stock ATSs are exempt from the definition of an “exchange” so long as they comply with Regulation ATS, and thus, are not required to register as a national securities exchange pursuant to Sections 5 and 6 of the Exchange Act, NMS Stock ATSs are not required to provide fair access unless they reach a 5% trading volume threshold in a stock, which almost all NMS Stock ATSs currently do not.⁴²⁷ As a result, access to the services of NMS Stock ATSs is determined primarily by private negotiation, and such access to services can differ among persons that subscribe to the NMS Stock ATS.

While the Commission is not proposing to change the fair access requirements applicable to NMS Stock ATSs in this proposal, the Commission is proposing to require, among other things, disclosures on Form ATS-N that identify and describe differences among

subscribers (or other persons) in the services, procedures or functionalities that an NMS Stock ATS provides, as well as disclosures that identify and describe any services, functionalities, or procedures of an NMS Stock ATS that are available to the broker-dealer operator's affiliates, but are not available to subscribers. The Commission preliminarily believes that the disclosure of these differences would allow market participants to evaluate whether such differences might put them at a disadvantage when trading on a particular NMS Stock ATS and thus, better enable market participants to decide whether submitting order flow to that NMS Stock ATS aligns with their trading or investment objectives.

The Commission notes that ATSs may treat subscribers differently with respect to the services offered by the ATS unless prohibited by applicable federal securities laws or the rules and regulations thereunder. For example, an ATS with at least 5% of the average daily volume for any covered security during four of the preceding six months is required to comply with fair access requirements under Rule 301(b)(5) of Regulation ATS,⁴²⁸ which, among other things, requires an ATS to establish written standards for granting access to trading on its system and not unreasonably prohibiting or limiting any person with respect to access to services offered by the ATS by applying the written standards in an unfair or discriminatory manner. Thus, for example, an ATS that discloses a service to one class of subscribers (or makes the associated functionality available to only one class of subscribers) could not, if it were subject to the fair access requirements, discriminate in this manner unless it had fair and non-discriminatory reasons for doing so. The Commission further notes that, even if an ATS is not subject to the fair access requirements, inaccurate or misleading disclosures about an ATS's operations could result in violations of the antifraud provisions of the federal securities laws.⁴²⁹

Request for Comment

239. Do you believe the Commission should require the disclosure of the

⁴²⁸ See *id.*

⁴²⁹ See, e.g., UBS Settlement at 14, ITG Settlement at 15, Pipeline Settlement at 16, and Liquidnet Settlement at 14, *supra* note 374 (all noting violations of Section 17(a)(2) of the Securities Act, which prohibits, directly or indirectly, in the offer or sale of securities, obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.) 15 U.S.C. 77q(a)(2).

information on Part III, Item 9 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

240. Do you believe Part III, Item 9 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS? Why or why not? Please support your arguments.

241. Do you believe there is other information that market participants might find relevant or useful regarding any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

242. Do you believe that Part III, Item 9 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to the differences in services provided to the broker-dealer operator or its affiliates trading on the NMS Stock ATS? If not, how should Part III, Item 9 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

243. Do you believe that the proposed disclosures in Part III, Item 9 of proposed Form ATS-N that are intended to cover differences in services, functionalities, or procedures should be applied to affiliates of the broker-dealer operator? Why or why not? Conversely, should such disclosures be extended to more remote affiliates under a revised definition of “affiliate”?⁴³⁰ Should disclosure apply to a more limited set of affiliates? Why or why not? Please support your arguments.

244. What are the potential costs and benefits of disclosing the information required by Part III, Item 9 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 9 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 9 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to

⁴³⁰ See, e.g., *supra* note 385 and accompanying text.

⁴²⁵ The Commission notes that it is similarly proposing to require NMS Stock ATSs to disclose differences in the treatment of subscribers on the NMS Stock ATS in a number of proposed disclosure requirements. See, e.g., proposed Items 1(a) and 1(b) of Part IV of proposed Form ATS-N.

⁴²⁶ 15 U.S.C. 78f(b)(2).

⁴²⁷ See 17 CFR 242.301(b)(5). See also *supra* notes 92–95 and accompanying text (discussing the fair access requirements of Regulation ATS).

reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

245. Do you believe there is any information regarding differences in services, functionalities, or procedures of the NMS Stock ATS that are available to the broker-dealer operator or its affiliates and not other subscribers that should not be required disclosures on Form ATS–N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

246. Do you believe that the Commission should propose amendments to Rule 301(b)(5) of Regulation ATS to lower the trading volume threshold in Regulation ATS that triggers the fair access requirement from its current 5%? If so, what is the appropriate threshold? Please support your arguments.

247. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 9 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 9?

11. Confidential Treatment of Trading Information

Part III, Item 10 of proposed Form ATS–N is based on the requirements of Rule 301(b)(10) of Regulation ATS,⁴³¹ and would require an NMS Stock ATS to describe the written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS. It would also require an NMS Stock ATS to: (a) Describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates); (b) identify the positions or titles of any persons that have access to the confidential trading information, describe the confidential trading information to which the persons have access, and describe the circumstances under which the persons can access confidential trading information; (c) describe the written standards controlling employees of the NMS Stock ATS trading for the employees' accounts; and (d) describe the written oversight procedures to ensure that the safeguards and

procedures described above are implemented and followed.

As previously noted,⁴³² the Commission stated when adopting Regulation ATS that Rule 301(b)(10) did not preclude a broker-dealer that operated an ATS from engaging in other broker-dealer functions. However, to prevent the misuse of private subscriber and customer trading information for the benefit of other customers or activities of the broker-dealer operator, the Commission required that ATSs have in place safeguards and procedures to protect that confidential trading information and to separate ATS functions from other broker-dealer functions.⁴³³ In adopting Rule 301(b)(10), the Commission stated that the rule was meant to ensure that information, such as the identity of subscribers and their orders, be available only to those employees of the alternative trading system who operate the system or are responsible for its compliance with applicable rules.⁴³⁴ Thus, a broker-dealer operator may not convert confidential trading information of ATS subscribers for use by the non-ATS business units operated by the broker-dealer.

The protection of subscribers' confidential trading information remains a bedrock component of the regulation of ATSs, including those that trade NMS stocks, and is essential to ensuring the integrity of ATSs as execution venues. To the extent that subscribers cannot be assured that their confidential trading information will be protected by an ATS, many of the advantages or purposes for which a subscriber may choose to send its orders to an ATS (*e.g.*, trade anonymously and/or to mitigate the impact of trading large positions)⁴³⁵ are eliminated. Moreover, if subscribers' confidential trading information is shared without subscribers' consent, that information may be used by the recipient of the information to gain a competitive advantage over the subscriber. In cases where the confidential trading information of a subscriber is impermissibly shared with the personnel of the broker-dealer operator or any of its affiliates (*i.e.*, persons who are not responsible for the operation of

the ATS or compliance with applicable rules), such an abuse is compounded by the conflicting interests of the broker-dealer operator. That is, in such a case, the broker-dealer operator has invited subscribers to trade on its ATS and may have abused that relationship to provide itself or its affiliates with a direct competitive advantage over that subscriber. The Commission preliminarily believes that disclosure is necessary in this area so market participants can independently evaluate the robustness of the safeguards and procedures that are employed by the NMS Stock ATS to protect subscriber confidential trading information and decide for themselves whether they wish to do business with a particular NMS Stock ATS.

Part III, Item 10(a) of proposed Form ATS–N would require the NMS Stock ATS to describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates). Disclosing the means by which a subscriber can consent or withdraw consent from the sharing of such information would allow subscribers and potential subscribers to understand what information about their orders or other trading interest will be kept confidential and how they can specify the means by which they choose to share confidential information. As the Commission noted in the adoption of Regulation ATS, subscribers should be able to give consent if they so choose to share their confidential trading information.⁴³⁶ ATSs that transact in NMS stocks vary in terms of what types of orders, indications of interests, or other forms of trading interest are confidential on their systems and what specific information about such trading interest may be shared. For example, an ATS might provide that no IOIs submitted by subscribers will be considered confidential, but may provide subscribers with the option to restrict the information in the IOI message to just the symbol and side (*i.e.*, buy or sell). In this example, responses to Item 10(a) would require an NMS Stock ATS to describe the means by which a subscriber or potential subscriber could control some of the information contained in the IOI message by providing consent or withdrawing such consent for the sharing of its confidential trading information.⁴³⁷

⁴³² See *infra* Sections IX and X (discussing the requirements of Rule 301(b)(10) and proposed amendments to require that safeguards and procedures be written and preserved).

⁴³³ See Regulation ATS Adopting Release, *supra* note 7, at 70879.

⁴³⁴ *Id.*

⁴³⁵ See *id.* (stating that many of the ATSs popular at the time Regulation ATS was adopted were anonymous and that many ECNs at that time were popular because they permitted wide dissemination of orders but provided anonymity).

⁴³⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70879.

⁴³⁷ The Commission notes that there may be some NMS Stock ATSs that might not offer any means by

⁴³¹ 17 CFR 242.301(b)(10).

Part III, Item 10(b) of proposed Form ATS–N, which would require that ATSs identify any person that has access to confidential trading information, the type of information, and the circumstances under which they may access such information, is meant to provide transparency into the potential sources from which confidential trading information might be compromised. As noted above, Regulation ATS requires that access to confidential subscriber information be available only to those employees of the ATS that operate the system or are responsible for the ATS's compliance with applicable rules.⁴³⁸ The Commission preliminarily believes that requiring ATSs to disclose the list by title or position of all personnel that can access the confidential trading information of subscribers would buttress the existing obligations on ATSs to restrict access only to permitted personnel (*i.e.*, those responsible for its operation or compliance).

Part III, Item 10(b) of proposed Form ATS–N would also require the NMS Stock ATS to describe the confidential trading information that may be accessed by permitted persons. For example, employees that operate the NMS Stock ATS may be able to see the size, side, and symbol of an order but not the identity of the subscriber that submitted the order. The Commission preliminarily believes that subscribers and potential subscribers to the NMS Stock ATS likely would find it useful to know the range of confidential trading information that a person may have access to. Item 10(b) would also require the disclosure of the circumstances under which confidential trading information may be accessed by permitted persons. This disclosure requirement is designed to encompass the reasons for which confidential subscriber information might be accessed. For example, an NMS Stock ATS may only permit its designated employees access to confidential subscriber information when it is necessary to break certain trades or to perform system maintenance or repairs. Disclosures in Item 10(b) generally should describe whether the information is available in real-time (*i.e.*, as trading is occurring on the platform) or whether the information relates to historical activity by one or more subscribers.⁴³⁹

which a subscriber could consent to the dissemination of its confidential trading information. An NMS Stock ATS would be required to disclose this fact pursuant to Item 9(a).

⁴³⁸ See Regulation ATS Adopting Release, *supra* note 7, at 70879; 17 CFR 242.301(b)(10)(i)(A).

⁴³⁹ For example, an NMS Stock ATS that permits access to the confidential trading information of

Part III, Items 10(c) and (d) of proposed Form ATS–N closely track the existing requirements of Regulation ATS encompassed in Rule 301(b)(10)(i)(B) and (b)(10)(ii) respectively. The Commission preliminarily believes that market participants and the Commission would benefit from a description of the NMS Stock ATS's standards in ensuring that employees of the NMS Stock ATS cannot trade for their own account using confidential trading information and the procedures adopted by the NMS Stock ATS to ensure its safeguards and procedures are followed. The Commission notes that, pursuant to existing Rule 301(b)(10), the Commission requires ATSs to have in place such standards, policies, and procedures. As discussed in greater detail below, the Commission is proposing to amend Regulation ATS to provide that these standards, policies, and procedures be written.⁴⁴⁰ By requiring that these standards, policies, and procedures be written and that a description of them be publicly disclosed in Part III, Item 10 of proposed Form ATS–N, NMS Stock ATSs may be encouraged to carefully consider the adequacy of their means of protecting the confidential trading information of subscribers, which may result in more robust protections of such information. Market participants would be able to evaluate the relative robustness of such standards, policies, and procedures based on the disclosures provided in Part III, Item 10 of proposed Form ATS–N, which would in turn allow them to better evaluate the NMS Stock ATS to which they might route orders or become a subscriber.

Request for Comment

248. Do you believe the Commission should require the disclosure of the information on Part III, Item 10 of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

249. Do you believe Part III, Item 10 of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS? Why or why not? Please support your arguments.

250. Do you believe that Part III, Item 10 of proposed Form ATS–N is sufficiently clear with respect to the

subscribers for breaking trades generally should specify, if true, that access to that information would only be of previous activity on the NMS Stock ATS for the purpose of breaking a trade.

⁴⁴⁰ See *infra* Section IX.

disclosures that would be required relating to the NMS Stock ATS's obligations under Rule 301(b)(10) of Regulation ATS, including a description of the safeguards and procedures of the NMS Stock ATS to protect the confidential trading information of subscribers? If not, how should Part III, Item 10 of proposed Form ATS–N be revised to provide additional clarity? Please explain.

251. Do you believe that any of information in the proposed disclosure requirements of Part III, Item 10 of proposed Form ATS–N, including a description of the NMS Stock ATS's safeguards and procedures to protect the confidential trading information of subscribers, should not be required to be disclosed on proposed Form ATS–N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

252. Do you believe that the proposed disclosures in Part III, Item 10(a) of proposed Form ATS–N requiring an NMS Stock ATS to describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information should be disclosed? Do ATSs that currently transact in NMS stock inform subscribers as to what trading information is considered confidential and/or provide a means for subscribers to give or withdraw consent to the disclosure of such trading information? Please explain.

253. Do you believe that the proposed disclosures in Part III, Item 10(b) of proposed Form ATS–N requiring an NMS Stock ATS to identify the positions or titles of any persons that have access to the confidential trading information of subscribers, what information they may obtain, and the circumstances under which such persons may obtain that information should be disclosed? Why or why not? Please support your arguments.

254. Do you believe there is other information that market participants might find relevant or useful regarding NMS Stock ATSs obligations under Rule 301(b)(10) and the protection of the confidential trading information of subscribers that has not been proposed in Part III, Item 10 of proposed Form ATS–N? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

255. What are the potential costs and benefits of disclosing the information required by Part III, Item 10 of proposed Form ATS–N? Would the proposed

disclosures in Part III, Item 10 of proposed Form ATS–N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

256. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 10 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 10?

VIII. Part IV of Proposed Form ATS–N: The Manner of Operations of the NMS Stock ATS

Given the dispersal of trading volume in NMS stocks among an increasing number of trading centers,⁴⁴¹ the decision of where to route orders to obtain best execution for market participants is critically important. Today, NMS Stock ATSs account for a significant source of liquidity for NMS stocks and compete with, and operate functionally similar to, registered national securities exchanges.⁴⁴² Notwithstanding the importance of NMS Stock ATSs as a source of liquidity in NMS stocks and the increasing operational complexity of NMS Stock ATSs, market participants have limited information about how these markets operate. The Commission is concerned that this lack of operational transparency impedes market participants from adequately discerning how orders interact, match, and execute on NMS Stock ATSs, and may hinder market participants' ability to obtain, or monitor for, best execution for their orders. The current disclosures on Form ATS are confidential, and even in cases where an ATS voluntarily discloses its Form ATS publicly, ATSs have often been reluctant to provide more than summary disclosures about their operations. As a result, neither the Commission nor market participants currently receive a full picture of the operations of NMS Stock ATSs. The Commission preliminarily believes that the information that would be disclosed on proposed Form ATS–N, and in particular Part IV of the Form, would significantly improve the opportunity for market participants and the

Commission to understand the operations of NMS Stock ATSs.

Part IV of proposed Form ATS–N would require that the NMS Stock ATS include as Exhibit 4 information about the operations of an NMS Stock ATS. Specifically, Part IV of proposed Form ATS–N would require detailed information about the operations of NMS Stock ATSs, including the following, which are discussed in more detail below: Subscribers; hours of operations; order types; connectivity and order entry; segmentation of order flow; display of orders and trading interest; trading services; procedures governing suspension of trading and trading during system disruptions and malfunctions; opening, reopening, closing and after-hours trading procedures; outbound routing from the NMS Stock ATS; use of market data by the NMS Stock ATS; fees; trade reporting, clearance and settlement procedures; order display and execution access; and fair access standards. The proposed disclosure requirements are designed to assist market participants in assessing an NMS Stock ATS as a trading venue. The Commission preliminarily believes that the information that would be required to be disclosed on proposed Form ATS–N would allow market participants to compare and evaluate NMS Stock ATSs, as well as compare NMS Stock ATSs with national securities exchanges, as the type and level of information required by Part IV of proposed Form ATS–N would be generally similar to the information disclosed by national securities exchanges about their operations. For example, the rules of national securities exchanges, which are publicly available,⁴⁴³ include membership eligibility requirements, hours of operations, the operation of order types, the structure of the market (e.g., auction market, limit order matching book), priority, and opening and closing procedures, among other things. In addition, information provided on proposed Form ATS–N should assist the Commission, and the SRO for the broker-dealer operator, in exercising oversight over the broker-dealer operator.⁴⁴⁴

A. Subscribers

Part IV, Item 1 of proposed Form ATS–N would require an NMS Stock ATS to disclose information regarding

any eligibility requirements to access the NMS Stock ATS, terms and conditions of use, types of subscribers, arrangements with liquidity providers, and any procedures or standards to limit or deny access to the NMS Stock ATS.⁴⁴⁵

Part IV, Item 1(a) of proposed Form ATS–N would require an NMS Stock ATS to describe any eligibility requirements to gain access to the services of the NMS Stock ATS. If the eligibility requirements are not the same for all subscribers and persons, an NMS Stock ATS would be required to describe any differences. This item is designed to provide potential subscribers with information about any conditions they would need to satisfy prior to accessing the NMS Stock ATS. Based on Commission experience, the eligibility process and requirements to access an NMS Stock ATS vary, and the requirements may differ depending on whether a potential subscriber is a customer of the broker-dealer operator of the NMS Stock ATS. For instance, some NMS Stock ATSs require that a potential subscriber be a broker-dealer to enter orders on the NMS Stock ATS, while other NMS Stock ATSs do not. Some NMS Stock ATSs may require potential subscribers to submit financial information as a pre-requisite to subscribing to, or maintaining their subscriber status on, the NMS Stock ATS.⁴⁴⁶ The Commission preliminarily believes that market participants would find it useful to understand an NMS Stock ATS's eligibility requirements so they may determine whether they may qualify for access to an NMS Stock ATS.⁴⁴⁷ The Commission preliminarily believes that making such information publicly available would provide efficiencies, as a market participant could source information about, and compare and contrast, the eligibility processes and requirements to access different NMS Stock ATSs. The Commission also preliminarily believes that it would be better able to monitor

⁴⁴⁵ The Commission notes that Exhibit A of current Form ATS requires an ATS to describe its classes of subscribers (for example, broker-dealer, institution, or retail) and any differences in access to the services offered by the ATS to different groups or classes of subscribers. Part IV, Section 1 of proposed Form ATS–N would require similar information, but the proposed requirements of Form ATS–N are designed to solicit more detailed information than that currently solicited by Form ATS.

⁴⁴⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70859 (stating that the limitation on ATSs governing the conduct of subscribers does not preclude an ATS from requiring financial information from subscribers).

⁴⁴⁷ See Liquidnet letter #1, *supra* note 166 and accompanying text (stating disclosures should include the admission criteria for each ATS).

⁴⁴¹ See *supra* Section III.A (discussing the various trading venues for NMS stocks and the significance of NMS Stock ATSs as a significant source of liquidity).

⁴⁴² See *id.*

⁴⁴³ See *supra* note 303.

⁴⁴⁴ The SRO for an ATS has responsibility for overseeing the activities of the broker-dealer operator, which includes the activities of the NMS Stock ATS and surveilling the trading that occurs on the NMS Stock ATS. See Regulation ATS Adopting Release, *supra* note 7, at 70863.

the extent to which NMS Stock ATSs are available to market participants and obtain a thorough understanding of NMS Stock ATS's eligibility processes and requirements.

Request for Comment

257. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(a) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

258. Do you believe Part IV, Item 1(a) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to eligibility requirements to gain access to the services of the NMS Stock ATS? Why or why not? Please support your arguments.

259. Is it sufficiently clear what information would be required by Part IV, Item 1(a) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

260. Do you believe there is other information that market participants might find relevant or useful regarding the eligibility process or requirements to gain access to the services of the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

261. Do you believe there is any information that would be required by Part IV, Item 1(a) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

262. Do you believe that subscribers and potential subscribers would benefit from knowing the eligibility requirements of the NMS Stock ATS? Why or why not? Please support your arguments.

263. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(a) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(a) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

264. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(a) of proposed Form ATS-N other than through

disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(a)?

Part IV, Item 1(b) of proposed Form ATS-N would require an NMS Stock ATS to describe the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on the NMS Stock ATS, and to state whether these contractual agreements are written. Furthermore, if the terms and conditions of any contractual agreements are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Based on Commission experience, these contractual agreements may or may not be in writing, and the terms and conditions therein can vary among subscribers to the NMS Stock ATSs.

The Commission preliminarily believes that it would be important for all subscribers to have access to all relevant information regarding the terms and conditions for accessing the trading services of the NMS Stock ATS, which today may not always be available to all subscribers. This item would allow subscribers to understand their rights and obligations in connection with their use of the NMS Stock ATS, and allow subscribers and potential subscribers to assess whether other market participants may have access arrangements more favorable than their own. This information is designed to help market participants when evaluating which trading centers they could or would like to access, and on which terms they could seek executions on those trading centers. The Commission preliminarily believes that having such information publicly available would provide efficiencies as market participants could more easily source information about the terms and conditions under which they could trade across NMS Stock ATSs, as well as compare those terms and conditions to those of national securities exchanges. The Commission understands that some NMS Stock ATSs communicate the terms and conditions to access the NMS Stock ATS orally to subscribers, often as part of an onboarding process, and do not provide written contractual agreements. The Commission preliminarily believes that market participants would benefit from knowing whether a written contractual agreement exists that sets forth the terms and conditions for accessing and trading on the NMS Stock ATS.

Furthermore, the Commission preliminarily believes that the disclosures that would be required under Item 1(b) would better inform potential subscribers about whether additional inquiry is necessary to fully understand the terms and conditions for trading on the NMS Stock ATS.

Request for Comment

265. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(b) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

266. Do you believe Part IV, Item 1(b) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS? Why or why not? Please support your arguments.

267. Is it sufficiently clear what information would be required by Part IV, Item 1(b) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

268. Do you believe there is other information that market participants might find relevant or useful regarding the terms and conditions of any contractual agreements by which access is granted to the services of the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

269. Do you believe there is any information that would be required by Part IV, Item 1(b) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

270. Do you believe that NMS Stock ATSs commonly have written contractual agreements for granting access to the NMS Stock ATS? Why or why not, and what is the basis for such belief? If not, how is access granted? How are the terms and conditions of trading on the NMS Stock ATS communicated to subscribers? Is there commonly an onboarding process for new subscribers? What does such onboarding process entail? Please explain in detail.

271. Do you believe there are agreements between subscribers and an NMS Stock ATS that are not written? If so, what is the basis for your belief,

what do those non-written agreements encompass, and how are they communicated to subscribers? Are any materials other than contracts provided to subscribers that set forth terms and conditions for granting access to the NMS Stock ATS? Please explain in detail.

272. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(b) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(b) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

273. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(b) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(b)?

Part IV, Item 1(c) of proposed Form ATS-N would require an NMS Stock ATS to describe the types of subscribers and other persons that use the services of the NMS Stock ATS (e.g., institutional and retail investors, broker-dealers, proprietary trading firms). The NMS Stock ATS would also be required to state whether it accepts non-broker-dealers as subscribers to the NMS Stock ATS and describe any criteria for distinguishing among types of subscribers, classes of subscribers, or other persons.

This item would provide information about the types of subscribers to the NMS Stock ATS, or other persons that can enter orders onto the NMS Stock ATS, so that market participants and the Commission would be better informed about the type of order flow that may be present on the NMS Stock ATS.

Moreover, this item would, in conjunction with the other disclosure requirements of proposed Form ATS-N regarding differences in access to services or functionality of the NMS Stock ATS, inform market participants of any privileges or restrictions that attach to different categories of subscribers so that subscribers could evaluate which privileges or restrictions might apply to them or the counterparties against which they would be trading.⁴⁴⁸ For example, an NMS Stock ATS may only allow certain types of subscribers, including

institutional investors, retail investors, broker-dealers, or proprietary trading firms, to enter a certain type of order on the NMS Stock ATS. Additionally, NMS Stock ATSs may assign different priorities to orders based on the types of subscribers that entered the orders on the NMS Stock ATS, such as orders originating from retail brokerage accounts or proprietary traders. Furthermore, the Commission understands that subscribers may wish to preclude or limit the interaction of their orders with the orders of certain other subscribers for several reasons, such as to help reduce information leakage or the possibility of trading with counterparties that they perceive to be undesirable. Accordingly, the Commission preliminarily believes that subscribers would find it useful to know the types of subscribers or other persons transacting on the NMS Stock ATS, and with that knowledge, they would be in a better position to evaluate the order flow on the NMS Stock ATS and determine whether they may wish to send their orders to the NMS Stock ATS for execution.⁴⁴⁹ The Commission also preliminarily believes that increased transparency regarding the types of subscribers—and distinctions an NMS Stock ATS makes among subscribers or other persons when trying to access the ATS—would advance the Commission's objective of protecting investors by giving them better information with which to protect their own interests.

Request for Comment

274. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(c) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

275. Do you believe Part IV, Item 1(c) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the types of subscribers and other persons that use the services of the NMS Stock ATS? Why or why not? Please support your arguments.

276. Is it sufficiently clear what information would be required by Part IV, Item 1(c) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

277. Do you believe there is other information that market participants might find relevant or useful regarding distinctions made by the NMS Stock

ATS among subscribers? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

278. Do you believe there is any information that would be required by Part IV, Item 1(c) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

279. Do you believe that the information that would be required by Part IV, Item 1(c) of proposed Form ATS-N would aid subscribers in evaluating the order flow on the NMS Stock ATS and determining whether they wish to send their orders there for execution? Why or why not? Please support your arguments.

280. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(c) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(c) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

281. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(c) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(c)?

Part IV, Item 1(d) of proposed Form ATS-N would require an NMS Stock ATS to describe any formal or informal arrangement the NMS Stock ATS has with a subscriber(s) or person(s) to provide liquidity to the NMS Stock ATS (e.g., undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). Item 1(d) would further require an NMS Stock ATS to describe the terms and conditions of each arrangement and identify any liquidity providers that are affiliates of the broker-dealer operator.

An NMS Stock ATS may want to ensure that there is sufficient liquidity in a particular NMS stock to incentivize subscribers to send order flow in that NMS stock to the NMS Stock ATS; market participants may believe they are more likely to get an execution because of such liquidity. The Commission understands that some ATSs that trade

⁴⁴⁸ But see *supra* notes 92–95 and 427–429 and accompanying text (discussing the fair access requirements of Regulation ATS).

⁴⁴⁹ See Lime Brokerage letter, *supra* note 192 and accompanying text (stating the Commission should require “transparency around . . . membership of dark pools”).

NMS stocks may engage certain subscribers to provide liquidity to the NMS Stock ATS and perform similar functions to that of a market maker on a national securities exchange.⁴⁵⁰ These liquidity providers may quote in a particular NMS stock on the NMS Stock ATS during trading hours and may receive a benefit for performing this function, such as discounts on fees, rebates, or the opportunity to execute with a particular type of segmented order flow.⁴⁵¹ The obligations required of liquidity providers and the benefits they are provided vary across NMS Stock ATSs. Accordingly, the Commission proposes to require NMS Stock ATSs to describe the terms of any formal or informal arrangement with a liquidity provider, which could entail such obligations and benefits as well as a description of the process by which a subscriber could become a liquidity provider on the NMS Stock ATS. The Commission preliminarily believes that information about liquidity providers would be useful to subscribers and market participants who, for example, may want their orders to only interact with agency orders (and not with those of a liquidity provider), or, conversely, may themselves want to become a liquidity provider on the NMS Stock ATS.

Part IV, Item 1(d) of proposed Form ATS-N would also require an NMS Stock ATS to identify any liquidity providers that are affiliates of the broker-dealer operator. The Commission preliminarily believes that market participants would find it useful to know whether the broker-dealer operator itself, or its affiliates, have an arrangement to provide liquidity to the NMS Stock ATS. The Commission preliminarily believes that such information could reveal potential conflicts of interest, if, for example, an NMS Stock ATS were to only permit affiliates to act as liquidity providers

⁴⁵⁰ See, e.g., The NASDAQ Stock Market LLC, Rule 4613, Market Maker Obligations. Market-makers on a national securities exchange typically undertake, among other things, two-sided quote obligations where the market maker holds itself out as willing to buy and sell a particular security or securities for its own account on a continuous basis during trading hours. The obligations required of market makers may vary across national securities exchanges.

⁴⁵¹ Often, market makers on national securities exchanges are provided benefits for providing liquidity to the exchange, such as fee discounts, rebates, or volume incentive programs that may not be available to non-market makers. See, e.g., The NASDAQ Stock Market LLC, Rule 7014, Market Quality Incentive Programs (describing the "Qualified Market Maker Program" and "Lead Market Maker Program"). The attendant benefits provided to market makers may vary across national securities exchanges.

and provided significant benefits for performing that function.

Request for Comment

282. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(d) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

283. Do you believe Part IV, Item 1(d) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to any formal or informal arrangement the NMS Stock ATS has with a subscriber(s) or person(s) to provide liquidity to the NMS Stock ATS? Why or why not? Please support your arguments.

284. Is it sufficiently clear what information would be required by Part IV, Item 1(d) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

285. Do you believe there is other information that market participants might find relevant or useful regarding arrangements with subscribers or other persons to provide liquidity to the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

286. Do you believe there is any information that would be required by Part IV, Item 1(d) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

287. Do you believe that the information that would be required by Part IV, Item 1(d) of proposed Form ATS-N would aid subscribers in evaluating the order flow on the NMS Stock ATS and determining whether they wish to send their orders there for execution? Why or why not? Please support your arguments.

288. Do you believe that the proposed requirement in Part IV, Item 1(d) of proposed Form ATS-N that the NMS Stock ATS identify any liquidity providers that are affiliates of the broker-dealer operator would aid subscribers in evaluating potential conflicts of interest of the broker-dealer operator, the order flow on the NMS Stock ATS, and determining whether they wish to send their orders there for execution? Why or why not? Please support your arguments.

289. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(d) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(d) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

290. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(d) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(d)?

Part IV, Item 1(e) of proposed Form ATS-N would require an NMS Stock ATS to describe the circumstances by which access to the NMS Stock ATS for a subscriber or other person may be limited or denied, and describe any procedures or standards that are used to determine such action. If these circumstances, procedures, or standards are not applicable to all subscribers and persons, the NMS Stock ATS would be required to describe any differences. As an ATS, an NMS Stock ATS cannot exercise SRO powers and may not discipline subscribers other than by excluding them from trading.⁴⁵² The Commission understands that ATSs that trade NMS stocks have rules governing subscribers' participation on the ATS, and that if a subscriber fails to comply with these rules, the ATS may limit or deny access to the NMS Stock ATS.⁴⁵³ These limitations can result in some subscribers having different levels of functionality or more favorable terms of access than others. The Commission preliminarily believes that it is important for subscribers to have advance notice of the circumstances under which their access to NMS Stock ATSs would be limited or denied, and the procedures or standards that would be used to govern such actions. The Commission preliminarily believes that understanding such information would provide efficiencies as a market participant could source information about potential limits to accessing an

⁴⁵² See *supra* note 286 and accompanying text.

⁴⁵³ Form ATS-R, Exhibit C requires an ATS subject to the fair access obligations under Rule 301(b)(5) of Regulation ATS to list all persons granted, denied, or limited access to the ATS during the period covered by the ATS-R report, designating for each person (a) whether they were granted, denied, or limited access; (b) the date the alternative trading system took such action; (c) the effective date of such action; and (d) the nature of any denial on limitation of access. See Form ATS-R.

NMS Stock ATS, even if that market participant otherwise meets the eligibility criteria for subscribing to the NMS Stock ATS, and it would allow them to evaluate whether any limitations may result in receiving less favorable access from the NMS Stock ATS. The increased transparency regarding these procedures also may advance the Commission's objective of protecting investors by helping the Commission to understand when NMS Stock ATSs deny or limit access to market participants.

Request for Comment

291. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(e) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

292. Do you believe Part IV, Item 1(e) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the circumstances by which access to the NMS Stock ATS for a subscriber or other person may be limited or denied? Please explain.

293. Is it sufficiently clear what information would be required by Part IV, Item 1(e) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

294. Do you believe there is other information that market participants might find relevant or useful regarding the process by which access to an NMS Stock ATS for a subscriber may be limited or denied? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

295. Do you believe there is any information that would be required by Part IV, Item 1(e) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

296. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(e) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(e) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

297. Do you believe there are circumstances under which NMS Stock

ATSs currently limit the functionality available to subscribers due to an action or inaction on the part of a subscriber? If so, what is the basis for your belief, what are those circumstances, and what functionality is typically limited? Is it common for an NMS Stock ATS to deny access to subscribers as opposed to limiting access? Why or why not, and under what circumstances? Please be specific.

298. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(e) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Items 1(e)?

B. Hours of Operations

Part IV, Item 2(a) of proposed Form ATS-N would require an NMS Stock ATS to provide the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered on the NMS Stock ATS and the time when pre-opening or after-hours trading occur. Also, if the times when orders or other trading interest are entered on the NMS Stock are not the same for all subscribers and persons, Part IV, Item 2(b) would require the NMS Stock ATS to describe any differences.

The Commission preliminarily believes that it is important for subscribers and the Commission to have information regarding when NMS Stock ATSs are operating and when orders can be entered on those trading centers, including when an NMS Stock ATS will accept orders outside of standard operating hours. The Commission notes that national securities exchanges' rulebooks, which are publicly available, include such information.⁴⁵⁴ Making such information publicly available for NMS Stock ATSs would enable market participants to more easily compare when trading interest may be entered on NMS stock trading centers. This information also would allow the Commission to better understand the operations of NMS Stock ATSs.

Request for Comment

299. Do you believe the Commission should require the disclosure of the

⁴⁵⁴ See, e.g., BATS Exchange Rules 1.5(c) (setting forth hours for the exchange's After Hours Trading Session), 1.5(r) (setting forth hours for the exchange's Pre-Opening Session), 1.5(w) (setting forth the hours for the exchange's Regular Trading Hours), and 11.1 (setting forth the exchange's hours of trading and trading days, and when certain order types may be entered).

information on Part IV, Item 2 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

300. Do you believe Part IV, Item 2 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the days and hours of operation of the NMS Stock ATS? Why or why not? Please support your arguments.

301. Do you believe there is other information that market participants might find relevant or useful regarding the hours of operation of an NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

302. Do you believe that Part IV, Item 2 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part IV, Item 2 of proposed Form ATS-N be revised to provide additional clarity? Please explain in detail.

303. Do you believe there is any information that would be required by Part IV, Item 2 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

304. What are the potential costs and benefits of disclosing the information required by Part IV, Item 2 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 2 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

305. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 2 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 2?

C. Types of Orders

Part IV, Item 3(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any types of orders that are entered on the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS, including: (i) Priority for each order type; (ii) conditions for each order

type; (iii) order types designed not to remove liquidity (e.g., post-only orders); (iv) order types that adjust their price as changes to the order book occur (e.g., price sliding orders or pegged orders) or have a discretionary range; (v) the time-in-force instructions that can be used or not used with each order type; (vi) the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of an order type across those forms of connectivity; (vii) whether an order type is eligible for routing to other trading centers; and (viii) the circumstances under which order types may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS.⁴⁵⁵ If the availability of order types and their terms and conditions are not the same for all subscribers and persons, Part IV, Item 3(b) would require the NMS Stock ATS to describe any differences. In addition, Part IV, Item 3(c) of Form ATS-N would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. The NMS Stock ATS must also describe any differences if the requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders are not the same for all subscribers and persons.⁴⁵⁶

As discussed above, NMS Stock ATSs offer a wide range of order types and modifiers and offer different minimum order size requirements.⁴⁵⁷ Order types, in particular, are a primary means by which users of an NMS Stock ATS communicate their instructions for handling their orders to the NMS Stock ATS. Moreover, order types can be complex and operate in various ways, and the Commission is therefore proposing to request that NMS Stock ATSs provide the level of detail set forth in subsections (i) through (viii) of Item 3(a). The Commission believes that all market participants should have sufficient information about all aspects of the operations of order types available on an NMS Stock ATS to understand how to use order types to achieve their investing or trading objectives, as well as to understand how order types used by other market

participants could affect their trading interest. Item 3(a) would require a complete and detailed description of the order types available on the NMS Stock ATS, their characteristics, operations, and how they are handled to provide transparency to market participants and the Commission. Subsection (i) of Item 3(a) would require that the NMS Stock ATS describe the priority rules for each order type. The description would be required to include the order type's priority on the NMS Stock ATS upon order entry as well as any subsequent change to priority (if applicable). Also, the NMS Stock ATS would need to describe whether an order type can receive a new time stamp (such as, for example, in the case of order types that adjust price), and such order type's priority vis-à-vis other orders on the book due to changes in the NBBO or other reference price. In addition, this subsection would also require a description of any instance in which the order type could lose execution priority to a later arriving order at the same price.

Subsection (ii) of Item 3(a) would require that the NMS Stock ATS describe any conditions for each order type. Such conditions would include: any price conditions, including how the order type is ranked and how price conditions affect the rank and price at which it can be executed; conditions on the display or non-display of an order; or conditions on the execution or routing of orders.

Subsection (iii) of Item 3(a) would require that the NMS Stock ATS describe order types designed not to remove liquidity (e.g., post-only orders). The NMS Stock ATS would need to describe what occurs when such order is marketable against trading interest on the NMS Stock ATS when received.

Subsection (iv) of Item 3(a) would require that the NMS Stock ATS describe order types that adjust their price as changes to the order book occur (e.g., price-sliding orders or pegged orders) or have a discretionary range. As part of a response, this description would be required to include an order's rank and price upon order entry and whether such prices or rank may change based on the NBBO or other market conditions when using such an order type. In addition, the description would have to include when the order type is executable and at what price the execution would occur, and also whether the price at which the order type can be executed ever changes. Also, if the order type can operate in different ways, the NMS Stock ATS would need to explain the default operation of the order type.

Subsection (v) of Item 3(a) would require the NMS Stock ATS to describe the time-in-force instructions that can be used or not used with each order type.

Subsection (vi) of Item 3(a) would require a description of the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of order types across those forms of connectivity. For example, if an NMS Stock ATS offers certain order types to persons who connect through the broker-dealer operator, such as through use of a SOR (or similar functionality) or algorithm, as opposed to persons who connect directly through a FIX connection, that difference in availability would need to be described in response to this subsection.

Subsection (vii) of Item 3(a) would require a description of whether the order type is eligible for routing to other trading centers. The response required by this item would be required to include, if it is routable, whether an order type can be used with any routing services offered.

Subsection (viii) of Item 3(a) would require the NMS Stock ATS to describe the circumstances under which order types submitted to the NMS Stock ATS may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS. If an NMS Stock ATS allows a subscriber to combine separate order types, or combine an order type with a time-in-force restriction, both of those instances would be responsive to subsection (viii) of Item 3(a).

Part IV, Item 3(b) of proposed Form ATS-N would require the NMS Stock ATS to describe any differences if the availability of its orders types and their terms and conditions are not the same for all subscribers and persons.

Part IV, Item 3(c) of proposed Form ATS-N would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. If the requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders are not the same for all subscribers and persons, the NMS Stock ATS would also be required to describe any differences. These would include, for example, any order size requirements that may differ based on factors such as the type of subscriber or person that uses the services of the NMS Stock ATS, or the type of order (e.g., if only certain subscribers or persons are eligible to use that order type).

⁴⁵⁵ Items 3(a)(i), (ii), (iii), (iv) and (vii) of proposed Form ATS-N provide further requirements of what needs to be included in responding to these items. See discussion under each item *infra*.

⁴⁵⁶ The Commission notes that a broker-dealer operator may have valid business reasons for offering various order types to subscribers and the Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements.

⁴⁵⁷ See *supra* Section III.B.

The Commission preliminarily believes that a detailed description of the characteristics of the order types of an NMS Stock ATS would assist subscribers in better understanding how their orders would function and interact with other orders on the NMS Stock ATS.⁴⁵⁸ It also would allow market participants to see what order types could be used by other market participants, which could affect the probability, timing, and quality of their own executions. Moreover, the Commission preliminarily believes that requiring comprehensive disclosure of an NMS Stock ATS's order types on proposed Form ATS-N would allow market participants to compare order types across NMS Stock ATSs and national securities exchanges. As a result, a market participant would be better able to assess the availability of order types and whether their characteristics would accomplish the market participant's investing or trading objectives.

The Commission also preliminarily believes that the disclosures about the characteristics and functions of order types would allow the Commission to better oversee NMS Stock ATSs, and alert the Commission as to whether the function of a particular order type may violate the federal securities laws or the rules or regulations thereunder, such as the requirement under Rule 611 of Regulation NMS that a trading center have policies and procedures reasonably designed to prevent trade-throughs of protected quotations in NMS stocks.⁴⁵⁹ The Commission preliminarily believes that the disclosures that would be required by Item 3(a) would help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required. The disclosures required by Item 3(a) would also facilitate the Commission's comparison of how the characteristics of order types were described to subscribers and how they operate in practice as part of any examination of the NMS Stock ATS.

The Commission preliminarily believes this information would also advance the Commission's interest in the protection of investors by allowing subscribers to clearly see the types of

orders available to them, as well as potential counterparties, and any differences between the order types, available among participants on the NMS Stock ATS.

As noted above, Part IV, Item 3(b) would require the NMS Stock ATS to describe any differences if the availability of its order types and their terms and conditions are not the same for all subscribers and persons. The Commission preliminarily believes that this information would be important for a market participant to better assess whether other participants on the NMS Stock ATS may receive advantageous or disadvantageous treatment as a result of the ATS's various order types and how that treatment may affect that market participant's trading interest. Information about any disparate treatment of investors also would be important for the Commission as it monitors developments in the national market system.

Part IV, Item 3(c) of proposed Form ATS-N would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. The NMS Stock ATS would also be required to explain any differences if the requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders are not the same for all subscribers and persons. The information that would be required by Item 3(c) is designed to facilitate the entry of orders by subscribers by providing information on minimum order sizes, odd-lot orders, and mixed-lot orders. An explanation of how an NMS Stock ATS's requirements and conditions for minimum order sizes, odd-lot orders, and mixed-lot orders differ among subscribers and persons would also provide a market participant with information regarding how its trading interest would be handled vis-à-vis other market participants. The information that would be required by Item 3(c) would also be useful to the Commission's monitoring of developments in market structure.

Request for Comment

306. Do you believe the Commission should require the disclosure of the information on Part IV, Items 3(a) through 3(c) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

307. Do you believe Part IV, Items 3(a) through 3(c) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the types of orders that are entered to the

NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS? Please explain.

308. Is it sufficiently clear what information would be required by Part IV, Items 3(a) through 3(c) of proposed Form ATS-N? Should the items be refined in any way? If so, how? Please be specific.

309. Do you believe the proposed requirement to disclose the information that would be required by Part IV, Item 3(a) of proposed Form ATS-N could impact innovation on NMS Stock ATSs? Why or why not? Please support your arguments.

310. Do you believe there is other information that market participants might find relevant or useful regarding the types of orders that are entered to the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

311. Do you believe there is any information that would be required by Part IV, Items 3(a) through 3(c) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

312. Do you believe there are any other aspects of order types that an NMS Stock ATS should be required to disclose in a subpart to Part IV, Item 3(a) of proposed Form ATS-N that have not been identified? If so, what? Do you believe there are other order types about which the Commission should ask specifically? If so, what order types? Please explain in detail.

313. Should the Commission require greater specificity regarding the operation of order types? If so, why and how? If not, why not? Please support your arguments.

314. Do you believe that information relating to available order types would help market participants in determining the best trading venue for their orders? Why or why not? Please support your arguments.

315. Do you believe that Items 3(a) through 3(c) of Part IV of proposed Form ATS-N would advance the Commission's interest in the protection of investors by allowing market participants to consider the types of orders available to them, as well as potential counterparties, and any differences between the order types, modifiers, and size requirements

⁴⁵⁸ See Consumer Federation of America Letter, *supra* note 188 and accompanying text (stating the Commission should require all ATSs to disclose certain information about the order types offered on the ATS); Liquidnet letter #1, *supra* note 171 and accompanying text (stating institutional brokers, including institutional ATSs, should disclose the order types offered).

⁴⁵⁹ See 17 CFR 242.611.

available among participants on the NMS Stock ATS? Why or why not? Please support your arguments.

316. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Items 3(a) through 3(c) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Items 3(a) through 3(c)?

317. What are the potential costs and benefits of disclosing the information required by Part IV, Items 3(a) through 3(c) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Items 3(a) through 3(c) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

318. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of priority for each order type? Why or why not? Please support your answer.

319. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of any conditions for each order type? Why or why not? Please support your answer.

320. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of order types designed not to remove liquidity? Why or why not? Please support your answer.

321. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of order types that adjust their price as changes to the order book occur or have a discretionary range? Why or why not? Please support your answer.

322. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of the time-in-force instructions for each order type? Why or why not? Please support your answer.

323. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of the availability of order types across all forms of connectivity to the NMS Stock ATS? Why or why not? Please support your answer.

324. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of whether order types are eligible for routing to other trading centers? Why or why not? Please support your answer.

325. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of the circumstances under which order types

may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS? Why or why not? Please support your answer.

Part IV, Item 3(d) of proposed Form ATS-N would require an NMS Stock ATS to describe any messages sent to or received by the NMS Stock ATS indicating trading interest (e.g., IOIs, actionable IOIs, or conditional orders), including information contained in the message, the means under which messages are transmitted, the circumstances in which messages are transmitted (e.g., automatically by the NMS Stock ATS or upon the subscriber's request), and the circumstances by which they may result in an execution on the NMS Stock ATS. If the terms and conditions regarding these messages, indications of interest, and conditional orders are not the same for all subscribers and persons, the NMS Stock ATS would be required describe any differences.

This item is designed to provide specific information about the use of IOIs, actionable IOIs, conditional orders, and similar functionalities on the NMS Stock ATS. Based on the Commission's experience, IOIs are used by NMS Stock ATSs to convey trading interest available on those trading centers. Some NMS Stock ATSs also transmit "actionable" IOIs to selected market participants for the purpose of attracting contra-side order flow to the ATS. In general, an actionable IOI is an IOI containing enough information to effectively alert the recipient about the details of the NMS Stock ATS's trading interest in a security. While an actionable IOI may not explicitly specify the price and/or size of the trading interest, the practical context in which it is submitted alerts the recipient about the side (buy or sell), size (minimum of a round lot of trading interest), and price (at or better than the NBBO, depending on the side of the order).

Conditional orders are also messages indicating a trading interest on a trading venue, and conditional orders generally function in a similar manner to IOIs. A conditional order may contain the same attributes as other order types when a subscriber enters it onto the trading venue (e.g., side, price, and size), but NMS Stock ATSs will generally not transmit those details to other subscribers or market participants. Rather, the NMS Stock ATS will tentatively match the conditional order with contra side interest and then alert the subscriber that entered the conditional order of the potential match. That subscriber may then either accept or decline the execution (i.e., "firm up"

the conditional order). Based on Commission experience, NMS Stock ATSs typically only permit conditional orders to execute against other conditional orders, but some ATSs allow conditional orders to interact with other order types.

The Commission preliminarily believes that understanding the manner in which NMS Stock ATSs use IOIs, actionable IOIs, conditional orders, and similar functionalities could be useful to market participants because it could impact the potential execution of a subscriber's trading interest. Also, because an actionable IOI conveys substantial information, the potential for information leakage could be a concern to NMS Stock ATS subscribers using IOIs, particularly when they are seeking to execute large-sized orders. In the Commission's experience, NMS Stock ATSs generally send IOIs and other conditional orders only to certain market participants. Accordingly, the disclosures that would be required by Item 3(d) are designed to help market participants better evaluate whether messages indicating trading interest (including IOIs, actionable IOIs, and conditional orders) are equally available to them as compared to other market participants and would be appropriate tools to accomplish their investing or trading objectives.

Request for Comment

326. Do you believe the Commission should require the disclosure of the information on Part IV, Item 3(d) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

327. Do you believe Part IV, Item 3(d) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to any messages sent to or received by the NMS Stock ATS indicating trading interest? Please explain.

328. Is it sufficiently clear what information would be required by Part IV, Item 3(d) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

329. Do you believe there is other information that market participants might find relevant or useful regarding messages indicating trading interest (e.g., IOIs, actionable IOIs, or conditional orders)? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

330. Do you believe there are other types of messages that communicate

trading interest that the Commission should specifically cite as examples in Part IV, Item 3(d) of proposed Form ATS–N? If so, what are those message types? Please provide a detailed explanation of each additional type of message and support your arguments as to each.

331. Do you believe there is any information that would be required by Part IV, Item 3(d) of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

332. Do you believe that there is potential concern for information leakage from the use of IOIs, particularly actionable IOIs on NMS Stock ATSs? If so, would disclosure about their operation on proposed Form ATS–N be an appropriate manner in which to mitigate any concern? If not, why not? Please support your arguments.

333. What are the potential costs and benefits of disclosing the information required by Part IV, Item 3(d) of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 3(d) of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

334. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 3(d) of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 3(d)?

D. Connectivity, Order Entry, and Co-Location

Part IV Item 4(a) of proposed Form ATS–N would require the NMS Stock ATS to describe the means by which subscribers or other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS (e.g., directly, through a Financial Information eXchange (“FIX”) connection to the ATS, or indirectly, through the broker-dealer operator’s SOR, or any intermediate functionality, algorithm, or sales desk). This item also would require an NMS Stock ATS to describe any differences if the terms and conditions for connecting and entering orders or other trading interest on the NMS Stock ATS are not the same for all subscribers and persons.

Based on Commission experience reviewing Forms ATS, subscribers send orders or other trading interest to the NMS Stock ATS both directly and indirectly. A direct method of sending orders or other trading interest to an ATS that trades NMS stocks, for example, may include the use of the FIX Protocol. The FIX Protocol allows subscribers to enter orders or other trading interest into the ATS without an intermediary. To the extent that a subscriber connects to the NMS Stock ATS by way of a FIX connection and an order sent by that subscriber passes through an intermediate application or functionality on its way to the NMS Stock ATS, the NMS Stock ATS should identify the application or functionality and provide a description of its purpose.⁴⁶⁰ One example of an indirect method of sending orders or other trading interest to an NMS Stock ATS is sending orders or other trading interest to the broker-dealer operator, which may then use its SOR (or similar functionality) or algorithm to send such orders or other trading interest to the NMS Stock ATS.

The disclosures regarding the direct or indirect means of order entry could be important to subscribers because they would provide information about the possible methods to reach the NMS Stock ATS and applicable system requirements necessary to send orders or other trading interest to the NMS Stock ATS. This information would also alert subscribers to the NMS Stock ATS as to whether trading interest can be entered on the NMS Stock ATS through the broker-dealer operator, which would allow subscribers to assess any potential advantages that orders sent through the broker-dealer operator may have with respect to other subscribers on the NMS Stock ATS.⁴⁶¹ The Commission would find the information required by this item useful to understanding how trading interest moves from persons to possible trading centers and in evaluating any potential conflicts of interest presented between the broker-dealer operator and the NMS Stock ATS in how orders are entered onto the NMS Stock ATS.

The disclosure of the information required for order entry on the NMS Stock ATS, such as limit price, size,

⁴⁶⁰ The Commission notes that, in this example, given that the intermediate application or functionality has access to a subscriber’s order information, the NMS Stock ATS should take appropriate measures to protect the confidentiality of such information pursuant to Rule 301(b)(10) of Regulation ATS.

⁴⁶¹ *But see supra* notes 92–95 and 427–429 and accompanying text (discussing the fair access requirements of Regulation ATS).

and/or side of the market, would inform all subscribers to the NMS Stock ATS about how to transmit orders or other trading interest to the NMS Stock ATS. The Commission preliminarily believes that understanding this information may expedite the order entry process of subscribers. The Commission, as part of its monitoring of developments in market structure, also could use this disclosure to better understand what information allows for the interaction of trading interest.

The Commission preliminarily believes that requiring NMS Stock ATSs to disclose any differences if the terms and conditions for connecting and entering orders or other trading interest on the NMS Stock ATS are not the same for all subscribers and persons would allow market participants to source the various order entry procedures offered by NMS Stock ATSs as part of evaluating an NMS Stock ATS as a potential destination for them to route their orders for execution.

Request for Comment

335. Do you believe the Commission should require the disclosure of the information on Part IV, Item 4(a) of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

336. Do you believe Part IV, Item 4(a) of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the means by which subscribers or other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS? Please explain.

337. Is it sufficiently clear what information would be required by Part IV, Item 4(a) of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

338. What are the direct and indirect means through which subscribers and other persons can send orders or other trading interest to the NMS Stock ATS? Do you believe there any means for which the Commission should specifically request information in Part IV, Item 4(a) of proposed Form ATS–N? If so, please explain how those means to send orders or other trading interest are used by subscribers and other persons.

339. Do you believe there are any methods of sending orders or other trading interest to NMS Stock ATSs that are more advantageous than others? If so, please explain how such methods provide advantages to subscribers or other persons who use them. Should those advantages, if any, be specifically disclosed?

340. Do you believe there is other information that market participants might find relevant or useful regarding the means by which subscribers can send orders or other trading interest to the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

341. Do you believe there is any information that would be required by Part IV, Item 4(a) of Proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

342. Do you believe that the information that would be required by Part IV, Item 4(a) of proposed Form ATS–N could be important to market participants in assessing any potential advantages that orders sent through the broker-dealer operator may have over other market participants on the NMS Stock ATS? Why or why not? Please support your arguments.

343. Do you believe that the information that would be required by Part IV, Item 4(a) of proposed Form ATS–N would be important to market participants when deciding whether to trade on an NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not? Please support your arguments.

344. What are the potential costs and benefits of disclosing the information required by Part IV, Item 4(a) of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 4(a) of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

345. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 4(a) of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 4(a)?

Part IV Item 4(b) of proposed Form ATS–N would require that the NMS Stock ATS describe any co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS

and the terms and conditions of co-location services. If the terms and conditions of the co-location services are not the same for all subscribers and persons, Part IV, Item 4(b) would require the NMS Stock ATS to describe any differences. Co-location is the placement of a user's systems in close physical proximity to the trading and execution system of a trading venue to reduce latency and enhance speed. The description of co-location services that could enhance the speed of orders and messages and the terms and conditions thereof would allow subscribers to evaluate these services and determine whether they would like to subscribe to such services if available. Moreover, subscribers and potential subscribers would know that others can use a co-location service even if they determine not to use it themselves, which would assist them in devising appropriate trading strategies if they choose to participate.⁴⁶² For instance, a subscriber could choose certain types of orders or trading strategies with the knowledge that other subscribers have enhanced speeds for submitting trading interest through the use of the NMS Stock ATS's connectivity or co-location services.

The proposed requirement that the NMS Stock ATS describe any differences in the terms and conditions of an NMS Stock ATS's co-location services among subscribers or other persons also could help inform the trading strategies chosen by subscribers. Information on such connectivity and co-location options would further the Commission's understanding of the dynamics of the markets and overall market structure for NMS stocks. In addition, this information would allow the Commission to evaluate whether the NMS Stock ATS is unreasonably prohibiting or limiting any person with respect to the access to services offered by the NMS Stock ATS in contravention of Rule 301(b)(5) of Regulation ATS for those NMS Stock ATSs that have surpassed the applicable trading volume thresholds.

Request for Comment

346. Do you believe the Commission should require the disclosure of the information on Part IV, Item 4(b) of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

⁴⁶² See SIFMA letter #1, *supra* note 194 and accompanying text (stating its belief that "added disclosure about co-location and other market access arrangements would be beneficial to market participants"); Morgan Stanley letter, *supra* note 197 and accompanying text (stating that it received questions from customers specific to dark pools related to the co-location of servers).

347. Do you believe Part IV, Item 4(b) of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS? Please explain.

348. Is it sufficiently clear what information would be required by Part IV, Item 4(b) of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

349. Do you believe there is other information that market participants might find relevant or useful regarding co-location services by which a subscriber may enhance the speed that it may submit orders or send and receive messages? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

350. Do you believe there is any information that would be required by Part IV, Item 4(b) of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

351. Do believe that the information that would be required by Part IV, Item 4(b) of proposed Form ATS–N would be useful to market participants when deciding whether to trade on an NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not? Please support your arguments.

352. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 4(b) of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 4(b)?

353. What are the potential costs and benefits of disclosing the information required by Part IV, Item 4(b) of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 4(b) of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

E. Segmentation of Order Flow and Notice About Segmentation

Part IV, Item 5(a) of proposed Form ATS–N would require an NMS Stock ATS to describe any segmentation of orders or other trading interest on the NMS Stock ATS (e.g., classification by type of participant, source, nature of trading activity). Part IV, Item 5(a) would also require the NMS Stock ATS to describe the segmented categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. If the segmented categories, the criteria used to segment these categories, and any procedures for determining, evaluating or changing segmented categories are not the same for all subscribers and persons, this item would require an NMS Stock ATS to describe any differences.

Based on Commission experience, some NMS Stock ATSs segment order flow entered on the NMS Stock ATS according to various categories and allow subscribers to select the type of persons or order flow they want to trade or not trade against. An NMS Stock ATS may segment trading interest by type of participant (e.g., buy-side or sell-side firms, proprietary trading firms, agency-only firms, firms above or below certain assets under management thresholds). For example, buy-side or institutional order flow may seek to only trade against other buy-side or institutional order flow, or may seek to avoid trading against proprietary trading firms or so-called high frequency trading firms. When segmenting by source, an NMS Stock ATS may look to the underlying source of the trading interest in the case of trading interest that is intermediated, such as the trading interest of retail customers. Some NMS Stock ATSs segment by the nature of the trading activity, which could include segmenting by patterns of behavior, time horizons of traders, or the passivity or aggressiveness of trading strategies. NMS Stock ATSs might elect to use some combination of these criteria or other criteria altogether.

This item would require that an NMS Stock ATS disclose the segmented categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. This would include, for example, any modification or overriding of an existing segmented category and a description of how existing subscribers in the segmented category would be handled and notified. This item would provide market participants with an understanding of the categories of order flow or types of

market participants with which they may interact and allow them to both assess the consistency of a segmented group and determine whether the manner in which the trading interest is segmented comports with its views of how certain trading interest should be categorized. Disclosure of the procedures and criteria used to segment categories would allow a market participant to determine whether its view of what constitutes certain trading interest it wants to seek or avoid is classified in the same way by the NMS Stock ATS. For example, a subscriber may find it useful to understand the metrics or criteria an NMS Stock ATS uses to categorize high frequency trading firms so that it can compare the criteria used by the NMS Stock ATS with its view of what constitutes a high frequency trading firm, and thus be able to successfully trade against or avoid such trading interest. Similarly, information regarding the procedures applicable to trading among segmented categories would allow market participants to evaluate whether they can successfully trade against or avoid the segments of trading interest they desire.

In addition, disclosure of any differences in the segmentation among participants would allow subscribers to more clearly note if certain persons are, for instance, not subject to segmentation in the same way as other persons, or not subject to segmentation at all and able to trade against all order flow. All participants would have access to the same information as to how the NMS Stock ATS segments order flow, and whether the segmentation criteria are applied by the NMS Stock ATS uniformly.⁴⁶³ These disclosures would help the Commission understand the categories and manner in which persons and order flow (or both) are segmented across NMS Stock ATSs and could aid the Commission in its oversight of the markets including, for example, its evaluation of whether segmentation could facilitate or hinder market participants from achieving their investing or trading objectives. The Commission is not proposing to prohibit NMS Stock ATSs from segmenting their

order flow;⁴⁶⁴ the Commission is instead proposing only that an NMS Stock ATS disclose to market participants and the Commission how they segment their order flow.

Request for Comment

354. Do you believe the Commission should require the disclosure of the information on Part IV, Item 5(a) of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

355. Do you believe Part IV, Item 5(a) of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to segmentation of orders or other trading interest on the NMS Stock ATS? Please explain.

356. Is it sufficiently clear what information would be required by Part IV, Item 5(a) of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

357. Do you believe there is other information that market participants might find relevant or useful regarding segmentation of order flow on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

358. Do you believe there is any information that would be required by Part IV, Item 5(a) of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

359. Do you believe there are any forms or types of order segmentation that would not be captured by Part IV, Item 5(a) of proposed Form ATS–N or should be addressed separately? If so, please provide a detailed explanation of how orders are segmented under such functionalities on NMS Stock ATSs.

360. What are the potential costs and benefits of disclosing the information required by Part IV, Item 5(a) of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 5(a) of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

361. Do you believe there are other ways to obtain the same information as

⁴⁶³ See Blackrock letter, *supra* note 186 and accompanying text (stating mandatory ATS disclosure should include greater detail on how the platform matches orders between client segments); Consumer Federation of America letter, *supra* note 187 and accompanying text (stating that Form ATS should require ATSs to provide “critical details about . . . segmentation” because “the information will allow market participants . . . to assess whether an ATS’s terms of access and service are such that it makes sense to trade on that venue”).

⁴⁶⁴ However, an ATS that crossed the fair access threshold and wished to segment its order flow could do so only in accordance with the fair access provisions of existing Rule 301(b)(5) of Regulation ATS.

would be required from NMS Stock ATSs by Part IV, Item 5(a) of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 5(a)?

Part IV, Item 5(b) of proposed Form ATS–N would require the NMS Stock ATS to state whether the NMS Stock ATS informs subscribers or persons about the segmentation category that a subscriber or a person is assigned and to describe any notice provided to subscribers or persons about the segmentation category that they are assigned and the segmentation identified in Part IV, Item 5(a), including the content of any notice and the means by which any notice is communicated. Also, an NMS Stock ATS would be required to describe any differences if the notice is not the same for all subscribers and persons. As discussed above, an NMS Stock ATS can elect to segment its order flow entered on the NMS Stock ATS according to various categories and allow subscribers and other persons to select the type of persons or order flow they want to trade or not trade against. Based on the experience of the Commission and its staff, ATSs provide subscribers with limited information about how they segment order flow and do not always inform subscribers about the categories into which they are segmented. A market participant that is unaware of its segmented category may not know about the order flow it is trading against, and therefore, the Commission preliminarily believes that market participants trading on an NMS Stock ATS would want to know about their assigned segmented categories and understand how those categories were determined.⁴⁶⁵ The category into which a subscriber is placed also informs its decision of where to trade because it could affect the contra-side trading interest available to them to trade against. Item 5(b) is therefore designed to inform market participants about the potential information that the NMS Stock ATS may provide to inform them about such segmentation, particularly with respect to whether the NMS Stock ATS informs subscribers about how it assigns a participant to a segmented category, as well as any differences in the notice provided to subscribers. The Commission preliminarily believes that market participants would find it useful to understand how they will be alerted about segmentation on an NMS Stock

ATS before deciding whether or not to subscribe to the NMS Stock ATS.

Request for Comment

362. Do you believe the Commission should require the disclosure of the information on Part IV, Item 5(b) of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

363. Do you believe Part IV, Item 5(b) of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to informing subscribers or persons about the segmentation category that a subscriber or a person is assigned? Please explain.

364. Is it sufficiently clear what information would be required by Part IV, Item 5(b) of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

365. Do you believe there is any information that would be required by Part IV, Item 5(b) of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

366. Do you believe there is any specific information that the Commission should require NMS Stock ATSs to disclose to each subscriber with regard to how it segments each subscriber's orders? If so, explain what information and why. Please support your arguments.

367. Do you believe transparency with respect to how an NMS Stock ATS notifies subscribers regarding how those subscribers' trading interests are segmented is useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? If not, why? Please support your arguments.

368. What are the potential costs and benefits of disclosing the information required by Part IV, Item 5(b) of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 5(b) of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

369. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 5(b) of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be

obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 5(b)?

Part IV, Item 5(c) of proposed Form ATS–N would require an NMS Stock ATS to describe any means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS (e.g., designating an order or trading interest to be executed against a specific subscriber) and how such designations affect order priority and interaction. Part IV, Item 5(c) would require the NMS Stock ATS to describe any means by which subscribers can seek or avoid certain executions against certain orders, persons, or trading interest. In response to this item, an NMS Stock ATS would be required to disclose, for example, any circumstances by which an NMS Stock ATS allows persons to designate an order submitted to the NMS Stock ATS to interact with specific orders resting on the NMS Stock ATS. The NMS Stock ATS would need to describe this process and how such order preferencing works with other rules governing order priority and interaction. The response to this item also would also be required to include a description of any means by which a subscriber could avoid executing against any order, person, or trading interest. For instance, an NMS Stock ATS would need to describe any mechanisms by which a person could avoid executing against its own orders or orders of its affiliates on the NMS Stock ATS.

The Commission preliminarily believes that it is important for market participants to understand whether—and how—they may designate their orders or other trading interest to avoid interacting with specific orders, trading interest, or persons on an NMS Stock ATS. The Commission preliminarily believes that this understanding would help market participants better evaluate the NMS Stock ATS as a potential trading venue. For instance, if a market participant seeks to avoid interacting with an order type that is commonly employed as part of certain trading strategies, the Commission preliminarily believes that the disclosures required under Item 5(c) would better enable that market participant to determine whether submitting order flow to a particular NMS Stock ATS would allow it to carry out its own trading strategy. Similarly, if a market participant would find it desirable to be able to designate an order submitted to the NMS Stock ATS to interact with specific orders resting

⁴⁶⁵ See *supra* notes 171, 186, 198, 199 and accompanying text.

on an NMS Stock ATS's order book, the Commission preliminarily believes that the information required by Item 5(c) would inform that market participant whether—and how—it can do so on a particular NMS Stock ATS, thereby assisting that market participant when it evaluates that NMS Stock ATS as a potential trading venue.

Request for Comment

370. Do you believe the Commission should require the disclosure of the information on Part IV, Item 5(c) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

371. Do you believe Part IV, Item 5(c) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS? Please explain.

372. Do you believe there is other information that market participants might find relevant or useful regarding the means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

373. Is it sufficiently clear what information would be required by Part IV, Item 5(c) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

374. Do you believe there is any information that would be required by Part IV, Item 5(c) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

375. Should the requirement to describe the means by which persons, orders, or trading interest may be sought or avoided on an NMS Stock ATS be refined in any way? Please be specific.

376. Does the process for seeking or avoiding specific orders, persons, or trading interest raise any other market structure issues or concerns that the

Commission should consider? Please be specific.

377. What are the potential costs and benefits of disclosing the information required by Part IV, Item 5(c) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 5(c) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

378. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 5(c) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 5(c)?

F. Display of Order and Trading Interest

Part IV, Item 6(a) of proposed Form ATS-N would require that an NMS Stock ATS describe any means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed. Also, if the display of orders or other trading interest is not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 6(b) of proposed Form ATS-N would also require the NMS Stock ATS to identify the subscriber(s) or person(s) (in the case of a natural person, to identify only the position or title) to whom the orders and trading interest are displayed or otherwise made known.

As discussed more fully above,⁴⁶⁶ most NMS Stock ATSs do not publicly display quotation data and are commonly referred to as “dark pools.” The Commission preliminarily believes that market participants generally are very sensitive to precisely how and when their trading interest is displayed or otherwise made known outside the NMS Stock ATS. The Commission is concerned that market participants currently may not know the extent to which their trading interest sent to ATSs is displayed outside those ATSs. Accordingly, for any NMS Stock ATSs that display some or all of the trading interest on their systems, Part IV, Item 6 of proposed Form ATS-N would require the NMS Stock ATS to identify the subscriber(s) or person(s) to whom orders or other trading interest information is displayed or otherwise made known, the means and

circumstances by which orders or other trading interest are displayed or made known, and the contents of that information. Because NMS Stock ATSs that are also ECNs may differ in how and where orders or other trading interest are displayed, the Commission preliminarily believes this item would clarify for market participants and the Commission exactly how such display may occur. In addition, an NMS Stock ATS would need to disclose arrangements, whether formal or informal (oral or written) to the extent they exist, with third parties to display the NMS Stock ATS's trading interest outside of the NMS Stock ATS, such as IOIs from the NMS Stock ATS's subscribers being displayed on vendor systems, or arrangements with third parties to transmit IOIs between subscribers.

The Commission preliminarily believes that when an NMS Stock ATS sends electronic messages outside of the NMS Stock ATS that expose the presence of orders or other trading interest on the NMS Stock ATS, it is displaying or making known orders or other trading interest on the NMS Stock ATS. For instance, an NMS Stock ATS may send to subscribers or other persons a direct data feed from the NMS Stock ATS that contains real-time information about current quotes, orders or other trading interest on the NMS Stock ATS. Accordingly, it would be responsive to this item for the NMS Stock ATS to disclose the circumstances under which the NMS Stock ATS would send these messages, the persons that received them, and the information contained in the messages, including the symbol or any other information relating to trading interest on the NMS Stock ATS. The NMS Stock ATS would need to disclose the information required by this item, including the exact content of the information, such as symbol, price, size, attribution, or any other information made known. The Commission preliminarily believes that disclosures in response to this item are important because the information disclosed would provide market participants with advance notice of the potential display of their orders or other trading interest outside of the NMS Stock ATS.⁴⁶⁷ The Commission preliminarily believes that market

⁴⁶⁶ See Morgan Stanley letter, *supra* note 197 and accompanying text (stating customers questioned it about whether its dark pool is truly dark); Bloomberg Tradebook letter, *supra* note 190 and accompanying text (recommending that the Commission ask ATSs to complete a questionnaire that would include questions relating to the sharing of orders or order information with affiliates or other trading venues by the ATS).

⁴⁶⁷ See *supra* note 123 and accompanying text.

participants, whose trading strategies are sensitive to how and to whom their orders and trading interest are displayed, would use the information disclosed under Item 6 to evaluate whether routing orders to a particular NMS Stock ATS would be consistent with their respective strategies.

Request for Comment

379. Do you believe the Commission should require the disclosure of the information on Part IV, Item 6 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

380. Do you believe Part IV, Item 6 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed? Please explain.

381. What are the means through which NMS Stock ATSs currently display or make known trading interest? Do you believe any of these means raise any concerns? If so, why? Please support your arguments. Do you believe that Part IV, Item 6 of proposed Form ATS-N would mitigate any of those concerns through the disclosure of responsive information? Why or why not? Please support your arguments.

382. Is it sufficiently clear what information would be required by Part IV, Item 6 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

383. Do you believe there is other information that market participants might find relevant or useful regarding orders or other trading interest on the NMS Stock ATS that are displayed or otherwise made known outside the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

384. Do you believe there is any information that would be required by Part IV, Item 6 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

385. What are the potential costs and benefits of disclosing the information required by Part IV, Item 6 of proposed Form ATS-N? Would the proposed

disclosures in Part IV, Item 6 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

386. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 6 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 6?

G. Trading Services

Part IV, Item 7(a) of proposed Form ATS-N would require an NMS Stock ATS to describe the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, including the structure of the market (e.g., crossing system, auction market, limit order matching book). If the use of these means or facilities are not the same for all subscribers and persons, the NMS Stock ATS would also be required to describe any differences.

This item is primarily designed to inform market participants and the Commission about an NMS Stock ATS's market and the facilities and mechanisms that it uses to match counterparties. Part IV, Item 7(a) of proposed Form ATS-N would require a description, with specificity, of the facilities and mechanisms into which subscribers enter orders and how orders entered into these facilities and mechanisms would interact. The Commission has previously explained that a trading center brings together orders when orders entered into the system for a given security have the opportunity to interact with other orders entered into the system for the same security.⁴⁶⁸ For instance, a trading center brings together orders if it displays, or otherwise represents, trading interests entered on the system, such as a consolidated quote screen, to system users.⁴⁶⁹ Furthermore, a trading center also brings together orders if it receives subscribers' orders centrally for future processing and execution, such as part of a limit order matching book that allows subscribers to display buy and sell orders in particular securities and to obtain execution against matching orders contemporaneously entered or stored in the system.⁴⁷⁰ Additionally, as

explained above, to qualify for the Rule 3a1-1(a)(2) exemption from the statutory definition of "exchange," an ATS must bring together the orders of *multiple buyers and sellers*.⁴⁷¹

Based on Commission experience, ATSs that trade NMS stocks use various types of trading mechanisms. For example, many ATSs bring together multiple buyers and sellers using limit order matching systems. Other ATSs use crossing mechanisms that allow participants to enter unpriced orders to buy and sell securities, with the ATS's system crossing orders at specified times at a price derived from another market.⁴⁷² Some ATSs use an auction mechanism that matches multiple buyers and sellers by first pausing execution in a certain security for a set amount of time, during which the ATS's system seeks out and/or concentrates liquidity for the auction; after the trading pause, orders will execute at either a single auction price or according to the priority rules for the auction's execution. Furthermore, some ATSs use a blotter scraping functionality, which may inform the ATS's system about the orders placed on a participant's order management system, but not yet entered into the ATS; the ATS or broker-dealer operator oftentimes can automatically generate those orders and enter them into the ATS on behalf of the subscriber, in accordance with the relevant terms and conditions, when certain contra-side trading interest exists in the ATS.

The Commission preliminarily believes that the disclosures required under Part IV, Item 7(a) would be useful to market participants when evaluating whether or not to route orders to a particular NMS Stock ATS. At times, market participants may route orders to a trading venue with certain characteristics to accomplish a particular trading strategy. For instance, a market participant aiming to execute a block transaction may seek out a trading platform that operates a block crossing network with specialized size discovery mechanisms and controls for information leakage. At the same time, a different market participant may seek to use an NMS Stock ATS's auction

⁴⁷¹ See *id.* The Commission emphasized in the Regulation ATS Adopting Release that the mere interpositioning of a designated counterparty as riskless principal for settlement purposes after the purchasing and selling counterparties to a trade have been matched would not, by itself, mean that the system does not have multiple buyers and sellers. See *id.* Additionally, systems in which there is only a single seller, such as systems that permit issuers to sell their own securities to investors, would not be included within Rule 3b-16. See *id.*

⁴⁷² See Regulation ATS Adopting Release, *supra* note 7, at 70849 n.37.

⁴⁶⁸ See Regulation ATS Adopting Release, *supra* note 7, at 70849.

⁴⁶⁹ See *id.*

⁴⁷⁰ See *id.*

function if that market participant believes the auction process would provide the best opportunity for price discovery or price improvement. Accordingly, the Commission preliminarily believes that disclosure of the information that would be required under Item 7(a) of proposed Form ATS–N would better enable market participants to evaluate an NMS Stock ATS as a potential destination for them to route their orders. In addition, this information also would assist the Commission to fully evaluate the facilities and mechanisms that consist of the NMS Stock ATS and whether an NMS Stock ATS meets the requirements of Rule 3b–16 that it is bringing together the orders for securities of multiple buyers and sellers.⁴⁷³

Request for Comment

387. Do you believe the Commission should require the disclosure of the information on Part IV, Item 7(a) of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

388. Do you believe Part IV, Item 7(a) of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, including the structure of the market? Please explain.

389. Is it sufficiently clear what information would be required by Part IV, Item 7(a) of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

390. Do you believe there is other information that market participants might find relevant or useful regarding the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

391. Do you believe there is any information that would be required by Part IV, Item 7(a) of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

392. Are there particular means or facilities for bringing together the orders of multiple buyers and sellers on which the Commission should request information specifically that is not

included as a component under Part IV, item 7(a) of proposed Form ATS–N?

393. What are the potential costs and benefits of disclosing the information required by Part IV, Item 7(a) of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 7(a) of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

394. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 7(a) of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 7(a)?

Part IV, Item 7(b) of Form ATS–N would require an NMS Stock ATS to describe the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. If these rules and procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences.

Part IV, Item 7(b) of proposed Form ATS–N is primarily designed to inform market participants about how orders interact on an NMS Stock ATS upon being entered into the system. Item 7(b) would require a description, with specificity, of all rules and procedures relevant to order interaction and execution, such as those addressing order priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. The Commission previously explained in the Regulation ATS Adopting Release that use of established, non-discretionary methods could include operation of a trading facility or the setting of rules governing the trading of subscribers.⁴⁷⁴ For example, the Commission considers the use of an algorithm by an electronic trading system, which sets trading procedures and priorities, to be a trading facility that uses established, non-discretionary methods.⁴⁷⁵ Similarly, the Commission has previously stated that rules imposing execution priorities, such as time and price priority rules, would be

“established, non-discretionary methods.”⁴⁷⁶

Based on Commission experience, NMS Stocks ATSs employ various terms and conditions under which orders interact and match. As noted above, some NMS Stock ATSs may offer price-time priority to determine how to match orders (potentially with various exceptions), while other NMS Stock ATSs may offer midpoint-only matching with time priority.⁴⁷⁷ Some NMS Stock ATSs might also take into account other factors to determine priority. For example, an NMS Stock ATS may assign either a lower or higher priority to an order entered by a subscriber in a certain class (e.g., orders of proprietary traders or retail investors) or routed from a particular source (e.g., orders routed by the broker-dealer operator’s SOR (or similar functionality) or algorithm) when compared to an equally priced order entered by a different subscriber or via a different source. Furthermore, in the Commission’s experience, an NMS Stock ATS might elect to apply different priority rules for matching conditional orders than it does for matching other order types.

Part IV, Item 7(c) of proposed Form ATS–N would require an NMS Stock ATS to describe any trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality. If the trading procedures are not the same for all subscribers and persons, the NMS Stock ATS would also be required to describe any differences. Some ATSs that trade NMS stocks apply various methods to determine an execution price based on the circumstances of the match. For example, an ATS may price an execution of a midpoint pegged order with a limit or market order at the midpoint of the NBBO. An ATS executing a match of two limit orders, or a limit and market order, might price the execution at or within the NBBO, with the possibility of offering the limit order(s) price improvement. On the other hand, an ATS that operates a block crossing network, with specialized size discovery mechanisms, might calculate a volume-weighted average price after the final size of the execution has been determined.

In the Commission’s experience, NMS Stock ATSs have also adopted other trading procedures governing the execution of orders, which the NMS Stock ATS would be required to explain under Part IV, Item 7(c) of proposed

⁴⁷⁴ See Regulation ATS Adopting Release, *supra* note 7, at 70851–52.

⁴⁷⁵ See *id.* at 70851.

⁴⁷⁶ See *id.* at 70852.

⁴⁷⁷ See *supra* Section III.B.

⁴⁷³ See 17 CFR 240.3b–16(a)(1).

Form ATS–N. For instance, an NMS Stock ATS might elect to use price protections to re-price orders or prevent their execution under certain circumstances, such as Limit Up Limit Down price bands pursuant to the National Market System Plan to Address Extraordinary Market Volatility (“LULD Plan”).⁴⁷⁸ An NMS Stock ATS might also permit short sales to be executed on its system and would thus be required to configure its system to comply with federal securities laws related to short sales, including Regulation SHO.⁴⁷⁹ Additionally, an NMS Stock ATS could have rules and procedures governing and/or precluding the execution of orders in a locked or crossed market. If an NMS Stock ATS has any procedures governing the handling of execution errors, such as the use of an error account by the NMS Stock ATS, it would be required to explain those procedures in Item 7(c).

Furthermore, under Part IV, Item 7(c) of proposed Form ATS–N, an NMS Stock ATS would also be required to describe any protocols for time-stamping orders and executions to ensure compliance with the Exchange Act and the rules and regulations thereunder and any execution procedures related to price improvement. For example, if an NMS Stock ATS has procedures to reprice orders under its price protection mechanisms, to reprice short sale orders to ensure compliance with Regulation SHO, or to reprice orders due to price-sliding order types (such as certain pegged order types), it would be required to explain when it creates new timestamps for such re-priced orders.⁴⁸⁰ In addition, any functionality or mechanism available on the NMS Stock ATS that allows for price improvement would also need to be described in response to this item.

The Commission preliminarily believes that information about how an NMS Stock ATS prices and matches orders is useful to market participants’

⁴⁷⁸ See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (“LULD Approval Order”). The registered national securities exchanges and FINRA filed the LULD Plan to create a market-wide limit up-limit down mechanism to address extraordinary market volatility in NMS Stocks. *See id.* at 33500. The Plan sets forth procedures that provide for market-wide limit up-limit down requirements that would be designed to prevent trades in individual NMS Stocks from occurring outside of the specified price bands. *See id.*

⁴⁷⁹ 17 CFR 242.200 through 242.204.

⁴⁸⁰ Additionally, if subscriber orders are routed from the NMS Stock ATS and are not filled, or filled only in part on the NMS Stock ATS, the Commission preliminarily believes that the NMS Stock ATS should describe how such orders are time stamped for priority purposes.

and the Commission’s understanding of that trading center’s operation. The Commission preliminarily believes that the information required under Part IV, Items 7(b) and 7(c) of proposed Form ATS–N would allow market participants to evaluate the terms and conditions under which their orders will interact and execute on an NMS Stock ATS, and would thus provide them with a better opportunity to determine whether that NMS Stock ATS is the appropriate trading destination for their orders. For example, a market participant whose order would be given a higher priority on an NMS Stock ATS based on its subscriber class may choose to first route its order to that venue, whereas a market participant seeking to enter a conditional order may choose to route an order based on an NMS Stock ATS’s specific priority rules governing conditional orders. Likewise, market participants likely would want to know whether an NMS Stock ATS applies price protection mechanisms, or other standards, that could re-price an order or prevent it from executing under certain conditions. In addition, the Commission preliminarily believes that the information provided in response to Items 7(a), 7(b), and 7(c) would allow the Commission to more easily evaluate whether the entity that filed the proposed Form ATS–N meets the criteria of Rule 3b-16 and the definition of an NMS Stock ATS.

Request for Comment

395. Do you believe the Commission should require the disclosure of the information on Part IV, Items 7(b) and 7(c) of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

396. Do you believe Part IV, Item 7(b) of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest? Please explain.

397. Do you believe Part IV, Item 7(c) of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and

executions, or price improvement functionality? Please explain.

398. Is it sufficiently clear what information would be required by Part IV, Items 7(b) and 7(c) of proposed Form ATS–N? Should these items be refined in any way? If so, how? Please be specific.

399. Do you believe there is other information that market participants might find relevant or useful regarding the established non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the market or facilities of an NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

400. Do you believe there is other information that market participants might find relevant or useful regarding trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality on an NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

401. Do you believe there is any information that would be required by Part IV, Items 7(b) and 7(c) of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

402. Are there any aspects of the non-discretionary methods that dictate the terms of trading among buyers and sellers on which the Commission should specifically require information that is not included as a component under Part IV, Item 7(b) of proposed Form ATS–N?

403. What are the potential costs and benefits of disclosing the information required by Part IV, Items 7(b) and 7(c) of proposed Form ATS–N? Would the proposed disclosures in Part IV, Items 7(b) and 7(c) of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

404. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Items 7(b) and 7(c) of proposed Form ATS–N other than through disclosure on proposed Form

ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Items 7(b) and 7(c)?

H. Suspension of Trading, System Disruption or Malfunction

Part IV, Item 8 of proposed Form ATS–N would require an NMS Stock ATS to describe any procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or malfunction. In addition, if the procedures governing trading during a suspension or system disruption or malfunction are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. This item is designed to inform market participants of whether, among other things, an NMS Stock ATS will continue to accept orders after suspension or system malfunction or disruption occurs, whether the NMS Stock ATS routes, holds, or continues to execute orders resting in the system prior to the disruption, and the type of notice the NMS Stock ATS provides to subscribers and other market participants during a suspension or system disruption or malfunction. Examples of system disruptions would include, but are not limited to, internal software problems that prevent the NMS Stock ATS's system from opening or continuing trading,⁴⁸¹ a significant increase in volume that exceeds the ability of the trading system of the NMS Stock ATS to process incoming orders,⁴⁸² and the failure of the ability of the trading system of the NMS Stock ATS to receive NBBO or other external pricing information that is used in the system's pricing methodology.

The Commission preliminarily believes that information regarding an NMS Stock ATS's procedures on how orders may be handled during a suspension of trading or system disruption or malfunction would be useful to market participants because such an event might preclude the NMS Stock ATS from accepting and/or executing time sensitive orders and could impact the price the subscriber receives. The information about how an NMS Stock ATS would handle orders under such circumstances would better inform a subscriber's trading decisions at the time of such an event and thus help that subscriber accomplish its investing or trading objectives.

Information regarding the procedures for how an NMS Stock ATS would handle orders during a suspension of trading or system disruption or malfunction would also help the Commission better monitor the securities markets. The Commission has recently noted that given the speed and interconnected nature of the U.S. securities markets, a seemingly minor systems problem at a single entity can quickly create losses and liability for market participants, and spread rapidly across the national market system, potentially creating widespread damage and harm to market participants and investors.⁴⁸³ Accordingly, it is important to fully understand what, if any, trading procedures an NMS Stock ATS would follow during a suspension of trading or system disruption or malfunction. The Commission preliminarily believes that the disclosures that would be required by Item 8 would help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required. The Commission notes that it is not proposing to require NMS Stock ATSs to adopt specific procedures governing trading during a system disruption or malfunction as it did under Regulation SCI for certain significant-volume ATSs that trade NMS stocks or non-NMS stocks.⁴⁸⁴ Rather, under Part IV, Item 8 of proposed Form ATS–N, the Commission is only requiring an NMS Stock ATS to disclose what procedures, if any, it follows during a suspension of trading or system disruption or malfunction on the NMS Stock ATS. Accordingly, the disclosure requirements under Item 8, similar to other items on proposed Form ATS–N, are intended to inform market participants of an NMS Stock ATS's procedures rather than impose any new procedural requirements on NMS Stock ATSs.

Request for Comment

405. Do you believe the Commission should require the disclosure of the information on Part IV, Item 8 of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

406. Do you believe Part IV, Item 8 of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any

procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or malfunction? Please explain.

407. Is it sufficiently clear what information would be required by Part IV, Item 8 of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

408. Do you believe there is other information that market participants might find relevant or useful regarding procedures governing trading in the event an NMS Stock ATS suspends trading or experiences a system disruption or malfunction? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

409. Do you believe there is any information that would be required by Part IV, Item 8 of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

410. What are the potential costs and benefits of disclosing the information required by Part IV, Item 8 of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 8 of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

411. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 8 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 8?

I. Opening, Reopening, and Closing Processes, and After Hours Procedures

Part IV, Item 9 of proposed Form ATS–N would require an NMS Stock ATS to describe its opening, reopening, and closing processes, if any, and any after-hours trading procedures. Part IV, Item 9(a) of proposed Form ATS–N would require an NMS Stock ATS to describe any opening and reopening processes, including how orders or other trading interest are matched and executed prior to the start of regular trading hours or following a stoppage of trading in a security during regular trading hours and how unexecuted orders or other trading interest are

⁴⁸¹ See SCI Adopting Release, *supra* note 17 at 72254–55 n.28.

⁴⁸² See *id.* at 72255 n.29.

⁴⁸³ See *id.* at 72253.

⁴⁸⁴ See *supra* notes 102–103 and accompanying text.

handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours. An NMS Stock ATS would also be required to describe any differences between pre-opening executions, executions following a stoppage of trading in a security during regular trading hours, and executions during regular trading hours. Part IV, Item 9(b) of proposed Form ATS-N would require a description of any closing process, including how unexecuted orders or other trading interest are handled at the close of regular trading. An NMS Stock ATS would also be required to describe any differences between the closing executions and executions during regular trading hours. Part IV, Item 9(c) of proposed Form ATS-N would require a description of any after-hours trading procedures, including how orders and trading interest are matched and executed during after-hours trading. An NMS Stock ATS would also be required to describe any differences between the after-hours executions and executions during regular trading hours.

Part IV, Item 9 of proposed Form ATS-N is designed to inform market participants about whether an NMS Stock ATS uses any special procedures to match orders outside of regular trading hours and/or processes to set a single opening, reopening, or closing price to, for example, maximize liquidity and accurately reflect market conditions at the opening, reopening, or close of trading. The Commission notes that it is standard practice for national securities exchanges to conduct opening, reopening, and closing auctions, or similar procedures, to start and conclude the trading day, or reopen trading in a security during the trading day.⁴⁸⁵ Furthermore, to facilitate their opening and closing processes, exchanges often permit members to enter orders specially designated to execute on the opening or closing.⁴⁸⁶

⁴⁸⁵ See, e.g., New York Stock Exchange Rule 123D (setting forth the duties of NYSE Designated Market Maker when opening and reopening trading in a stock); New York Stock Exchange Rule 123C (setting forth the exchange's closing procedures); The Nasdaq Stock Market LLC Rule 4752 (setting forth rules for the Nasdaq Opening Cross); The Nasdaq Stock Market LLC Rule 4753 (setting forth rules for the Nasdaq Halt Cross); The Nasdaq Stock Market LLC Rule 4754 (setting forth rules for the Nasdaq Closing Cross); BATS Exchange Rules 11.23 and 11.24 (setting forth the exchange's procedures for openings, closings and auctions following a trading halt).

⁴⁸⁶ See, e.g., New York Stock Exchange Rule 13 (defining Market-on-Open, Market-on-Close, Limit-on-Open, and Limit-on-Close, and Closing Offset order types); The Nasdaq Stock Market LLC Rule 4752 (a) (defining Market on Open, Limit on Open,

The disclosures under this item would allow for comparisons between NMS Stock ATSs and exchanges.

Market participants would likely want to know about any special opening, reopening, or closing processes, and after-hours trading procedures, employed by an NMS Stock ATS. In particular, the Commission preliminarily believes that market participants would want to know which, if any, order types participate in an NMS Stock ATS's opening, reopening, and/or closing processes, and after-hours trading. The Commission preliminarily believes that such information would help market participants assess whether participating in an NMS Stock ATS's opening, reopening, or closing processes, or after-hours trading on the NMS Stock ATS, would help accomplish their investing or trading objectives and thus, cause them to route orders to the NMS Stock ATS.

The disclosures required under Part IV, Item 9 of proposed Form ATS-N are also designed to help the Commission to better oversee NMS Stock ATSs and alert the Commission about any potential regulatory issues arising from an NMS Stock ATS's opening, reopening, or closing processes, or after-hours trading procedures. For example, under Rule 611(b)(3) of Regulation NMS,⁴⁸⁷ single-priced opening and closing transactions are excepted from the Order Protection Rule under Rule 611(a) of Regulation NMS.⁴⁸⁸ The Commission preliminarily believes the disclosures required under Part IV, Item 9 of proposed Form ATS-N would help the Commission analyze whether the opening, reopening, and/or closing processes of an NMS Stock ATS, and after-hours trading procedures, are consistent with the Exchange Act and the rules and regulations thereunder.

Request for Comment

412. Do you believe the Commission should require the disclosure of the information on Part IV, Item 9 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

413. Do you believe Part IV, Item 9 of proposed Form ATS-N captures the information that is most relevant to

Opening Imbalance Only, and Market Hours order types); The Nasdaq Stock Market LLC Rule 4754(a) (defining Market on Close, Limit on Close, and Imbalance Only order types); BATS Exchange Rule 11.23(a) (defining Eligible Auction, Market-on-Open, Limit-on-Open, Late-Limit-on-Open, Market-on-Close, Limit-on-Close, and Late Limit-on-Close order types).

⁴⁸⁷ See 17 CFR 242.611(b)(3).

⁴⁸⁸ See 17 CFR 242.611(a).

understanding the operations of the NMS Stock ATS regarding its opening, reopening, or closing processes, if any, and any after-hours trading procedures? Please explain.

414. Do you believe there is other information that market participants might find relevant or useful regarding the opening or reopening processes, closing process, or after-hours trading procedures on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

415. Is it sufficiently clear what information would be required by Part IV, Item 9 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

416. Do you believe there is any information that would be required by Part IV, Item 9 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

417. Do you believe the information that would be required by Part IV, Item 9 of proposed Form ATS-N would be useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not? Please support your arguments.

418. What are the potential costs and benefits of disclosing the information required by Part IV, Item 9 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 9 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

419. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 9 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 9?

J. Outbound Routing

Part IV, Item 10(a) of Proposed Form ATS-N would require an NMS Stock ATS to describe the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, including whether outbound routing occurs at the

affirmative instruction of the subscriber or at the discretion of the broker-dealer operator, and the means by which routing is performed (e.g., a third party or order management system or a SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates). If the means by which orders or other trading interest are routed from the NMS Stock ATS are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences under Part IV, Item 10(b) of proposed Form ATS-N.

Based on Commission experience, some NMS Stock ATSs, by way of their broker-dealer operator, provide outbound routing services whereby a subscriber's order or trading interest could be routed to another trading center.⁴⁸⁹ Orders and trading interest could be routed to other trading centers under a variety of circumstances. For instance, a subscriber could instruct the NMS Stock ATS to route its orders to another trading center if it is not immediately executed on the NMS Stock ATS upon entry. Also, a subscriber could enter an order on the NMS Stock ATS that rests as an open order on the NMS Stock ATS and is concurrently routed to another trading center for potential execution. If the order is executed at the away trading center, the NMS Stock ATS would cancel the order resting as an open order on the NMS Stock ATS. If the order is executed on the NMS Stock ATS, the order that was routed to the away market would be canceled.

The descriptions in response to Part IV, Item 10 of proposed Form ATS-N would be required to include who determines routing destinations, whether the subscriber, the broker-dealer operator, or both. This information is meant to illuminate when subscribers would have control over potential routing destinations and when the broker-dealer operator would have discretion to route away. The Commission preliminarily believes that subscribers would find it useful to be aware of any instance in which the broker-dealer operator has discretion to route trading interest so that a subscriber could better protect its interests and monitor any such routing. Item 10 of proposed Form ATS-N would also require a description of the means by which the routing is

performed. Examples of the means of outbound routing could include a third-party router, an order management system or SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates, or any other functionality used to outbound route trading interest.

The Commission preliminarily believes that it is important for subscribers and potential subscribers to know at whose discretion any outbound routing occurs and who would be performing the routing. The Commission preliminarily believes that such disclosures concerning outbound routing would provide subscribers and potential subscribers with the ability to gauge how their orders would be handled if they are not executed on the NMS Stock ATS. Subscribers and potential subscribers might, for example, have concerns about the leakage of confidential trading information when their orders are routed to other trading centers. Part IV, Item 10 of proposed Form ATS-N is designed to provide subscribers and potential subscribers with relevant information to evaluate the potential for leakage of their confidential trading information. In addition, subscribers and potential subscribers could have concerns about the treatment of their confidential trading information should their orders be routed by a third party or the SOR (or similar functionality) or algorithm of the broker-dealer operator. Overall, the Commission preliminarily believes that information about routing would likely be useful to market participants when deciding whether to subscribe or otherwise submit orders to an NMS Stock ATS that might be eligible for routing.

The Commission also preliminarily believes that the disclosures required by Part IV, Item 10 of proposed Form ATS-N would aid it in evaluating whether an NMS Stock ATS is in compliance with Rule 301(b)(10) of Regulation ATS.⁴⁹⁰ The Commission could use the disclosures required under Item 10 of proposed Form ATS-N to evaluate whether there are any risks to the confidentiality of trading information on an NMS Stock ATS due to the outbound routing functionality being used. These disclosures would provide the Commission with insight into what trading information may be visible to the entity performing the NMS Stock ATS's outbound routing functions, such as a third party or the broker-dealer operator's SOR (or similar functionality) or algorithm.

Request for Comment

420. Do you believe the Commission should require the disclosure of the information on Part IV, Item 10 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

421. Do you believe Part IV, Item 10 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center? Please explain.

422. Is it sufficiently clear what information would be required by Part IV, Item 10 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

423. What mechanisms are available for NMS Stock ATSs to perform outbound routing? Do you believe there is any additional information that the Commission should require NMS Stock ATSs to disclose with regard to outbound routing? If so, explain what information and why. Please support your arguments.

424. Do you believe there is any information that would be required by Part IV, Item 10 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

425. Do you believe that the disclosures required under Part IV, Item 10 of proposed Form ATS-N would provide market participants with relevant information to evaluate the potential for leakage of their confidential trading information? Why or why not? Please be specific.

426. Do you believe transparency in how an NMS Stock ATS routes orders to other trading centers is useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not?

427. Do you believe there is other information that market participants might find relevant or useful regarding the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

428. What are the potential costs and benefits of disclosing the information

⁴⁸⁹ "Trading center" under Regulation NMS is defined as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent." 17 CFR 242.600(b)(78).

⁴⁹⁰ See 17 CFR 242.301(b)(10).

required by Part IV, Item 10 of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 10 of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

429. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 10 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 10?

K. Market Data

Part IV, Item 11 of proposed Form ATS–N would require an NMS Stock ATS to disclose its sources and use of market data. Part IV, Item 11(a) of proposed Form ATS–N would require a description of the market data used by the NMS Stock ATS and the source of that market data (e.g., market data feeds disseminated by the consolidated data processor (“SIP”) and market data feeds disseminated directly by an exchange or other trading center or third-party vendor of market data). Part IV, Item 11(b) of proposed Form ATS–N would require the NMS Stock ATS to describe the specific purpose for which the market data is used by the NMS Stock ATS, including how market data is used to determine the NBBO, protected quotes, pricing of orders and executions, and routing destinations. For instance, an NMS Stock ATS can elect to use market data feeds for purposes of complying with the trade through rule of Rule 611 of Regulation NMS⁴⁹¹ and for pricing executions on the NMS Stock ATS that are derived from prices on other trading centers, such as an execution at the mid-point of the NBBO. An NMS Stock ATS also might use data feeds to determine the prices available at other trading centers for purposes of routing orders or other trading interest.

The Commission preliminarily believes that market participants would likely find it useful to know the source and specific purpose for which market data is used by an NMS Stock ATS. For instance, the market data received by an NMS Stock ATS might affect the price at which orders are executed on the NMS Stock ATS.⁴⁹² In addition, because

of the latency differences between the SIP and the direct data feeds of the exchanges,⁴⁹³ the source of an NMS Stock ATS’s market data could impact the price received by a market participant, depending on the ATS’s source of the market data. Accordingly, the Commission preliminarily believes that Part IV, Item 11 of proposed Form ATS–N would provide market participants with information to assist them in developing optimal trading strategies to account for any potential latency differences between market data feeds. Furthermore, the Commission preliminarily believes that these disclosures would assist subscribers to understand the procedures employed by the NMS Stock ATS for complying with Regulation NMS, including an understanding about how their orders might be routed by the NMS Stock ATS. The Commission also preliminarily believes that the disclosures required under Item 11 could help the Commission in understanding how market data is used for purposes of monitoring developments in market structure.

Request for Comment

430. Do you believe the Commission should require the disclosure of the information on Part IV, Item 11 of Form ATS–N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

431. Do you believe Part IV, Item 11 of proposed Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the sources and use of market data? Please explain.

432. Is it sufficiently clear what information would be required by Part IV, Item 11 of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

433. Do you believe there is other information that market participants might find relevant or useful regarding the sources and use of market data? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS–N. Please support your arguments.

434. Do you believe there is any information that would be required by

feeds by the dark pool’s servers and algorithmic strategies).

⁴⁹³ See 2010 Equity Market Structure Release, *supra* note 124, at 3611 (“Given the extra step required for SROs to transmit market data to plan processors, and for plan processors to consolidate the information and distribute it the public, the information in the individual data feeds of exchanges and ECNs generally reaches market participants faster than the same information in the consolidated data feeds.”).

Part IV, Item 11 of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

435. Are there any other applications for which NMS Stock ATSs use market data that the Commission should specifically identify and/or discuss under Part IV, Item 11 of Proposed Form ATS–N?

436. Do you believe that transparency regarding what market data an NMS Stock ATS uses and how the NMS Stock ATS uses that market data is useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not?

437. Do you believe that the disclosures required under Part IV, Item 11 of Proposed Form ATS–N would assist the Commission to understand the procedures employed by an NMS Stock ATS for complying with Regulation NMS and to understand how orders are priced, handled, and routed by the NMS Stock ATS? Why or why not?

438. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 11 of proposed Form ATS–N other than through disclosure on proposed Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 11?

439. What are the potential costs and benefits of disclosing the information required by Part IV, Item 11 of proposed Form ATS–N? Would the proposed disclosures in Part IV, Item 11 of proposed Form ATS–N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

L. Fees

Part IV, Item 12 of proposed Form ATS–N would require the NMS Stock ATS to disclose and describe its fee and rebate structure. Part IV, Item 12(a) of proposed Form ATS–N would require an NMS Stock ATS to describe any fees, rebates, or other charges of the NMS Stock ATS (e.g., connectivity fees, subscription fees, execution fees, volume discounts) and provide the range (e.g., high and low) of such fees, rebates, or other charges. If the fees, rebates, or other charges of the NMS Stock ATS are not the same for all subscribers and persons, the NMS Stock

⁴⁹¹ See 17 CFR 242.611(a).

⁴⁹² See *supra* Section VIII.G (explaining how NMS Stock ATSs might use the NBBO to set execution prices). See also Morgan Stanley letter, *supra* note 197, (stating it received customer questions specific to the use of direct market data

ATS would be required to describe any differences under Part IV, Item 12(b) of proposed Form ATS-N.

The Commission preliminarily believes that by requiring a description of an NMS Stock ATS's fees, rebates, and other charges, market participants would be able to review and evaluate the fee structure of each NMS Stock ATS. If an NMS Stock ATS has a recognized fee structure, such as a maker-taker pricing model,⁴⁹⁴ that information would be required to be disclosed under Part IV, Item 12 of proposed Form ATS-N. The Commission preliminarily believes these disclosures would allow market participants to analyze the fee structures across NMS Stock ATSs in an expedited manner and decide which ATS offers them the best pricing according to the characteristics of their order flow, the type of participant they are (if relevant), or any other aspects of an ATS's fee structure that serves to provide incentivizes or disincentives for specific market participants or trading behaviors. For instance, an institutional subscriber that commonly adds non-marketable, resting orders that offer liquidity may choose to subscribe to an ATS that rewards liquidity-providing orders with rebates. The types of fees charged for services also could influence whether a market participant subscribes to, or the extent to which it participates on, an NMS Stock ATS. For instance, an NMS Stock ATS with relatively higher connectivity fees and relatively lower execution fees may not be as attractive to a market participant that only intends to send the NMS Stock ATS a small amount of trading interest.

The Commission also is proposing to require that NMS Stock ATSs describe any differences in their fees, rebates, or other charges among differing types of subscribers or other persons. The Commission preliminarily believes that this information would further illuminate the types of subscribers and/or trading interest that the NMS Stock ATS may be trying to attract.⁴⁹⁵ This information would allow market participants to observe whether an NMS Stock ATS is offering more preferential treatment to other market participants

⁴⁹⁴ Under the maker-taker pricing model, non-marketable, resting orders that offer (make) liquidity at a particular price receive a liquidity rebate if they are executed, while incoming orders that execute against (take) the liquidity of resting orders are charged an access fee. See 2010 Equity Market Structure Release, *supra* note 124, at 3598–3599.

⁴⁹⁵ See Bloomberg Tradebook letter, *supra* note 190 and accompanying text (recommending that the Commission ask ATSs to complete a questionnaire including questions relating to any special fees or rebates which lead to a preference of one order over another).

and, therefore, aid market participants in deciding where to route their trading interest accordingly.⁴⁹⁶

Part IV, Item 12 of proposed Form ATS-N also would require that the NMS Stock ATS provide the range (e.g., high and low) of such fees, rebates, or other charges. For these disclosures, the types of fees should be categorized in the same manner as the NMS Stock ATS divides fees internally or on its fee schedule. For example, if an NMS Stock ATS provides rebates for liquidity added onto the ATS, then the range for such rebates would be required by this item. If these rebates are further divided into differing rebate amounts depending on order types used, then the range of such rebates for each order type would also need to be disclosed on proposed Form ATS-N.

Item 12, however, does not require NMS Stock ATSs to disclose a complete schedule of their fees. In some cases, the fee schedules employed by NMS Stock ATSs are highly bespoke, and it may not be practical or desirable to require an NMS Stock ATS to disclose the fee schedule applicable to each subscriber to the NMS Stock ATS. The Commission, therefore, is proposing that the NMS Stock ATS disclose only the range of fees for each service. These disclosures are designed to give market participants an awareness of the fees charged by the NMS Stock ATS and allow market participants to understand and compare fees across NMS Stock ATSs, which could reduce the search costs of market participants in deciding where to send their orders and trading interest. The Commission preliminarily believes that the disclosures required by Part IV, Item 12 of proposed Form ATS-N would also assist the Commission in better understanding the fee structures of NMS Stock ATSs and trends in the market as part of the Commission's overall review of market structure.

Request for Comment

440. Do you believe the Commission should require the disclosure of the information on Part IV, Item 12 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

441. Do you believe Part IV, Item 12 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding its fee and rebate structure? Please explain.

442. Is it sufficiently clear what information would be required by Part

⁴⁹⁶ *But see supra* notes 92–95 and 427–429 and accompanying text (discussing the fair access requirements of Regulation ATS).

IV, Item 12 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

443. Do you believe the Commission should require NMS Stock ATSs to publicly disclose their fees, charges, and rebates on proposed Form ATS-N? Why or why not?

444. Do you believe the Commission should require NMS Stock ATSs to disclose their complete fee schedules? Are there other ways that NMS Stock ATSs earn revenue about which the Commission should require disclosure?

445. Do you believe there is other information that market participants might find relevant or useful regarding fees, rebates and other charges? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

446. Do you believe there is any information that would be required by Part IV, Item 12 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

447. Do you believe that the information required by Part IV, Item 12 of proposed Form ATS-N would assist market participants and the Commission in comparing fees across NMS Stock ATSs? Why or why not? Please support your arguments.

448. Do you believe that the information required by Part IV, Item 12 of proposed Form ATS-N would allow the Commission to gather further information and analyze trends in the market, including how the prevalence of different fee structures may impact different categories of market participants? Would this information assist the Commission in evaluating the potential incentives and disincentives created by different fee structures in the market for NMS stocks? Why or why not? Please support your arguments.

449. What are the potential costs and benefits of disclosing the information required by Part IV, Item 12 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 12 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

450. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 12 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If

so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 12?

M. Trade Reporting, Clearance and Settlement

Part IV, Item 13 would require an NMS Stock ATS to describe its arrangements or procedures for trade reporting, clearance, and settlement of transactions. Part IV, Item 13(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures for reporting transactions on the NMS Stock ATS and if the trade reporting procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 13(b) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS. If the clearance and settlement procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. The Commission notes that Item 13 of proposed Form ATS-N would solicit similar information that is solicited pursuant to Exhibit F, subsection (d) of Form ATS, which currently requires ATSs to provide their procedures governing execution, reporting, clearance, and settlement of transactions effected through the ATS.⁴⁹⁷

Trade reporting furthers the transparent, efficient, and fair operation of the securities markets.⁴⁹⁸ For example, among other requirements, a broker-dealer operator of an NMS Stock ATS that is a member of FINRA has trade reporting obligations to FINRA under FINRA Rule 4552 and FINRA Rule 6730. The Commission preliminarily believes the proposed disclosure of the trade reporting procedures of an NMS Stock ATS under Part IV, Item 13(a) of proposed Form

ATS-N would also allow the Commission and the NMS Stock ATS's SRO to more easily review the compliance of the NMS Stock ATS with its applicable trade reporting obligations. The Commission also preliminarily believes market participants may also find the disclosure of these procedures useful to understanding how their trade information is reported.

Part IV, Item 13(b) of proposed Form ATS-N would require that an NMS Stock ATS describe any arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS. The Commission has previously stated that the integrity of the trading markets depends on the prompt and accurate clearance and settlement of securities transactions.⁴⁹⁹ For example, the description of procedures required by Item 13(b) of proposed Form ATS-N could include the process through which an NMS Stock ATS clears a trade (e.g., whether the NMS Stock ATS becomes a counterparty to a transaction, interposing itself between two counterparties to a transaction, or whether the NMS Stock ATS submits trades to a registered clearing agency for clearing) and any requirements an NMS Stock ATS places on its subscribers, or other persons whose orders are routed to an NMS Stock ATS, to have clearance and settlement systems and/or arrangements with a clearing firm. The Commission preliminarily believes market participants would likely find the disclosures required by Item 13(b) to be useful in understanding the measures undertaken by an NMS Stock ATS to facilitate clearance and settlement of subscriber orders on the NMS Stock ATS and allow them to more easily compare the clearance arrangements required across NMS Stock ATSs as part of deciding where to route their trading interest. The Commission preliminarily believes that the disclosures required by Part IV, Item 13 of proposed Form ATS-N may assist the Commission in better understanding the trade reporting, clearance and settlement procedures of NMS Stock ATSs and trends in the market as part of the Commission's overall review of market structure.

Request for Comment

451. Do you believe the Commission should require the disclosure of the information on Part IV, Item 13 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

452. Do you believe Part IV, Item 13 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding its arrangements or procedures for trade reporting, clearance, and settlement of transactions? Please explain.

453. Do you believe there is other information that market participants might find relevant or useful regarding procedures for trade reporting, clearance, and settlement of transactions on the NMS Stock ATSs? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

454. Is it sufficiently clear what information would be required by Part IV, Item 13 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

455. Do you believe there is any information that would be required by Part IV, Item 13 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

456. Do you believe that the information required by Part IV, Item 13 of proposed Form ATS-N will assist market participants in the manner described above? Why or why not? Please support your arguments.

457. What are the potential costs and benefits of disclosing the information required by Part IV, Item 13 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 13 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

458. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 13 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 13?

N. Order Display and Execution Access

Part IV, Item 14 of proposed Form ATS-N would require an NMS Stock ATS to provide the following information if the NMS Stock ATS displays orders in an NMS stock to any person other than employees of the NMS Stock ATS and executed 5% or more of the average daily trading

⁴⁹⁷ In contrast to current Form ATS, Form ATS-N further would require that an NMS Stock ATS describe any differences in the manner in which its trade reporting, clearance, and settlement procedures are applied among subscribers and other persons. Also, Exhibit F, subsection (d) of Form ATS requires ATSs to provide the procedures governing execution in the same section as reporting and clearance and settlement procedures, whereas Form ATS-N would require information on execution procedures under a separate item, Part IV, Item 7.

⁴⁹⁸ See Regulation ATS Adopting Release, *supra* note 7, at 70887 (stating the market-wide transaction and quotation reporting plans operated by the registered national securities exchanges are responsible for the transparent, efficient, and fair operations of the securities markets).

⁴⁹⁹ See *id.* at 70897.

volume in that NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) The ticker symbol for each such NMS stock displayed for each of the last 6 calendar months; (b) the manner in which the NMS Stock ATS displays such orders on a national securities exchange or through a national securities association; and (c) how the NMS Stock ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that exchange or association.⁵⁰⁰

The information elicited in Part IV, Item 14 relates to an NMS Stock ATS's obligations under current Rule 301(b)(3) of Regulation ATS, which applies if an ATS displays a subscriber order in an NMS stock to any person other than ATS employees, and during at least 4 of the preceding 6 calendar months, executed 5% or more of the average daily trading volume in that NMS Stock as reported by an effective transaction reporting plan. Rule 301(b)(3)(ii) and (iii) requires qualifying ATSs to report their highest bid and lowest offer for the relevant NMS stock for inclusion in the quotation data made available by the national securities exchange or national securities association to which it reports and provide equivalent access to effect a transaction with other orders displayed on the exchange or by the association.⁵⁰¹ Under the current regulatory regime for ATSs, there is no mechanism under which an ATS must notify the Commission, its SRO, or market participants after it has triggered those requirements.⁵⁰²

⁵⁰⁰ In response to Part IV, Item 14 of proposed Form ATS-N, an NMS Stock ATS filing a Form ATS-N would indicate "not applicable" if the NMS Stock ATS had not triggered the volume thresholds under Rule 301(b)(3)(i) of Regulation ATS before commencing operations pursuant to an effective Form ATS-N. If an NMS Stock ATS triggers the Rule 301(b)(3)(i) thresholds after commencing operations pursuant to an effective Form ATS-N, the Commission generally would consider this to be a material change to the operations of the NMS Stock ATS (assuming it is not already complying with the display and access requirements of Rule 301(b)(3)), and the NMS Stock ATS would be required to file a Form ATS-N Amendment pursuant to proposed Rule 304(a)(2)(i)(A). In the case where an NMS Stock ATS has voluntarily chosen to comply with the display and access requirements of Rule 301(b)(3)(ii) and (iii) before crossing the relevant thresholds, the NMS Stock ATS would nevertheless have to file a Form ATS-N Amendment upon surpassing the thresholds within 30 days after the end of the calendar quarter pursuant to proposed Rule 304(a)(2)(i)(B).

⁵⁰¹ See 17 CFR 242.301(b)(3)(ii) and (iii).

⁵⁰² In contrast, an ATS that triggers the "fair access" requirements under Rule 301(b)(5), see

The information required by Part IV, Item 14 of proposed Form ATS-N is designed to elicit information about how the NMS Stock ATS complies with the requirements of Rule 301(b)(3) of Regulation ATS when applicable. The Commission preliminarily believes that the disclosure of the information required by Item 14 of proposed Form ATS-N would facilitate the Commission's oversight of NMS Stock ATSs and their compliance with Rule 301(b)(3) and help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required. In part, because the thresholds required for display and access are counted for each NMS stock individually, an NMS Stock ATS would be required to disclose the ticker symbol for the relevant NMS stock to aid the Commission in evaluating its compliance. The Commission also preliminarily believes that these disclosures would help ensure that market participants and the Commission are aware when an NMS Stock ATS has become a significant source of liquidity in an NMS stock. Further, the Commission preliminarily believes that market participants would find the information disclosed in this item useful to understand how they can access applicable quotations.

Request for Comment

459. Do you believe the Commission should require the disclosure of the information on Part IV, Item 14 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

460. Do you believe Part IV, Item 14 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the NMS Stock ATS's obligations under current Rule 301(b)(3) of Regulation ATS? Please explain.

supra notes 92-95 and 426-429 and accompanying text, is required to attach Exhibit C to Form ATS-R, which is filed with the Commission, but not publicly available. Exhibit C of Form ATS-R requires an ATS that triggered the fair access requirements to: (1) Provide a list of all persons granted, denied, or limited access to the ATS during the period covered by the ATS-R and (2) designate for each person (a) whether they were granted, denied, or limited access, (b) the date the ATS took such action, (c) the effective date of such action, and (d) the nature of any denial or limitation of access. See *supra* note 453.

461. Do you believe there is other information that market participants might find relevant or useful regarding the NMS Stock ATS's obligations under current Rule 301(b)(3) of Regulation ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

462. Is it sufficiently clear what information would be required by Part IV, Item 14 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

463. Do you believe there is any information that would be required by Part IV, Item 14 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

464. Do you believe that the information required by Part IV, Item 14 of proposed Form ATS-N will assist market participants in accessing applicable quotations and ensuring they receive equivalent access on the NMS Stock ATS? Why or why not? Please support your arguments.

465. Do you believe that the imposition of the requirements of Rule 301(b)(3) on an NMS Stock ATS crossing the relevant volume thresholds of Rule 301(b)(3)(i) and meeting the display requirement of the rule, should constitute a material change in the operations of the NMS Stock ATS such that it should be reported to the Commission in advance? Why or why not?

466. What are the potential costs and benefits of disclosing the information required by Part IV, Item 14 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 14 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

467. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 14 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 14?

In 2009, the Commission published a proposal to address certain practices with respect to undisplayed liquidity, which is trading interest that is available for execution at a trading center, but is not included in the consolidated quotation data that is widely disseminated to the public.⁵⁰³ Among other things, the Commission proposed amending Rule 301(b)(3) of Regulation ATS to lower the trading volume threshold that triggers public display obligations for ATSs from 5% or more of the aggregate average daily share volume for an NMS stock as reported by an effective transaction reporting plan to 0.25% or more of the aggregate average daily share volume for an NMS stock as reported by an effective transaction reporting plan.⁵⁰⁴ The Commission also proposed to change the definition of “bid” or “offer” in Regulation NMS to clarify that the public quoting requirements apply to actionable indications of interest privately transmitted by dark pools to selected market participants.⁵⁰⁵

Request for Comment

468. Do you believe that the Commission should lower the 5% trading volume threshold in Rule 301(b)(3) of Regulation ATS that triggers the public display requirement for ATSs? Why or why not? If so, what is the appropriate threshold level? Please support your arguments.

469. Do you believe that the Commission should define actionable indications of interest in the definition of “bid” and “offer” in Regulation NMS? Why or why not? Please support your arguments.

O. Fair Access

Part IV, Item 15 of proposed Form ATS-N would require an NMS Stock ATS to provide the following information if the NMS Stock ATS executes 5% or more of the average daily trading volume in an NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) The ticker symbol for each NMS stock for each of the last 6 calendar months; and (b) a description of the written standards for granting access to trading on the NMS

Stock ATS.⁵⁰⁶ As explained above,⁵⁰⁷ Rule 301(b)(5)(ii)(A) of Regulation ATS requires an ATS to establish written standards for granting access to trading on its system when it crosses the fair access thresholds of Rule 301(b)(5)(i) and does not meet the exception set forth in Rule 301(b)(5)(iii). If an ATS crosses the fair access thresholds, Rule 301(b)(5)(ii)(B) requires the ATS to “not unreasonably prohibit or limit any person in respect to access to services offered by such alternative trading system by applying the [written] standards . . . in an unfair or discriminatory manner.”⁵⁰⁸

The Commission preliminarily believes that the disclosure of the information requested by Part IV, Item 15 of proposed Form ATS-N would facilitate the Commission’s oversight of NMS Stock ATSs and their compliance with Rule 301(b)(5). Because the volume thresholds required for fair access are counted for each NMS stock individually, an NMS Stock ATS would be required to disclose the ticker symbol for the relevant NMS stock to aid the Commission in evaluating the NMS Stock ATS’s compliance. The Commission also preliminarily believes that it is important for market participants to be aware of whether an NMS Stock ATS is a significant source of liquidity for an NMS stocks and therefore, must provide fair access. Although Exhibit C of Form ATS-R requires an ATS to notify the Commission when it has crossed a fair access threshold in a particular calendar quarter,⁵⁰⁹ there is currently no requirement that an ATS must notify the public when it has done so. The Commission preliminarily believes that having such information publicly available will help market participants

⁵⁰⁶ In response to Part IV, Item 15 of proposed Form ATS-N, an NMS Stock ATS filing a Form ATS-N would indicate “not applicable” if the NMS Stock ATS had not triggered the volume thresholds under Rule 301(b)(5)(i) of Regulation ATS before commencing operations pursuant to an effective Form ATS-N. If an NMS Stock ATS triggers the Rule 301(b)(5)(i) thresholds after commencing operations pursuant to an effective Form ATS-N, the Commission would generally consider this to be a material change to the operations of the NMS Stock ATS (assuming it is not already complying with the fair access requirements of Rule 301(b)(5)), and the NMS Stock ATS would be required to file a Form ATS-N Amendment pursuant to proposed Rule 304(a)(2)(i)(A). In the case where an NMS Stock ATS has voluntarily chosen to comply with the fair access requirements of Rule 301(b)(5)(ii) before crossing the relevant thresholds, the NMS Stock ATS would nevertheless have to file a Form ATS-N Amendment upon surpassing the thresholds within 30 days after the end of the calendar quarter pursuant to Rule proposed 304(a)(2)(i)(B).

⁵⁰⁷ See *supra* notes 92–95 and accompanying text.

⁵⁰⁸ See 17 CFR 242.301(b)(5)(ii)(B).

⁵⁰⁹ See *supra* note 453.

better evaluate trading opportunities and where to route orders in order to reach their trading and/or investment objectives. The Commission preliminarily believes that the disclosures that would be required by Item 15 would help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required.

Request for Comment

470. Do you believe the Commission should require the disclosure of the information on Part IV, Item 15 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

471. Do you believe Part IV, Item 15 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the written standards for granting access to trading on its system when it crosses the fair access thresholds of Rule 301(b)(5)(i) (and does not meet the exception set forth in Rule 301(b)(5)(iii))? Please explain.

472. Do you believe there is other information that market participants might find relevant or useful regarding the written standards for granting access to trading on its system when it crosses the fair access thresholds of Rule 301(b)(5)(i) (and does not meet the exception set forth in Rule 301(b)(5)(iii))? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

473. Do you believe there is any information that would be required by Part IV, Item 15 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

474. Is it sufficiently clear what information would be required by Part IV, Item 15 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

475. Do you believe that the disclosures under Part IV, Item 15 of proposed Form ATS-N would help market participants better evaluate trading opportunities and where to route orders in order to reach their investment objectives? Why or why not? Please support your arguments.

476. Do you believe that the imposition of the requirements of Rule

⁵⁰³ See generally Regulation of Non-Public Trading Interest, *supra* note 123.

⁵⁰⁴ See *id.* at 61216.

⁵⁰⁵ See *id.*

301(b)(5) on an NMS Stock ATS crossing the relevant volume thresholds of Rule 301(b)(5)(i) should constitute a material change in the operations of the NMS Stock ATS such that it should be reported to the Commission in advance? Why or why not?

477. What are the potential costs and benefits of disclosing the information required by Part IV, Item 15 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 15 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

478. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 15 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 15?

P. Market Quality Statistics Published or Provided by the NMS Stock ATS to Subscribers

Part IV, Item 16 of proposed Form ATS-N would require an NMS Stock ATS to explain and provide certain aggregate platform-wide market quality statistics that it publishes or provides to one or more subscribers regarding the NMS Stock ATS.⁵¹⁰ Under Item 16, if the NMS Stock ATS publishes or otherwise provides to one or more subscribers aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS, it would be required to: (i) List and describe the categories of the aggregate platform-wide order flow and execution statistics published or provided; (ii) describe the metrics and methodology used to calculate the aggregate platform-wide order flow and execution statistics; and (iii) attach as Exhibit 5 the most recent disclosure of the aggregate platform-wide order flow and execution statistics published or provided to one or more subscribers for each category or metric as of the end of the calendar quarter. An NMS Stock ATS would not be required to develop or publish any new statistics for purposes of making this disclosure; it would only be required to make the disclosures for statistics it already

⁵¹⁰ An NMS Stock ATS would only be required to provide order flow and execution statistics that are aggregated across the ATS as a whole, not subscriber-specific order flow and execution statistics.

otherwise collects and publishes or provides to one or more subscribers to the NMS Stock ATS.

The Commission preliminarily believes that some NMS Stock ATSs voluntarily publish or otherwise provide to subscribers aggregate platform-wide order flow and execution statistics that do not fall under the statistical information that is required to be disclosed under Exchange Act Rule 605,⁵¹¹ which requires market centers, such as NMS Stock ATSs, to publish monthly reports of statistics on their order executions. To the extent an NMS Stock ATS publishes or provides such aggregate platform-wide statistics to one or more subscribers, Part IV, Items 16(a) and (b) of proposed Form ATS-N would require the NMS Stock ATS to list and describe the categories or metrics of the statistics it publishes or provides to subscribers and describe any criteria or methodology that the ATS uses to calculate those statistics, respectively. Item 16(c) would require the NMS Stock ATS to attach as Exhibit 5 the most recent disclosure of order flow and execution statistics published or provided for each category or metric as of the end of the calendar quarter.⁵¹² To comply with the requirements of Item 16(c), an NMS Stock ATS would file a Form ATS-N Amendment with an updated Exhibit 5 within 30 calendar days after the end of each calendar quarter.⁵¹³

Under Part IV, Item 16, an NMS Stock ATS would be required to explain and provide any aggregate platform-wide order flow or execution statistic that is not otherwise a required disclosure under Exchange Act Rule 605 and published or provided to one or more subscribers by the NMS Stock ATS. An example of a type of statistic that would be a required disclosure under Item 16 would be statistics related to the percentage of midpoint executions on the NMS Stock ATS that the NMS Stock ATS publishes or otherwise provides to subscribers. The NMS Stock ATS would be required to list that category under Part IV, Item 16(a) and explain how the NMS Stock ATS calculates that statistic

⁵¹¹ 17 CFR 242.605.

⁵¹² For instance, if an NMS Stock ATS publishes or provides a particular statistic on a daily basis, the NMS Stock ATS would include in Exhibit 5 the statistic that was published or provided to one or more subscribers on the last trading day of the calendar quarter (e.g., the statistic published or provided on June 30th or last trading day prior to June 30th). If an NMS Stock ATS publishes or provides a particular statistic weekly, the NMS Stock ATS would be required to include in Exhibit 5 the statistic that was published or provided to one or more subscribers at the end of the week prior to the end of the calendar quarter (e.g., the statistic published for the last full week of June).

⁵¹³ See proposed Rule 304(a)(2)(i)(B).

under Item 16(b). Within 30 calendar days after the end of each calendar quarter, the NMS Stock ATS would be required to attach an Exhibit 5 containing the most recent percentage it disseminated during the previous quarter. The Commission preliminarily believes that requiring the NMS Stock ATS to provide the statistic on Form ATS-N on a quarterly basis would allow market participants to obtain insight into the nature of trading on the NMS Stock ATS on a sufficiently frequent basis while minimizing the reporting burden for the NMS Stock ATS.

The Commission preliminarily believes that an NMS Stock ATS may choose to create and publish or provide to one or more subscribers information concerning order flow and execution quality for different reasons. For example, the NMS Stock ATS may have concluded that publication of certain statistics may highlight certain characteristics of the NMS Stock ATS that would attract certain order flow. Or a subscriber may have requested that the NMS Stock ATS provide certain aggregated information concerning order flow and execution quality that the subscriber needed to assess the ATS's operations. The Commission notes that certain performance metrics and statistics may be important factors for investors and subscribers in comparing and selecting an ATS that is most appropriate for their investment objectives.⁵¹⁴ Indeed, Exchange Act Rule 605 currently requires ATSs to provide quarterly public reports containing certain information concerning ATS executions. As such, to the extent that an NMS Stock ATS has made a determination to create and publish or provide to subscribers certain aggregate platform-wide order flow and execution quality statistics, the Commission preliminarily believes that others may also find such information useful when evaluating an NMS Stock ATS as a possible venue to which to route orders in order to accomplish their investing or trading objectives.

The Commission also solicits comment on whether other standardized statistical disclosures should be required from NMS Stock ATSs and the nature and extent of any such metrics or statistics that commenters believe should be disclosed.

Request for Comment

479. Do you believe the Commission should require the disclosure of the information on Part IV, Item 16 of Form ATS-N? Why or why not? If so, what

⁵¹⁴ See generally Tuttle: ATS Trading in NMS Stocks, *supra* note 126.

level of detail should be disclosed? Please be specific.

480. Do you believe that the statistics required on Part IV, Item 16 of Form ATS–N should be provided on a more or less frequent basis? Why or why not? If so, how often should the statistics be provided (e.g., on a daily, weekly, monthly, quarterly, or annual basis)? Please support your arguments.

481. Is it sufficiently clear what information would be required by Part IV, Item 16 of proposed Form ATS–N? Should the item be refined in any way? If so, how? Please be specific.

482. Do you believe that the disclosures under Part IV, Item 16 of proposed Form ATS–N would help market participants better evaluate trading opportunities and where to route orders in order to reach their investment objectives? Why or why not? Please support your arguments.

483. Do you believe that the Commission should require standardized public disclosures of performance metrics or statistics for each NMS Stock ATS? Why or why not? Please support your arguments. If so, what metrics or statistics should NMS Stock ATSs be required to disclose publicly? Please be specific.

484. What percentage of NMS Stock ATSs publish or provide market quality statistics not otherwise required under Exchange Act Rule 605? Please explain how you have calculated this number.

485. Do you believe that there are other statistics or data that an NMS Stock ATS should be required to provide on proposed Form ATS–N that would be useful to market participants that either subscribe to or are considering subscribing to the NMS Stock ATS? If so, please identify those metrics and explain how they would be useful to market participants. Please support your arguments.

486. Should the Commission require NMS Stock ATSs to disclose on Form ATS–N, statistics regarding the extent of trading by the broker-dealer operator and its affiliates on the NMS Stock ATS? Why or why not? If so, what statistics should be required to be disclosed? Please support your arguments. If you believe that an NMS Stock ATS should disclose statistics about the extent of its broker-dealer operator's and its affiliates' trading activity on the NMS Stock ATS, how often should these statistics be disclosed (e.g., on a weekly, monthly, quarterly, annual basis)?

487. Do you believe there is any information that would be required by Part IV, Item 16 of proposed Form ATS–N that an NMS Stock ATS should not be required to disclose due to

concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

The Commission also notes that some industry participants have previously requested public statistics about the quality of these markets. In the 2010 Equity Market Structure Release, the Commission solicited public comment about, among other things, market structure performance and order execution quality, and how transparency could be improved in these areas.⁵¹⁵ For example, the Commission noted that an important objective of many dark pools is to offer institutional investors an efficient venue in which to trade in large size with minimized market impact,⁵¹⁶ and requested comment on the extent to which dark pools meet this objective of improving execution quality for the large orders of institutional investors.⁵¹⁷ In seeking comment on other tools to protect investor interests, the Commission also requested comment on Exchange Act Rules 605 and Exchange Act Rule 606.⁵¹⁸ Exchange Act Rule 606 requires broker-dealers to publish quarterly reports on their routing practices, including the venues to which they route orders for execution.⁵¹⁹ Specifically, the Commission asked about the currency of Exchange Act Rules 605 and 606 and whether the information provided on the reports was useful to investors and their brokers in assessing the quality of order execution and routing practices.⁵²⁰

In response, some commenters stated their concern about the lack of market quality information available to the public about ATSs and other trading centers. For example, one commenter expressed support for national securities exchanges and ATSs to disclose how often a functionality is used and more market quality statistics, such as quote-per-execution ratios, duration of quotes and number of times orders are routed out without getting filled so that investors and other market participants could better gauge execution quality.⁵²¹ Another commenter stated that “regulators should direct broker-dealers to provide public reports of order

routing and execution quality metrics that are geared toward retail investors.”⁵²² This commenter also stated that “the Commission should direct broker-dealers to provide institutional clients with standardized execution venue statistical analysis reports” and noted its commitment “to working with other industry groups to develop consistent industry templates, which it believes will greatly enhance institutional investors’ ability to evaluate their brokers’ routing practices and the quality of execution provided by different venues.”⁵²³ Another commenter stated its belief that publicly available order routing and execution quality statistics pursuant to Rules 605 and 606 do not provide information to measure broker-dealers’ and execution venues’ performance with respect to specific institutional investors and that the reports are not presented in a uniform manner that allows for easy comparison across different broker-dealers and venues.⁵²⁴

With regard to the comment that the execution quality statistics currently made public under Rules 605 and 606 are inadequate, the Commission notes that it is considering proposing to amend Rules 600 and 606 to standardize and improve transparency around how broker-dealers handle and route institutional customer orders. These

⁵²² See SIFMA letter #2, *supra* note 175 at 12. For example, the commenter suggested including information on “(i) percent of shares Improved, (ii) average price improvement, (iii) net Price Improvement per share, and (iv) effective/quoted spread ratio.”

⁵²³ See SIFMA letter #2, *supra* note 175 at 13. The commenter gave examples of the types of information (per venue) that should be incorporated into these reports as: (i) Percentage of orders executed, (ii) average number of shares ordered and executed, (iii) fill rates—overall, taken, added, and routed, and (iv) percentage executed displayed and undisplayed.

⁵²⁴ See letter from Dorothy M. Donohue, Deputy General Counsel, Investment Company Institute; Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association; and Randy Snook, Executive Vice President, Securities Industry and Financial Markets Association, dated October 23, 2014, at 2.

This commenter also provided a template for disclosure of order routing and execution quality information that institutional investors could request from their broker-dealers, which included, among other things: The number of total shares routed as actionable IOIs; the percent of shares routed to the venue by the broker that resulted in executions at that venue; the average length of time (measured in milliseconds) that orders (other than IOCs) were posted to a venue before being filled or cancelled; the average size, by number of shares, of each order actually executed on the venue; the aggregate number of shares executed at the venue that were priced at or near the mid-point between the bid and the offer; and the percentage of total shares executed that were executed at or near the midpoint between the bid and the offer. See *id.* at “Broker Routing Venue Analysis Template Definitions.”

⁵¹⁵ See Equity Market Structure Release, *supra* note 124 at 3602–3614. See also *supra* Section III.D (discussing certain comments received on the Equity Market Structure Release).

⁵¹⁶ See Equity Market Structure Release, *supra* note 124 at 3612.

⁵¹⁷ See *id.*

⁵¹⁸ 17 CFR 242.606.

⁵¹⁹ See 2010 Equity Market Structure Release, *supra* note 124, at 3605–3606.

⁵²⁰ See *id.*

⁵²¹ Goldman Sachs letter, *supra* note 175, at 10.

revisions being considered would include addressing commenter concerns regarding disclosures by broker-dealers about the trading venues to which they route orders, particularly with respect to order and execution sizes, fill rates, price improvement, and the use of actionable indications of interests.⁵²⁵ The Commission also is considering disclosures to facilitate the ability of institutional investors to assess potential conflicts of interest and risks of information leakage.

Request for Comment

488. Do you believe that there is information that the Commission should require NMS Stock ATSs to disclose other than the information that is currently available to market participants from order execution reports pursuant to Exchange Act Rule 605? Why or why not? Please support your arguments. If so, what information should be disclosed and how would the information be useful to market participants? Please explain. Do you believe that there is information that the Commission should require a broker-dealer operator of the NMS Stock ATS to disclose other than the information that is currently available to market participants from order routing reports pursuant to Exchange Act Rules 606? Why or why not? Please support your arguments.

489. Do you believe that there are other means by which market quality metrics should be required to be made available by NMS Stock ATSs to market participants, other than as disclosures on proposed Form ATS-N? Why or why not? Please support your arguments. If so, please identify by what means and why? Please support your arguments.

490. Do you believe that an NMS Stock ATS should be required to disclose information about orders entered into its system and the ultimate disposition of such orders? Why or why not? Please support your arguments. For example, should NMS Stock ATSs disclose information regarding the average order size, average execution size, and percentage of orders marked immediate or cancel? Why or why not? Please support your arguments.

491. Do you believe that NMS Stock ATSs should be required to disclose whether the NMS Stock ATS provided order flow and execution statistics to some subscribers and not others? Why or why not? Please support your arguments.

492. Do you believe that NMS Stock ATSs should be required to disclose execution information such as the total

number and percentage of shares executed at the midpoint, total number and percentage of shares executed at the national best bid, total number and percentage of shares executed at the national best offer, total number and percentage of shares executed between the national best bid and the midpoint, and total number and percentage of shares executed between the midpoint and the national best offer? Why or why not? Please support your arguments. If so, do you believe such information should be disclosed publicly on an aggregated basis or should the information be disclosed to each subscriber based on its own orders? Please support your arguments.

493. Do you believe that the joint-industry plan should be amended for publicly disseminating consolidated trade data to require real-time disclosure of the identity of NMS Stock ATSs on reports of their executed trades? Why or why not? Please support your arguments. Alternatively, should executions on NMS Stock ATSs be publicly disseminated on a delayed basis?⁵²⁶ Why or why not? Please support your arguments. If so, how should this be done and what would be the appropriate delay? Please explain.

494. Do you believe that there are other data elements that should be provided by NMS Stock ATSs in the consolidated trade data? What are they and why should they be required? Please be specific.

IX. Proposed Amendment to Rule 301(b)(10): Written Safeguards and Written Procedures To Protect Confidential Trading Information

Current Rule 301(b)(10) of Regulation ATS⁵²⁷ requires every ATS to have in place safeguards and procedures to protect subscribers' confidential trading information and to separate ATS functions from other broker-dealer functions, including proprietary and customer trading.⁵²⁸ In the Regulation ATS Adopting Release, the Commission recognized that some broker-dealer operators provide traditional brokerage services as well as access to their ATS(s).⁵²⁹ The Commission further stated that Rule 301(b)(10) was not intended to preclude an ATS from

⁵²⁶ FINRA Rule 4552 requires each ATS to report to FINRA weekly volume information and number of trades regarding equity securities transactions within the ATS. Each ATS is also required to use a single MPID when reporting information to FINRA and to report weekly aggregate volume information on a security-by-security basis to FINRA.

⁵²⁷ See 17 CFR 242.301(b)(10).

⁵²⁸ See Regulation ATS Adopting Release, *supra* note 7, at 70879.

⁵²⁹ See *id.*

providing its traditional brokerage services; rather, Rule 301(b)(10) was designed to prevent the misuse of private customer information in the system for the benefit of other customers, the ATS's operator, or its employees.⁵³⁰ The Commission also stated its belief that the sensitive nature of trading information subscribers send to ATSs requires such systems to take certain steps to ensure the confidentiality of such information.⁵³¹ To illustrate its point, the Commission provided the example that unless subscribers consent, registered representatives of an ATS should not disclose information regarding trading activities of such subscribers to other subscribers that could not be ascertained from viewing the ATS's screens directly at the time the information is conveyed.⁵³² As a result of its concerns regarding confidentiality, the Commission adopted Rule 301(b)(10), which was designed to eliminate the potential for abuse of the confidential trading information that subscribers send to ATSs.⁵³³

Rule 301(b)(10), however, does not currently require that the safeguards and procedures mandated under Rule 301(b)(10) be memorialized in writing. The Commission is now proposing to amend Rule 301(b)(10) to require that such safeguards and procedures be reduced to writing.⁵³⁴ Specifically, the Commission proposes to amend Rule 301(b)(10)(i) to require that all ATSs (including non-NMS Stock ATSs) establish written safeguards and written procedures to protect subscribers' confidential trading information.⁵³⁵ This would include an ATS adopting written safeguards and written procedures that limit access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or are responsible for its compliance with

⁵³⁰ See *id.*

⁵³¹ See *id.*

⁵³² The Commission stated that its concern regarding confidentiality grew out of its inspections of some ECNs, during which the Commission and its staff found that some of the broker-dealers operating ECNs used the same personnel to operate the ECN as they did for more traditional broker-dealer activities, such as handling customer orders that were received by telephone. These types of situations create the potential for misuse of the confidential trading information in the ECN, such as customers' orders receiving preferential treatment, or customers receiving material confidential information about orders in the ECN. See *id.*

⁵³³ See *id.*

⁵³⁴ As discussed above, proposed Form ATS-N would also require NMS Stock ATSs to describe the written safeguards and procedures. See Part III, Item 10 of Proposed Form ATS-N. See also *supra* Section VII.B.11.

⁵³⁵ See proposed Rule 301(b)(10)(i).

⁵²⁵ See *id.*

Regulation ATS or any other applicable rules,⁵³⁶ and implementing written standards controlling employees of the ATS trading for their own accounts.⁵³⁷ The Commission is also proposing to amend Rule 301(b)(10)(ii) to require that the oversight procedures, which an ATS adopts and implements to ensure that the above safeguards and procedures are followed, be in writing.⁵³⁸

The Commission continues to believe that safeguards and procedures to ensure the confidential treatment of ATS subscribers' trading information are important, and that the potential for misuse of such information continues to exist. The Commission preliminarily believes that requiring an ATS to reduce to writing those safeguards and procedures, as well as its oversight procedures to ensure that such safeguards and procedures are followed, would strengthen the effectiveness of the ATS's safeguards and procedures and would better enable the ATS to protect confidential subscriber trading information and implement and monitor the adequacy of, and the ATS's compliance with, its safeguards and procedures. For example, if an ATS were required to reduce its safeguards and procedures to writing, it could self-audit—or if it chose to do so, undergo a third-party audit—for compliance with those safeguards and procedures, and also assess their adequacy. In addition, the Commission preliminarily believes that reducing ATSs' safeguards and procedures under Rule 301(b)(10) to writing will help the Commission and its staff, and the staff of the SRO of which an ATS's broker-dealer operator is a member, evaluate whether an ATS has established such procedures and safeguards, whether the ATS has implemented and is abiding by them, and whether they comply with the requirements of Rule 301(b)(10). This should enable the Commission, and the applicable SRO(s), to exercise more effective oversight of ATSs regarding the ATSs' compliance with Rule 301(b)(10) and other federal securities laws, rules, and regulations. The Commission also preliminarily believes that its proposal would benefit market participants because they would be able to better evaluate the implementation of such safeguards and procedures, due to the proposed rule to reduce those safeguards and procedures to writing.

Request for Comment

495. Do you believe the Commission should require ATSs to reduce to

writing their safeguards and procedures as described above? Why or why not? Should the requirement apply to all ATSs or only a subset such as NMS Stock ATSs? Please support your arguments.

496. Do you believe that requiring ATSs to reduce to writing their safeguards and procedures, as proposed, would help to ensure that subscribers' confidential trading information is protected and not misused? If not, why not? Please support your arguments.

497. Are there other conditions that the Commission should implement to achieve the goal of protecting subscribers' confidential trading information? If so, what are they and why would they be preferable? Please be specific.

498. Currently, how common is it for ATSs to reduce to writing their safeguards and procedures to protect subscribers' confidential trading information and/or their oversight procedures to ensure that those safeguards and procedures are followed? For ATSs that have not reduced their safeguards and procedures to protect subscribers' confidential trading information to writing, how do they currently ensure their compliance with the requirements of Rule 301(b)(10)? Please be specific.

499. For ATSs that have not reduced to writing their safeguards and procedures to protect subscribers' confidential trading information and/or their oversight procedures to ensure that those safeguards and procedures are followed, how long would it take to do so? Please explain.

X. Recordkeeping Requirements

The Commission is proposing to amend Rules 303(a)(1) and 303(a)(2) of Regulation ATS to reflect its proposed amendments to Rule 301(b)(2)⁵³⁹ and 301(b)(10),⁵⁴⁰ and its proposed addition of Rule 304.⁵⁴¹ In addition, the Commission is proposing to make a minor technical amendment to Rule 303.

Currently, unless not required to comply with Regulation ATS pursuant to Rule 301(a)⁵⁴² of Regulation ATS, ATS must comply with the recordkeeping requirements of Regulation ATS. Specifically, Rule 301(b)(8)⁵⁴³ requires an ATS to make and keep current the records specified in Rule 302⁵⁴⁴ and to preserve the

records specified in Rule 303.⁵⁴⁵ In the Regulation ATS Adopting Release, the Commission stated that the requirements to make and preserve records set forth in Regulation ATS are necessary to create a meaningful audit trail and permit surveillance and examination to help ensure fair and orderly markets.⁵⁴⁶

Rule 303(a)(1) requires an ATS to preserve certain records for at least three years, the first two years in an easily accessible place.⁵⁴⁷ Specifically, Rule 303(a)(1)⁵⁴⁸ requires an ATS to preserve: All records required to be made pursuant to Rule 302; all notices provided to subscribers, including notices addressing hours of operation, system malfunctions, changes to system procedures, and instructions pertaining to access to the ATS; documents made or received in the course of complying with the system capacity, integrity, and security standards in Rule 301(b)(6), if applicable;⁵⁴⁹ and, if the ATS is subject to the fair access requirements under Rule 304(b)(5),⁵⁵⁰ a record of its access standards. Rule 303(a)(2)⁵⁵¹ requires that certain other records must be kept for the life of the ATS and any successor enterprise, including partnership articles or articles of incorporation (as applicable), and copies of reports filed pursuant to Rule 301(b)(2),⁵⁵² which includes current Form ATS, and records made pursuant to Rule 301(b)(5).⁵⁵³ In particular, reports required to be maintained for the life of the ATS or any successor enterprise include initial operation reports, amendments, and cessation of operations reports, filed on Form ATS.⁵⁵⁴

The Commission is proposing to amend the record preservation requirements of Rule 303 to incorporate the preservation of records that would be created pursuant to the proposed requirements that NMS Stock ATSs file Forms ATS-N, Form ATS-N Amendments, and notices of cessation instead of Form ATS. Specifically, the Commission is proposing to amend Rule 303(a)(2)(ii) to require that an ATS shall preserve, for the life of the enterprise and of any successor enterprise, copies of reports filed pursuant to Rule 301(b)(2) or—in the case of an NMS

⁵⁴⁵ See 17 CFR 242.303.

⁵⁴⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70877–78.

⁵⁴⁷ See 17 CFR 242.303(a)(1).

⁵⁴⁸ See 17 CFR 242.303(a)(1).

⁵⁴⁹ See *supra* notes 96–100 and accompanying text.

⁵⁵⁰ See *supra* notes 92–95 and accompanying text.

⁵⁵¹ See 17 CFR 242.303(a)(2).

⁵⁵² See 17 CFR 242.301(b)(2).

⁵⁵³ See *supra* notes 92–95 and accompanying text.

⁵⁵⁴ See 17 CFR 242.301(b)(2).

⁵³⁶ See proposed Rule 301(b)(10)(i)(A).

⁵³⁷ See proposed Rule 301(b)(10)(i)(B).

⁵³⁸ See proposed Rule 301(b)(10)(ii).

⁵³⁹ See *supra* Section IV.C.

⁵⁴⁰ See *supra* Section IX.

⁵⁴¹ See *supra* Section IV.C.

⁵⁴² 17 CFR 242.301(a).

⁵⁴³ See 17 CFR 242.301(b)(8).

⁵⁴⁴ See 17 CFR 242.302.

Stock ATS—Rule 304, and records made pursuant to Rule 301(b)(5).⁵⁵⁵ As a result, because an NMS Stock ATS would be required to file Forms ATS–N, Form ATS–N Amendments, and notices of cessation pursuant to proposed Rule 304, instead of on Form ATS, the NMS Stock ATS would be required to preserve those reports for the life of the enterprise and of any successor enterprise pursuant to the proposed amendments to Rule 303(a)(2).⁵⁵⁶ The Commission is not proposing any amendments to the recordkeeping requirements of Rule 302, or any other amendments to the record preservation requirements of Rule 303(a)(2).

The Commission is also proposing amendments to the record preservation requirements of Rule 303(a)(1) to incorporate the Commission's proposed amendments to Rule 301(b)(10),⁵⁵⁷ which would require an ATS to reduce to writing its safeguards and procedures to ensure confidential treatment of subscribers' trading information and the oversight procedures to ensure that those safeguards and procedures are followed.⁵⁵⁸ Accordingly, the Commission is proposing to require an ATS, for a period of not less than three years, the first two years in an easily accessible place, to preserve at least one copy of the written safeguards and written procedures to protect subscribers' confidential trading information and the written oversight procedures created in the course of complying with Rule 301(b)(10).⁵⁵⁹ The Commission is not proposing to amend any other aspects of the records preservation requirements of Rule 303(a)(1). The Commission preliminarily believes that the proposed amendments to Rule 303 are necessary to create a meaningful audit trail of an ATS's current and previous written safeguards and procedures pursuant to Rule 301(b)(2) and permit surveillance and examination to help ensure fair and orderly markets,⁵⁶⁰ without imposing any undue burden on ATSs.

Finally, the Commission proposes to make a minor technical amendment to Rule 303(a). Currently, Rule 303(a) references “paragraph (b)(9) of

§ 242.301” when setting forth the record preservation requirements for ATSs. The Commission is proposing to change the above reference to “paragraph (b)(8) of § 242.301” because Rule 301(b)(8) sets forth the recordkeeping requirements for ATSs.

Request for Comment

500. Do you believe the Commission should amend the recordkeeping requirements for ATSs as proposed? Why or why not?

501. Do you believe that there are any other requirements of Rule 303 that should be amended to satisfy the objectives of this proposal? If so, what are they and why?

502. Do you believe that the proposed amendments to the record preservation requirements of Rule 303 are reasonable? If not, why? Please support your arguments.

XI. General Request for Comment

The Commission is requesting comments from all members of the public. The Commission particularly requests comment from the point of view of persons who operate ATSs that would meet the proposed definition of NMS Stock ATS, subscribers to those systems, investors, and registered national securities exchanges. The Commission seeks comment on all aspects of the proposed rule amendments and proposed form, particularly the specific questions posed above. Commenters should, when possible, provide the Commission with data to support their views. Commenters suggesting alternative approaches should provide comprehensive proposals, including any conditions or limitations that they believe should apply, the reasons for their suggested approaches, and their analysis regarding why their suggested approaches would satisfy the objectives of the proposed amendments. The Commission will carefully consider the comments it receives.

503. Do you believe that there is other information about the nature or extent of the operations of an NMS Stock ATS that should be disclosed on proposed Form ATS–N? Are there specific topics about which the Commission should request more information? If so, what information should be disclosed and why?

504. Do you believe that there are activities of an NMS Stock ATS broker-dealer operator and its affiliates that may give rise to potential conflicts of interest, other than those described, that should be disclosed on Form ATS–N? If so, what information should be

disclosed and why? If so, what are they and why?

505. Is there other information or data that would be useful for a market participant to consider when evaluating an NMS Stock ATS as a potential trading center for its orders? If so, what are they and why?

XII. Paperwork Reduction Act

Certain provisions of the proposal contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).⁵⁶¹ The titles of these requirements are:

- Requirements for Alternative Trading Systems That Are Not National Securities Exchanges—Rule 301, Form ATS and Form ATS–R, 17 CFR 242.301 (OMB Control No. 3235–0509);

- Rule 303 (17 CFR 242.303) Record Preservation Requirements for Alternative Trading Systems (OMB Control No. 3235–0505).

- Rule 304 and Form ATS–N (a proposed new collection of information).

We are submitting these requirements to the Office of Management and Budget (“OMB”) for review and approval in accordance with the PRA and its implementing regulations.⁵⁶² We are applying for an OMB control number for the proposed new collection of information in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. If adopted, responses to the new collection of information would be mandatory. 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.⁵⁶³

A. Summary of Collection of Information

The proposed amendments to Regulation ATS include two new categories of obligations that would require a collection of information within the meaning of the PRA. The first category relates to Rule 301(b)(10) of Regulation ATS⁵⁶⁴ and would apply to all ATSs, while the second category relates to proposed Form ATS–N and would apply only to NMS Stock ATSs.

1. Requirements Relating to Rule 301(b)(10) of Regulation ATS

Under Rule 301(b)(10) of Regulation ATS, all ATSs are currently required to: (1) Establish adequate safeguards and procedures to protect subscribers’

⁵⁵⁵ See proposed Rule 301(a)(2)(ii).

⁵⁵⁶ The Commission notes that an NMS Stock ATS that had previously made filings on Form ATS would be required to preserve those filings for the life of the enterprise, as well as filings made going forward on Form ATS–N.

⁵⁵⁷ See proposed Rule 301(b)(10).

⁵⁵⁸ See *supra* Section VII (discussing the Commission's proposed amendments to Rule 301(b)(10)).

⁵⁵⁹ See proposed Rule 303(a)(1)(v).

⁵⁶⁰ See Regulation ATS Adopting Release, *supra* note 7, at 70877–78.

⁵⁶¹ 44 U.S.C. 3501 *et seq.*

⁵⁶² 44 U.S.C. 3507; 5 CFR 1320.11.

⁵⁶³ 5 CFR 1320.11(l).

⁵⁶⁴ 17 CFR 242.301(b)(10).

confidential trading information; and (2) adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established to protect subscribers' confidential trading information are followed. Rule 301(b)(10) of Regulation ATS further requires that the safeguards and procedures to protect subscribers' confidential trading information shall include: (1) Limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with Regulation ATS or any other applicable rules; and (2) implementing standards controlling employees of the ATS trading for their own accounts. The proposed amendments to Regulation ATS would require written safeguards and written procedures to protect subscribers' confidential trading information and written oversight procedures to ensure that the safeguards and procedures are followed.

In addition, the Commission proposes to amend Rule 303(a)(1)⁵⁶⁵ of Regulation ATS to provide that all ATSs must preserve at least one copy of their written safeguards and written procedures to protect subscribers' confidential trading information and the written oversight procedures created in the course of complying with Rule 301(b)(10) of Regulation ATS. Under the proposed amendment, Rule 303(a)(1)(v) would be added to Regulation ATS to require an ATS to preserve such written safeguards and written procedures, and written oversight procedures for a period of not less than three years, the first two years in an easily accessible place.⁵⁶⁶

2. Requirements Relating to Proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS, Including Proposed Form ATS-N

As described above, the Commission proposes that any ATS that meets the definition of an NMS Stock ATS would be required to complete Form ATS-N and file it with the Commission in a structured format.⁵⁶⁷ Upon the Commission declaring a Form ATS-N effective, the Commission would make the Form ATS-N publicly available. The Commission would also make publicly available upon filing all properly filed Form ATS-N Amendments and notices of cessation on Form ATS-N. The proposed amendments to Regulation ATS would also require each NMS Stock ATS to make public via posting

on its Web site a direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2).

Proposed Form ATS-N consists of five parts. First, the entity submitting the filing would indicate whether it is submitting or withdrawing an initial filing. The entity would also indicate the type of filing—whether the filing is a Form ATS-N, a Form ATS-N Amendment (whether a material amendment, periodic amendment, or correcting amendment), or a notice of cessation, and if it is a notice of cessation, the date the NMS Stock ATS will cease to operate. If the filing is a Form ATS-N Amendment, the NMS Stock ATS would also be required to provide a brief narrative description of the amendment and a redline(s) showing changes to Part III and/or Part IV of proposed Form ATS-N. Part I would require that entity to state the name of the Registered Broker Dealer of the NMS Stock ATS (*i.e.*, the broker-dealer operator), the name under which the NMS Stock ATS conducts business, if any, the MPID of the NMS Stock ATS, and whether it is an NMS Stock ATS currently operating pursuant to a previously filed initial operation report on Form ATS. Part II would require registration information regarding the broker-dealer operator of the ATS, such as the broker-dealer's file number with the Commission, the name of the national securities association with which the broker-dealer operator is a member, the effective dates of the broker-dealer's registration with the Commission and membership in the national securities association, and the broker-dealer operator's CRD Number. In addition, Part II would require the address of the physical location of the NMS Stock ATS matching system, the NMS Stock ATS's mailing address, and a URL to the Web site of the NMS Stock ATS. Part II would also require information regarding the legal status of the broker-dealer operator of the NMS Stock ATS (*e.g.*, corporation, partnership, sole proprietorship) and its date of formation. Furthermore, Part II of proposed Form ATS-N would require the NMS Stock ATS to attach the following three exhibits: (1) Exhibit 1—a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N; (2) Exhibit 2A—a copy of the most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information relating to direct owners and executive officers; and (3) Exhibit

2B—a copy of the most recently filed or amended Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners. In lieu of attaching Exhibits 2A and 2B to proposed Form ATS-N, the NMS Stock ATSs would be able to provide a URL address for where the required documents can be found.

Part III of proposed Form ATS-N would require an NMS Stock ATS to provide certain disclosures related to the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS. Part III consists of ten items, which are summarized here, and explained in greater detail below in the discussion of the estimated burdens related to each disclosure requirement. Part III of proposed Form ATS-N would include disclosures relating to: (1) Whether the broker-dealer operator, or any of its affiliates, operate or control any non-ATS trading centers and how such non-ATS trading centers coordinate or interact with the NMS Stock ATS, if at all; (2) whether the broker-dealer operator, or any of its affiliates, operates another NMS Stock ATS and how such other NMS Stock ATS coordinates or interacts with the NMS Stock ATS completing the Form ATS-N, if at all; (3) the products and services offered by the broker-dealer operator, or any of its affiliates, to subscribers in connection with their use of the NMS Stock ATS; (4) whether the broker-dealer operator, or any of its affiliates, has any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person(s), that operates a trading center regarding access to the NMS Stock ATS, including preferential routing arrangements; (5) whether the broker-dealer operator or any of its affiliates enter orders or other trading interest on the NMS Stock ATS and the manner in which such trading is done; (6) whether the broker-dealer operator or any of its affiliates use a SOR(s) (or similar functionality), an algorithm(s), or both to send or receive orders or other trading interest to or from the NMS Stock ATS, and the interaction or coordination between the SOR(s) (or similar functionality) or algorithm(s) and the NMS Stock ATS; (7) whether there are any employees of the broker-dealer operator that service the operations of the NMS Stock ATS that also service any other business unit(s) of the broker-dealer operator or any affiliate(s) other than the NMS Stock ATS, and the roles and responsibilities of such shared employees; (8) whether any operation, service, or function of the NMS Stock ATS is performed by any

⁵⁶⁵ 17 CFR 242.303(a)(1).

⁵⁶⁶ *Id.*

⁵⁶⁷ See generally *supra* Section IV.

person(s) other than the broker-dealer operator, a description of such operation, service, or function, and whether those person(s), or any of their affiliates, may enter orders or other trading interest on the NMS Stock ATS; (9) whether the NMS Stock ATS makes available or applies any service, functionality, or procedure of the NMS Stock ATS to the broker-dealer operator or its affiliates that is not available or does not apply to a subscriber(s) to the NMS Stock ATS and a description of such service, functionality, or procedure; and (10) a description of the written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS, including (a) a description of the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information, (b) identification of the positions or titles of any persons that have access to confidential trading information, the type of confidential trading information those persons can access, and the circumstances under which they can access it, (c) a description of the written standards controlling employees of the NMS Stock ATS trading for their own accounts, and (d) a description of the written oversight procedures to ensure that the ATS's Rule 301(b)(10) safeguards and procedures are implemented and followed.

Part IV of proposed Form ATS-N would require an NMS Stock ATS to provide certain disclosures related to the manner of operations of the NMS Stock ATS. Part IV consists of 15 items, which are summarized here, and explained in greater detail below in the discussion of the estimated burdens related to each disclosure requirement. Part IV of proposed Form ATS-N would include disclosures relating to: (1) Subscribers to the NMS Stock ATS, including any eligibility requirements to gain access to the services of the ATS, the terms or conditions of any contractual agreement for access, the types of subscribers and other persons that use the services of the ATS, any formal or informal arrangement the NMS Stock ATS may have with a subscriber or person to provide liquidity to the ATS (including the terms and conditions of each arrangement and the identity of any liquidity provider that is an affiliate of the broker-dealer operator), the circumstances by which a subscriber or other person may be limited or denied access to the NMS Stock ATS, and any differences in the treatment of different subscribers and persons with respect to eligibility, terms

and conditions of use, criteria for distinguishing among subscribers or other persons, and limitations and denials of access; (2) the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered and the time when pre-opening or after-hours trading occur, and whether there are any differences in when orders or other trading interest may be entered by different subscribers or persons; (3) the order types and modifiers entered on the NMS Stock ATS, including their characteristics, operations, how they are ranked and executed on the ATS (such as priority vis-à-vis other orders), eligibility and conditions for routing to other trading centers, the available time-in-force instructions for each order type, whether the availability and terms and conditions of each order type is the same for all subscribers and persons, any requirements and handling procedures for minimum order sizes, odd-lot orders or mixed-lot orders, including whether such requirements and procedures are the same for all subscribers and persons, and any messages sent to or received by the NMS Stock ATS indicating trading interest, including any differences in the terms and conditions for such messages for different subscribers and persons; (4) the means by which subscribers and other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS (*e.g.*, direct FIX connection or indirect connection via the broker-dealer operator's SOR or any intermediate functionality, algorithm or sales desk); any co-location services or other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS; and any differences in the terms and conditions for connecting and entering trading interest or co-location services for different subscribers or persons; (5) the segmentation of orders or other trading interest on the NMS Stock ATS and notice about segmentation to subscribers or persons, including the criteria used to segment orders or other trading interest on the NMS Stock ATS, any notice provided to subscribers or persons about the segmented category that a subscriber or a person is assigned, any differences in segmentation (or notice about segmentation) for different subscribers or persons, and order preferencing and its effect on order priority and interaction; (6) the means and circumstances by which orders or other trading interest on the NMS Stock ATS

are displayed or made known outside the NMS Stock ATS, type of information displayed, any differences in display for different subscribers and persons, and to whom orders and trading interest is displayed; (7) the trading services of the NMS Stock ATS, including the means used by the ATS to bring multiple buy and sell orders together, the established, non-discretionary methods dictating the terms of trading on the facilities of the NMS Stock ATS, trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality, and any differences for different subscribers and persons; (8) the procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or malfunction, including any differences in the procedures among subscribers and persons; (9) the opening, reopening or closing processes, or after-hours trading procedures of the NMS Stock ATS; (10) the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, and any differences in the means by which orders are routed among subscribers and persons; (11) the market data used by the NMS Stock ATS and the source of that market data, and the specific purpose for which market data is used by the ATS, including how it is used to determine the NBBO; (12) the fees, rebates, or other charges of the NMS Stock ATS and whether such fees are not the same for all subscribers and persons; (13) arrangements or procedures for trade reporting of transactions on the NMS Stock ATS, and arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transaction on the ATS, including any differences in these procedures among subscribers and persons; (14) information related to the NMS Stock ATS's order display and execution obligations under Rule 301(b)(3) of Regulation ATS, if applicable; (15) information related to the NMS Stock ATS's obligations under the fair access requirements of Rule 301(b)(5) of Regulation ATS, if applicable; and (16) aggregate market quality statistics published or provided to one or more subscribers.

Part V of proposed Form ATS-N would require an NMS Stock ATS to provide certain basic information about the point of contact for the NMS Stock ATS, such as the point of contact's name, title, telephone number and email

address. Part V would also require the NMS Stock ATS to consent to service of any civil action brought by, or any notice of any proceeding before, the Commission or an SRO in connection with the ATS's activities.

The Commission proposes that Form ATS-N would be filed electronically and require an electronic signature. Consequently, the proposed amendments to Regulation ATS would require that every NMS Stock ATS have the ability to file forms electronically with an electronic signature. The Commission preliminarily believes that most, if not all, ATSs that transact in NMS stock currently have the ability to access and submit an electronic form such that the requirement to file Form ATS-N electronically with an electronic signature would not impose new implementation costs. The burdens related to electronic submission and providing an electronic signature are included in the burden hour estimates provided below.

In addition, the Commission proposes to amend Rule 303(a)(2)(ii)⁵⁶⁸ of Regulation ATS to provide that all ATSs must preserve copies of all reports filed pursuant to Rule 304, which includes Form ATS-N filings, for the life of the enterprise and any successor enterprise.

Furthermore, under this proposal, an ATS that effects transactions in both NMS stocks and non-NMS stocks would be required to file both a Form ATS-N with respect to its trading of NMS stocks and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. The ATS would also be required to file two Forms ATS-R—one to report its trading volume in NMS stocks and another to report its trading volume in non-NMS stocks.

B. Proposed Use of Information

1. Proposed Amendments to Rules 301(b)(10) of Regulation ATS

As noted above, the proposed amendments to Rule 301(b)(10) of Regulation ATS would require all ATSs to have in place written safeguards and written procedures to protect subscribers' confidential trading information. Proposed Rule 303(a)(1)(v) of Regulation ATS would require all ATSs to preserve at least one copy of those written safeguards and written procedures.

The Commission preliminarily believes that both the Commission and the SRO of which the ATS's broker dealer-operator is a member will use these written safeguards and written

procedures in order to better understand how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access. The Commission preliminarily believes that the information contained in the records required to be preserved by proposed Rule 303(a)(1)(v) would be used by examiners and other representatives of the Commission, state securities regulatory authorities, and SROs to evaluate whether ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations. The Commission also preliminarily believes that the proposed requirements to memorialize in writing the safeguards and procedures to protect subscribers' confidential trading information would assist ATSs in more effectively complying with their existing legal requirements under Regulation ATS; in particular, the requirements to protect the confidentiality of subscribers' trading information under Rule 301(b)(10) of Regulation ATS.

2. Proposed Rules 301(b)(2)(viii), 304 of Regulation ATS, Including Proposed Form ATS-N, and 301(b)(9)

Proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS would require each NMS Stock ATS to file a Form ATS-N, Form ATS-N Amendments, and a notice of cessation on proposed Form ATS-N.⁵⁶⁹ As noted above, proposed Form ATS-N would require information regarding the broker-dealer operator of the NMS Stock ATS and, in some instances affiliates of the broker-dealer operator, and the operation of the NMS Stock ATS, including detailed disclosures regarding the ATS's method of operation, order types and access criteria. Additionally, an ATS that effects transactions in both NMS stocks and non-NMS stocks would be required to file both a Form ATS-N with respect to its trading of NMS stocks and a revised Form ATS that removes discussion of those aspects of the ATS

⁵⁶⁹ Specifically, proposed Rule 304(a)(1) would require an NMS Stock ATS to file a Form ATS-N prior to the NMS Stock ATS commencing operations. Proposed Rule 304(a)(2)(i) would require an NMS Stock ATS to file amendments to its proposed Form ATS-N: (A) At least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N; (B) within 30 calendar days after the end of each calendar quarter to correct any other information on proposed Form ATS-N that has become inaccurate; or (C) promptly, to correct any information on proposed Form ATS-N that was inaccurate when originally filed. Proposed Rule 304(a)(3) would require an NMS Stock ATS to notice its cessation of operations at least 10 business days before the date on which the NMS Stock ATS ceases operation.

relating to the trading of NMS stocks.⁵⁷⁰ Under the proposed amendments to Rule 301(b)(9), an ATS that effects trades in both NMS stocks and non-NMS stocks would be required to file two Forms ATS-Rs—one reporting its trading volume in NMS stocks and the other reporting its trading volume in non-NMS stocks.⁵⁷¹ The information filed on proposed Form ATS-N would be publicly available on the Commission's Web site and each NMS Stock ATS would be required to post on the NMS Stock ATS's Web site a direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2), but information filed on Forms ATS and ATS-R would be kept confidential, subject to the provisions of current applicable law.

The Commission preliminarily believes that market participants would use the information publicly disclosed on proposed Form ATS-N to source, evaluate, and compare and contrast information about different NMS Stock ATSs, including information relating to the broker-dealer operator and any potential conflicts of interests it may have with respect to its operation of the NMS Stock ATS. The Commission also preliminarily believes that market participants would use the information publicly disclosed on proposed Form ATS-N to source, evaluate, and compare and contrast information about, among other things, an NMS Stock ATS's eligibility requirements, trading hours, order types, connection and order entry functionalities, segmentation of order flow, display of orders and other trading interests, trading platform functionality, procedures governing trading during a suspension of trading, system disruption, or system malfunction, opening, closing, and after-hours trading processes or procedures, routing procedures, market data usages and sources, fees, trade reporting, clearing, and settlement, order display and execution access standards, fair access standards, and market quality statistics published or provided to one or more subscribers. Accordingly, the Commission preliminarily believes that market participants would use the information disclosed on proposed Form ATS-N to better evaluate to which trading venue they may want to subscribe and/or route orders for execution in order to accomplish their investing or trading objectives.

The Commission preliminarily believes it will use the information

⁵⁷⁰ See proposed Rule 301(b)(2)(viii).

⁵⁷¹ See proposed Rule 301(b)(9).

⁵⁶⁸ 17 CFR 242.303(a)(2)(ii).

disclosed on proposed Form ATS–N, Form ATS, and Form ATS–R to oversee the growth and development of NMS Stock ATSs, including those that also effect transactions in non-NMS stocks, and to evaluate whether those systems operate in a manner consistent with the federal securities laws should the disclosures provided on Form ATS–N reveal potential non-compliance with federal securities laws. In particular, the Commission preliminarily believes that the information collected and reported to the Commission by NMS Stock ATSs would enable the Commission to evaluate better the operations of NMS Stock ATSs with regard to the Commission’s duty under the Exchange Act to remove impediments to and perfect the mechanisms of a national market system for securities⁵⁷² and evaluate the competitive effects of these systems to ascertain whether the regulatory framework remains appropriate to the operation of such systems. The information provided on Form ATS–N should also assist the SRO for the broker-dealer operator in exercising oversight over the broker-dealer operator. For example, by having to describe their safeguards and procedures to protect the confidential trading information of subscribers, and knowing that such descriptions will be public, NMS Stock ATSs may be encouraged to carefully consider the adequacy of their means of protecting the confidential trading information of subscribers.

The Commission also proposes to amend Rule 303(a)(2)(ii) of Regulation ATS to provide that all ATSs must preserve copies of all reports filed pursuant to proposed Rule 304 for the life of the enterprise and any successor enterprise. The Commission preliminarily believes that the information contained in the records required to be preserved by the proposed amendment to Rule 303(a)(2)(ii) would be used by examiners and other representatives of the Commission, state securities regulatory authorities, and SROs to evaluate whether ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations.

⁵⁷² See 15 U.S.C. 78b (providing that the necessity for the Exchange Act is, among other things, “to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities . . . and to impose requirements necessary to make such regulation and control reasonably complete and effective . . .”).

C. Respondents

The “collection of information” requirements under the proposed amendments to Regulation ATS relating to Rule 301(b)(10) and proposed Rule 303(a)(1)(v), as described above, would apply to all ATSs, including NMS Stock ATSs. The “collection of information” requirements under the proposed amendments to Regulation ATS relating to proposed Rule 304, Form ATS–N, and the proposed amendments to Rule 303(a)(2)(ii), as described above, would apply only to NMS Stock ATSs, and the “collection of information” requirements under the proposed amendments to Rule 301(b)(9), as described above, would apply to NMS Stock ATSs that also effect trades in both NMS stocks and non-NMS stocks.

Currently, there are 84 ATSs that have filed Form ATS with the Commission. Of these 84 ATSs, 46 would meet the definition of an NMS Stock ATS.⁵⁷³ Accordingly, the Commission estimates that 84 entities would be required to comply with the proposed amendments related to Rule 301(b)(10) of Regulation ATS and 46 entities would be required to complete Form ATS–N.⁵⁷⁴

In addition, the Commission notes that there are currently 11 ATSs that trade, or have indicated in Exhibit B to their Form ATS that they expect to trade, both NMS stocks and non-NMS stocks on the ATS.⁵⁷⁵ Under the proposed amendments to Regulation ATS, these 11 entities would be required to file a Form ATS–N to disclose information about their NMS stock activities and file a Form ATS to disclose information about their non-NMS stock activities. Consequently,

⁵⁷³ Data compiled from Form ATS submitted to the Commission as of November 1, 2015. That is, 46 ATS have disclosed on their Form ATS that they trade or expect to trade NMS stock.

⁵⁷⁴ The Commission recognizes that there may be new entities that will seek to become ATSs, or NMS Stock ATSs, that would be required to comply with the proposed amendments to Rule 301(b)(10). From 2012 through the first half of 2015, there has been an average of 8 Form ATS initial operation reports filed each year with the Commission. Similarly, there may be some ATSs that may cease operations in the normal course of business or possibly in response to the proposed amendments to Regulation ATS. From 2012 through the first half of 2015, there has been an average of 11 ATSs, including those that trade NMS stocks, that have ceased operations. For the purposes of this paperwork burden analysis, the Commission assumes that there are 84 respondents that would be required to comply with the proposed amendments to Rule 301(b)(10), if adopted. The Commission is estimating that the number of entities that may file a Form ATS initial operation report would generally offset any ATSs that may file a Form ATS cessation of operations report.

⁵⁷⁵ Data compiled from Forms ATS and ATS–R submitted to the Commission as of November 1, 2015. These 11 ATSs are included within the 46 NMS Stock ATSs.

these 11 ATSs would have to amend their Forms ATS to remove discussion of those aspects of the ATS related to the trading of NMS stocks and on an ongoing basis, file separate Forms ATS–R to report trading volume in NMS stocks and trading volume in non-NMS stocks.⁵⁷⁶

With respect to proposed Form ATS–N, the Commission recognizes there may be entities that might file a Form ATS–N to operate an NMS Stock ATS in the future. From 2012 through the first half of 2015, there has been an average of 2 new ATSs per year that disclose that they trade or expect to trade NMS stocks on their initial operation reports, which would therefore fall within the proposed definition of an NMS Stock ATS. Similarly, some ATSs that currently trade NMS stocks may choose to cease operations rather than comply with the proposed amendments requiring them to file proposed Form ATS–N. Other ATSs may choose to cease operations in the normal course of business. From 2012 through the first half of 2015, there has been an average of 6 ATSs that trade NMS stocks that have ceased operations each year.

The Commission preliminarily believes that most ATSs that currently trade NMS stocks would continue to operate notwithstanding the proposed amendments to Regulation ATS. For the purposes of this analysis of the paperwork burden associated with the proposed amendments to Regulation ATS, the Commission assumes that there will be 46 respondents. The Commission preliminarily believes that this number is reasonable, as it assumes that most ATSs that currently trade NMS stocks would file a Form ATS–N with the Commission, and acknowledges that there may be some ATSs that cease operations altogether and other entities that may choose to commence operations as an NMS Stock ATS. Based on the number of initial filings and cessation of operations reports on current Form ATS for ATSs that trade NMS stocks described above, the Commission estimates that, 2 to 3 new entities will file to become an NMS Stock ATS and 4 to 6 NMS Stock ATSs will cease operations in each of the next three years.

⁵⁷⁶ Pursuant to Rule 301(b)(9), all ATSs are required to file Form ATS–R within 30 calendar days after the end of each calendar quarter in which the market has operated, and within 10 calendar days after the ATS ceases to operate. For ATSs that trade both NMS stocks and non-NMS stocks, the ATS would report its transactions in NMS stocks on one Form ATS–R, and its transaction volume in other securities on a separate Form ATS–R.

D. Total Initial and Annual Reporting and Recordkeeping Burdens

1. Proposed Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS

a. Baseline Measurements

Under current Rule 301(b)(10) of Regulation ATS,⁵⁷⁷ all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, as well as oversight procedures to ensure such safeguards and procedures are followed. As discussed below, the Commission preliminarily believes that ATSs—in particular, ATSs whose broker-dealer operators are large, multi-service broker-dealers—generally have and maintain in writing their safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed.⁵⁷⁸ However, neither Rule 301(b)(10) nor Rule 303(a)(1) of Regulation ATS currently requires that an ATS have and preserve those safeguards and procedures in writing.

For ATSs that currently have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information under Rule 301(b)(10) of Regulation ATS, the Commission preliminarily estimates that the average annual burden they voluntarily undertake to update and preserve those written safeguards and written procedures is 4 hours.⁵⁷⁹ Because neither current Rule 301(b)(1) nor current Rule 303(a)(1) requires an ATS to have and preserve its safeguards and procedures to protect subscribers' confidential trading information in writing, this burden is not reflected in the current PRA baseline burdens for Rules 301 and 303.⁵⁸⁰ As such, in accordance with the below analysis, the Commission would modify the current PRA burdens for Rules 301 and 303 to account for the proposed requirement that ATSs have and preserve in written format the safeguards and procedures to

protect subscribers' confidential trading information.⁵⁸¹

b. Burden

The Commission recognizes that proposed Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS would impose certain burdens on respondents. For ATSs that currently have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information and written oversight procedures to ensure such safeguards and procedures are followed, the Commission preliminarily believes that there will be no increased burden under the proposed amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS. The Commission preliminarily believes that the current practices of those ATSs would already be in compliance with the proposed rules. Therefore, the proposed amendments should not require those ATSs to take any measures or actions in addition to those currently undertaken.

For ATSs that have not recorded in writing their safeguards and procedures to protect subscribers' confidential trading information and oversight procedures to ensure such safeguards and procedures are followed, there will be an initial, one-time burden to memorialize them in a written document(s). The Commission preliminarily estimates that an ATS's initial, one-time burden to put in writing its safeguards and procedures to protect subscribers' confidential trading information and the oversight procedures to ensure such safeguards and procedures are followed would be approximately 8 hours,⁵⁸² but the Commission preliminarily estimates that the burden could range between 5 and 10 hours.⁵⁸³ Because ATSs are already required to have safeguards and procedures to protect subscribers' confidential trading information and to have oversight procedures to ensure such safeguards and procedures are followed, the Commission preliminarily believes that recording these items in a written format would not impose a substantial burden on ATSs. Consequently, the Commission preliminarily believes that ATSs would rely on internal staff to record the ATS's Rule 301(b)(10) procedures in writing. The Commission preliminarily estimates that, of the 84 current ATSs, 15 ATSs might not have their safeguards

and procedures to protect subscribers' confidential trading information or oversight procedures to ensure such safeguards and procedures are followed in writing, and would therefore be subject to this one-time initial burden.⁵⁸⁴ Accordingly, the Commission preliminarily estimates that the aggregate initial, one-time burden on all ATSs would be 150 hours based on the Commission's highest approximation of the additional burden per ATS.⁵⁸⁵

As explained above, the Commission preliminarily estimates that the average annual, ongoing burden per ATS to update and preserve written safeguards and written procedures to protect subscribers' confidential trading information, as well as to update and preserve the written standards controlling employees of the ATS trading for their own account and the written oversight procedures, would be 4 hours.⁵⁸⁶ As a result, the Commission preliminarily estimates that the total aggregate, ongoing burden per year for all ATSs would be 336 hours,⁵⁸⁷ and thus, the Commission is modifying the current PRA burden estimates for Rules 301 and 303 to account for this increased burden on ATSs.

2. Proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS, Including Proposed Form ATS-N

a. Baseline Measurements

Currently, Rule 301(b)(2)(i) of Regulation ATS⁵⁸⁸ requires an ATS to file an initial operation report on current Form ATS at least 20 days prior to commencing operation as an alternative trading system. Current Form ATS requires information regarding the operation of the ATS, including, among other things, classes of subscribers, the types of securities traded, the outsourcing of operations of the ATS to other entities, the procedures governing the entry of orders, the means of access to the ATS, and procedures governing execution and reporting. Regarding amendments to an existing Form ATS, Rule 301(b)(2)(ii) of Regulation ATS⁵⁸⁹

⁵⁸⁴ It is likely that most, if not all, ATSs fulfill their Rule 301(b)(10) obligations in writing, given the practical difficulty in ensuring such safeguards and procedures, as well as oversight procedures, are "adequate," as required under Rule 301(b)(10), and contain all necessary components. The Commission solicits comment on the accuracy of this estimate.

⁵⁸⁵ (Attorney at 9 hours + Compliance Clerk at 1 hour) × (15 ATSs) = 150 burden hours. See *supra* note 583 and accompanying text.

⁵⁸⁶ See *supra* note 579 and accompanying text.

⁵⁸⁷ (Attorney at 2 hours + Compliance Clerk at 2 hours) × 84 ATSs = 336 burden hours.

⁵⁸⁸ 17 CFR 242.301(b)(2)(i).

⁵⁸⁹ 17 CFR 242.301(b)(2)(ii).

⁵⁷⁷ 17 CFR 242.301(b)(10).

⁵⁷⁸ See *infra* Section XIII.B.4.

⁵⁷⁹ Attorney at 2 hours + Compliance Clerk at 2 hours = 4 burden hours. For ATSs that do not have their safeguards and procedures or oversight procedures in a written format, these firms would incur a one-time initial burden to record their safeguards and procedures as well as their oversight procedures in a written format as described below.

⁵⁸⁰ See FR Doc. 2014-02143, 79 FR 6236 (February 3, 2014) (Request to OMB for Extension of Rule 301 and Forms ATS and ATS-R; SEC File No. 270-451; OMB Control No. 3235-0509) (hereinafter "Rule 301 PRA Update"); FR Doc. 2013-17474, 78 FR 43943 (July 22, 2013) (Request to OMB for Extension of Rule 303; SEC File No. 270-450; OMB Control No. 3235-0505) (hereinafter "Rule 303 PRA Update").

⁵⁸¹ See *infra* note 587 and accompanying text.

⁵⁸² Attorney at 7 hours + Compliance Clerk at 1 hour = 8 burden hours.

⁵⁸³ Attorney at 4-9 hours + Compliance Clerk at 1 hour = 5-10 burden hours.

requires an ATS to file amendments to its current Form ATS at least 20 calendar days prior to implementing a material change to its operations. Rule 301(b)(2)(iii) of Regulation ATS⁵⁹⁰ requires an ATS to file amendments to its current Form ATS within 30 calendar days after the end of each calendar quarter if any information contained in its initial operation report becomes inaccurate and has not been previously reported to the Commission.⁵⁹¹ Regarding shutting down an ATS, Rule 301(b)(2)(v) of Regulation ATS⁵⁹² requires an ATS to promptly file a cessation of operation report on current Form ATS upon ceasing operations as an ATS.

The Commission's currently approved estimate for an initial operation report on current Form ATS is 20 hours to gather the necessary information, provide the required disclosures in Exhibits A through I, and submit the Form ATS to the Commission.⁵⁹³ With respect to Form ATS amendments, the Commission understands, based on the review of Form ATS amendments by the Commission and its staff, that ATSs that trade NMS stocks typically amend their Form ATS on average twice per year.⁵⁹⁴ The frequency and scope of Form ATS amendments vary depending on whether the ATS is implementing a material change or a periodic change. Some ATSs may not change the manner in which they operate or anything else that might require an amendment to Form ATS in a given year while others may implement a number of changes during a given year that require Form ATS amendments. The Commission estimates that the current average compliance burden for each amendment to Form ATS is approximately 6 hours.⁵⁹⁵ Accordingly, the estimated average annual ongoing burden of updating and amending Form ATS is approximately 12 hours per NMS Stock ATS.⁵⁹⁶ With respect to ceasing operations, the currently approved average estimated compliance burden for an ATS to complete a cessation of operations report is 2 hours to check the

appropriate box on Form ATS and send the cessation of operations report to the Commission.⁵⁹⁷ The Commission's currently approved estimate for the average compliance burden for each Form ATS-R filing is 4 hours.⁵⁹⁸

b. Burdens

The Commission recognizes that proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS, including proposed Form ATS-N, would impose certain burdens on respondents.⁵⁹⁹ Although the Commission preliminarily believes that many of the disclosures required by proposed Form ATS-N are currently required by Form ATS, proposed Form ATS-N would require an NMS Stock ATS to provide significantly more detail in those disclosures than currently is required by Form ATS. Proposed Form ATS-N would also require additional disclosures not currently mandated by current Form ATS such as those contained in Part III of proposed Form ATS-N. Under the proposed amendments to Regulation ATS, NMS Stock ATSs would be required to complete and file the enhanced and additional disclosures on proposed Form ATS-N.⁶⁰⁰ Section XII.D.2.b.i below provides the estimated burden above the current Form ATS baseline of each item of proposed Form ATS-N. The Commission notes that many of the proposed disclosure items on proposed Form ATS-N are already required disclosures by respondents in whole or in part on current Form ATS, while other disclosure items on proposed Form ATS-N are novel (*i.e.*, current Form ATS does not require some form of the proposed disclosure). Section XII.D.2.b.ii aggregates these new burdens and the additional burdens above the current Form ATS baseline that will be imposed by proposed Form ATS-N.

⁵⁹⁷ Attorney at 1.5 hours + Compliance Clerk at 0.5 hours = 2 burden hours. *See id.*

⁵⁹⁸ Attorney at 3 hours + Compliance Clerk at 1 hour = 4 burden hours. *See id.*

⁵⁹⁹ In establishing the estimates below with respect to proposed Form ATS-N, the Commission has considered its estimate of the burden for an SRO to amend a Form 19b-4. Specifically, the Commission estimated that 34 hours is the amount of time required to complete an average rule filing and 129 hours is the amount of time required to complete a complex rule filing, and three hours is the amount of time required to complete an average amendment to a rule filing. *See* Securities Exchange Act Release No. 50486 (October 4, 2004), 69 FR 60287 (October 8, 2004), 60294.

⁶⁰⁰ These disclosures would be provided on proposed Form ATS-N and may have to be amended periodically as provided in proposed Rule 304.

i. Analysis of Estimated Additional Burden for Proposed Form ATS-N

Parts I and II of proposed Form ATS-N would require disclosure of certain general information regarding the broker-dealer operator and the NMS Stock ATS. Part I of proposed Form ATS-N would require the NMS Stock ATS to state the name of its broker-dealer operator, the name under which the NMS Stock ATS conducts business, if any, the MPID of the NMS Stock ATS, and whether it is an NMS Stock ATS operating pursuant to a previously filed initial operation report on Form ATS. Part II of proposed Form ATS-N would require the address of the physical location of the NMS Stock ATS matching system and the NMS Stock ATS's mailing address. Part II of proposed Form ATS-N would also require registration information of the broker-dealer operator, including its SEC File Number, the effective date of the broker-dealer operator's registration with the Commission, its CRD Number, the name of its national securities association, and the effective date of the broker-dealer operator's membership with the national securities association. In addition, Part II of proposed Form ATS-N would require disclosure of certain information regarding the legal status of the broker-dealer operator and would require the NMS Stock ATS to provide a URL address to its Web site. Finally, Part II would require the NMS Stock ATS to attach Exhibit 1 (a copy of any materials provided to subscribers or any other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N), Exhibit 2A (a copy of the most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information related to direct owners and executive officers), and Exhibit 2B (a copy of the most recently filed or amended Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners). In lieu of attaching those exhibits to Form ATS-N, the NMS Stock ATSs would be able to provide a URL address to where the required documents can be found.

Under current Form ATS, an ATS is required to provide all of the information that would be required under Parts I and II of proposed Form ATS-N with the exception of: (1) Its Web site address; (2) the effective date of the broker-dealer operator's registration with the Commission; (3) the name of the national securities association and effective date of the broker-dealer operator's membership with the national securities association;

⁵⁹⁰ 17 CFR 242.301(b)(2)(iii).

⁵⁹¹ In addition, Rule 301(b)(2)(iv) requires an ATS to promptly file an amendment on current Form ATS after the discovery that any information previously filed on current Form ATS was inaccurate when filed. 17 CFR 242.301(b)(2)(iv).

⁵⁹² 17 CFR 242.301(b)(2)(v).

⁵⁹³ Attorney at 13 hours + Compliance Clerk at 7 hours = 20 burden hours. *See* Rule 301 PRA Update, *supra* note 580, 79 FR 6237.

⁵⁹⁴ *See id.*

⁵⁹⁵ Attorney at 4.5 hours + Compliance Clerk at 1.5 hours = 6 burden hours. *See id.*

⁵⁹⁶ 2 Form ATS Amendments filed annually × 6 burden hours per Form ATS Amendment = 12 burden hours per ATS.

(4) the MPID of the NMS Stock ATS; (5) the broker-dealer operator's legal status (e.g., corporation or partnership); (6) the date of formation and the state in which the broker-dealer operator was formed; and (7) copies of the broker-dealer operator's most recently filed or amended Schedules A and B of Form BD.⁶⁰¹ Current Form ATS, however, requires an ATS to provide a copy of its governing documents, such as its constitution and bylaws,⁶⁰² which would not be required in proposed Form ATS-N. The Commission preliminarily believes that all ATSs currently have access to all of these items because such information is germane to the operation of its broker-dealer operator. Accordingly, the Commission preliminarily estimates that, on average, preparing Parts I and II for a Form ATS-N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS. The aggregate initial burden on all NMS Stock ATSs to complete Parts I and II of proposed Form ATS-N would be 23 hours above the current baseline.⁶⁰³

Part III, Item 1 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates operate or control any non-ATS trading center(s), and if so, to (1) identify the non-ATS trading center(s); and (2) describe any interaction or coordination between the identified non-ATS trading center(s) and the NMS Stock ATS including: (i) Circumstances under which subscriber orders or other trading interest sent to the NMS Stock ATS are displayed or otherwise made known to the identified non-ATS trading center(s) before entering the NMS Stock ATS; (ii) circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates may execute, in whole or in part, in the identified non-ATS trading center(s) before entering the NMS Stock ATS; and (iii) circumstances under which orders or other trading interest are removed from the NMS Stock ATS and sent to the identified non-ATS trading center(s). Under Proposed Form ATS-N, affiliates of the broker-dealer operator would only include any person that,

⁶⁰¹ Exhibit I of Current Form ATS requires ATS to provide a list with the full legal name of those direct owners reported on Schedule A of Form BD, but not a copy of Schedule A.

⁶⁰² Exhibit D of Form ATS requires an ATS to provide a copy of its constitution, articles of incorporation or association, with all amendments, and of the existing bylaws or corresponding rules or instruments, whatever the name.

⁶⁰³ Compliance Clerk at 0.5 hours × 46 NMS Stock ATSs = 23 burden hours.

directly or indirectly, controls, is under common control with, or is controlled by, the broker-dealer operator. The affiliates of the broker-dealer operator that might operate non-ATS trading centers under this proposal would thus be "control affiliates" that are either controlled by the broker-dealer operator or under common control with another entity. Consequently, because the broker-dealer operator would control all affiliates or would be under common control with those affiliates, the broker-dealer operator should be aware of whether its affiliates operate a non-ATS trading center or in most instances, should otherwise be able to readily obtain such information from its affiliates.⁶⁰⁴

To the extent the operation of a non-ATS trading center operated or controlled by the broker-dealer operator or any of its affiliates does not interact with the NMS Stock ATS (e.g., the two platforms do not share order flow or route trading interest between one another), the proposed disclosure requirement in Part III, Item 1, would require only that the NMS Stock ATS identify the non-ATS trading center in Item 1(a) and note that there is no interaction between the non-ATS trading center and the NMS Stock ATS in Item 1(b). To the extent the operation of a non-ATS trading center of the broker-dealer operator or its affiliates interacts with the NMS Stock ATS, the Commission preliminarily believes that the NMS Stock ATS would likely already be aware of how such operation may interact with the NMS Stock ATS. If there is substantial interaction between the non-ATS trading center and the NMS Stock ATS, the burden related to this disclosure would be higher.

The Commission understands that most, but not all, broker-dealer operators of NMS Stock ATSs currently, either by themselves or through their affiliates, operate or control a non-ATS trading center. The Commission preliminarily estimates that, on average, preparing Part III, Item 1 for a Form ATS-N would add 10 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 460 hours above the baseline for all NMS Stock ATSs to complete Part III, Item 1 of proposed Form ATS-N.⁶⁰⁵

⁶⁰⁴ To the extent the broker-dealer operator is currently unaware of whether its affiliates operate a non-ATS trading center, the Commission preliminarily believes that the broker-dealer operator could readily obtain this information from its affiliates.

⁶⁰⁵ (Attorney at 8 hours + Compliance Manager at 2 hours) × 46 NMS Stock ATSs = 460 burden hours.

Part III, Item 2 of proposed Form ATS-N would require an NMS Stock ATS to state whether the broker-dealer operator, or any of its affiliates, operates one or more NMS Stock ATSs other than the NMS Stock ATS named on the Form ATS-N, and, if so, to (1) identify the NMS Stock ATS(s) and provide its MPID(s); and (2) describe any interaction or coordination between the NMS Stock ATS(s) identified and the NMS Stock ATS named on the Form ATS-N including: (i) The circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or any of its affiliates to be sent to the NMS Stock ATS named in the Form ATS-N may be sent to any identified NMS Stock ATS(s); (ii) circumstances under which subscriber orders or other trading interest to be sent to the NMS Stock ATS named on the Form ATS-N are displayed or otherwise made known in any other identified NMS Stock ATS(s); and (iii) the circumstances under which a subscriber order received by the NMS Stock ATS named on the Form ATS-N may be removed and sent to any other identified NMS Stock ATS(s). Broker-dealer operators of multiple NMS Stock ATSs would already be aware of how their NMS Stock ATSs may interact with one another and those of its affiliates by, for example, sharing order flow between each other.⁶⁰⁶ Further, as noted above, affiliates under this proposed disclosure requirement would be control affiliates that are either controlled by the broker-dealer operator or under common control with another entity. Consequently, the NMS Stock ATS should already be aware through its control or common control of whether its affiliates operate another NMS Stock ATS.

Based on the currently filed Forms ATS reviewed by the Commission during the third quarter of 2015, the Commission estimates that there are 6 broker-dealer operators that operate, by themselves or through an affiliate, multiple ATSs that trade NMS stocks. The Commission notes that broker-dealer operators operating multiple NMS Stock ATSs, by themselves or with their affiliates, would be required to complete Part III, Item 2 of proposed Form ATS-N for each NMS Stock ATS. The Commission preliminarily believes that it would not be a significant burden for a broker-dealer operator to identify all of the NMS Stock ATSs operated by

⁶⁰⁶ To the extent the broker-dealer operator or its affiliates operate multiple NMS Stock ATSs but there is no possibility of interaction between such NMS Stock ATSs, proposed Form ATS-N would only require that this fact be noted in Part III, Item 2(b).

either itself or its affiliates because, among other reasons, FINRA maintains an updated list of ATSs that trade equity securities on its public Web site.⁶⁰⁷ Furthermore, the disclosure requirement in Part III, Item 2(b) to describe the interaction of the various NMS Stock ATSs should generally be the same for each NMS Stock ATS, reducing the overall hour burden for completing multiple Forms ATS–N.⁶⁰⁸ The Commission also notes that the disclosure requirement in Part III, Item 2 would not impose any significant burden on broker-dealer operators that, by themselves or with their affiliates, do not operate multiple NMS Stock ATSs. For broker-dealer operators operating multiple NMS Stock ATSs, by themselves or with their affiliates, the Commission preliminarily estimates that, on average, preparing Part III, Item 2 for a Form ATS–N would add 4 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial hourly burden on such broker-dealer operators of 24 hours above the current baseline.⁶⁰⁹

Part III, Item 3 of proposed Form ATS–N would require an NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates offer subscribers of the NMS Stock ATS any products or services used in connection with trading on the NMS Stock ATS (e.g., algorithmic trading products, market data feeds). If so, the NMS Stock ATS would be required to describe the products and services and identify the types of subscribers (e.g., retail, institutional, professional) to which such services or products are offered, and if the terms and conditions of the services or products are not the same for all subscribers, describe any differences. These products and services may vary widely across NMS Stock ATSs, some of which may offer no additional products or services in connection with access to the NMS Stock ATS and others that may offer a wide array of other products or services such as trading algorithms, order management systems, or market data services. Because the broker-dealer

operator controls all aspects of the NMS Stock ATS, it should already be aware of all the products and services that it or its affiliates provide to subscribers in connection with subscribers' access to the ATS. Accordingly, the Commission preliminarily believes that listing and describing these products and services in Part III, Item 3 would not impose a substantial burden on respondents. In addition, Part III, Item 3 would also require the NMS Stock ATS to describe which products and services are offered to which type of subscriber and any differences in the terms or conditions of the services or products among subscribers. Depending on the extent to which the terms and conditions of the services or products vary among subscribers, the hourly burden related to completing Part III, Item 3 would likely vary. The Commission preliminarily estimates that, on average, preparing Part III, Item 3 for a Form ATS–N would add 3 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 138 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 3 of proposed Form ATS–N.⁶¹⁰

Part III, Item 4 of proposed Form ATS–N would require an NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates have any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center regarding access to the NMS Stock ATS, including preferential routing arrangements, and, if so, to identify the person(s) and the trading center(s) and describe the terms of the arrangement(s). The Commission understands from discussions with ATSs that some ATSs that currently trade NMS stock have arrangements with other ATSs to provide mutual access to the each other's respective ATSs. The Commission recognizes that an NMS Stock ATS could also have arrangements with other trading centers such as a non-ATS trading center or a national securities exchange. In addition, there may be NMS Stock ATSs that have no arrangements with any other trading center. As the broker-dealer operator controls all aspects of the operation of the NMS Stock ATS, the broker-dealer operator should already be aware of any such arrangements providing for mutual access or preferential routing that it has with other trading centers. Accordingly, the Commission preliminarily estimates

that, on average, preparing Part III, Item 4 for a Form ATS–N would add 4 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 184 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 4 of proposed Form ATS–N.⁶¹¹

Part III, Item 5 of proposed Form ATS–N would require certain disclosures related to the trading activity of the broker-dealer operator or its affiliates on the NMS Stock ATS. Specifically, Part III, Item 5 would require the NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates enters orders or other trading interest on the NMS Stock ATS, and, if so, to provide detailed disclosures describing such trading activity.⁶¹² As the broker-dealer operator controls all aspects of the operation of the NMS Stock ATS, the broker-dealer operator should already know all of the subscribers to the NMS Stock ATS, including any affiliates that trade on the ATS, whether the broker-dealer operator itself trades on the NMS Stock ATS, and how the broker-dealer operator or its affiliates trade on the NMS Stock ATS.⁶¹³ The Commission preliminarily believes that this knowledge should allow NMS Stock ATSs to readily identify and list all affiliates that trade on the NMS Stock ATS pursuant to Part III, Item 5(a) without a significant burden. The broker-dealer operator may have to inquire as to the capacity in which each of its affiliates trade, the means by

⁶¹¹ (Attorney at 2 hours + Compliance Manager at 2 hours) × 46 NMS Stock ATSs = 184 burden hours.

⁶¹² Specifically, the NMS Stock ATS would be required to: (a) Identify each affiliate and business unit of the broker-dealer operator that may enter orders or other trading interest on the NMS Stock ATS; (b) describe the circumstances and capacity in which each identified affiliate and business unit enters orders or trading interest on the NMS Stock ATS (e.g., proprietary or agency); (c) describe the means by which each identified affiliate and business unit enters orders or other trading interest on the NMS Stock ATS (e.g., directly through a FIX connection to the NMS Stock ATS, or indirectly, by way of the broker-dealer operator's SOR (or similar functionality), algorithm, intermediate application, or sales desk); and (d) describe any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates on the NMS Stock ATS.

⁶¹³ There may be some NMS Stock ATSs for which neither the broker-dealer operator nor its affiliates trade on the NMS Stock ATS at all, and thus, for which the disclosures required under Part III, Item 5 would impose no significant burden. However, based on the review of Forms ATS by the Commission and its staff and discussions with broker-dealer operators, the Commission understands that a majority of ATSs that trade NMS stocks currently either trade in their own ATSs, either by themselves or with or through their affiliates.

⁶⁰⁷ See FINRA Equity ATS Firm List, <https://www.finra.org/file/finra-equity-ats-firms-list>.

⁶⁰⁸ In other words, a broker-dealer operator that operates NMS Stock ATSs "A" and "B" would likely be able to use the disclosure in A's Form ATS–N for Part III, Item 2 for B as well.

⁶⁰⁹ As noted above, the Commission estimates that there are currently approximately 6 broker-dealer operators that operate, by themselves or through an affiliate, multiple ATSs that trade NMS stocks. As such the increased burden would be calculated as follows: 6 operators of multiple NMS Stock ATSs × (Attorney at 2 hours + Senior Systems Analyst 2 hours) = 24 burden hours.

⁶¹⁰ (Compliance Manager at 2 hours + Senior Marketing Manager at 1 hour) × 46 NMS Stock ATSs = 138 burden hours.

which they enter orders or other trading interest to the ATS, and any means by which a subscriber can be excluded from interacting with the orders or other trading interest of the broker-dealer operator or its affiliates pursuant to Items 5(b), (c), and (d). However, as previously noted, because the disclosure requirements with respect to affiliates would only apply to control affiliates, which would either be controlled by the broker-dealer operator or under common control with the broker-dealer operator, the broker-dealer operator may already have this information or would likely be able to obtain the information required under Items 5(b) and (c) without a significant burden. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 5 for a Form ATS-N would add 5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 230 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 5 of proposed Form ATS-N.⁶¹⁴

Part III, Item 6 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, use a SOR(s) (or similar functionality), an algorithm(s), or both to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS.⁶¹⁵ The Commission and its staff understand from conversations with ATSs that nearly every ATS that trades NMS stocks currently uses some form of SOR (or similar functionality) or algorithm. The Commission recognizes that the SOR(s) (or similar functionality) of the broker-dealer operator or its affiliates and any algorithm(s) employed by the broker-dealer operator or its affiliates to enter orders onto the NMS Stock ATS may vary widely among ATSs with respect to the manner in which they operate, the information they send or receive, and how the SOR(s) (or similar functionality) and/or algorithm(s) may determine to route certain orders to the NMS Stock ATS as

opposed to other venues. Accordingly, the Commission preliminarily believes that the burdens associated with the disclosures in Part III, Item 6 of proposed Form ATS-N are likely to vary depending on the complexity of the SOR(s) (or similar functionality) and/or algorithm(s), its significance to the operation of the NMS Stock ATS, and the functions and roles that it performs.

For example, in responding to Part III, Item 6(b), which would require an NMS Stock ATS to describe, among other things, any information or messages about orders or other trading interest that the SOR(s) (or similar functionality) and algorithm(s) send or receive to or from the NMS Stock ATS, an NMS Stock ATS that uses IOIs to facilitate trades on the NMS Stock ATS and that uses its SOR(s) (or similar functionality) and/or algorithm(s) to facilitate the sending of those IOIs to relevant persons would likely have a substantially greater burden in responding to Item 6(b) due to the number of messages that may be associated with an IOI and the subsequent responses to that IOI than an NMS Stock ATS that does not use IOIs. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 6 for a Form ATS-N would add 10 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 460 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 6 of proposed Form ATS-N.⁶¹⁶

Part III, Item 7 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether it has any shared employees,⁶¹⁷ and identify the business unit(s) and/or the affiliate(s) of the broker-dealer operator to which the shared employee(s) provides services and identify the position(s) or title(s) that the shared employee(s) holds in the business unit(s) and/or affiliate(s) of the broker-dealer operator; and (2) describe the roles and responsibilities of the shared employee(s) at the NMS Stock ATS and the business unit(s) and/or affiliate(s) of the broker-dealer operator. As the broker-dealer operator controls all aspects of the NMS Stock ATS, it should already be aware of all of its employees and likely aware of any other roles or functions that such employees provide to other business units or affiliates of the broker-dealer operator. The Commission therefore preliminarily

believes that the NMS Stock ATS should be able to obtain this information readily. The extent of this disclosure burden would likely vary depending on the number of employees of the NMS Stock ATS and the extent to which such employees' roles are solely dedicated to operating the NMS Stock ATS versus also servicing other business unit(s) of the broker-dealer operator or its affiliates. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 7 for a Form ATS-N would add 4 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 184 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 7 of proposed Form ATS-N.⁶¹⁸

Part III, Item 8 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether any operation, service, or function of the NMS Stock ATS is performed by any person(s) other than the broker-dealer operator of the NMS Stock ATS, and if so to: (1) Identify the person(s) (in the case of a natural person, to identify only the person's position or title) performing the operation, service, or function and note whether this service provider(s) is an affiliate of the broker-dealer, if applicable; (2) describe the operation, service, or function that the identified person(s) provides and describe the role and responsibilities of that person(s); and (3) state whether the identified person(s), or any of its affiliates, may enter orders or other trading interest on the NMS Stock ATS and, if so, describe the circumstances and means by which such orders or other trading interest are entered on the NMS Stock ATS. The Commission notes that this proposed disclosure requirement is similar to the Exhibit E disclosure requirement under the current Form ATS.⁶¹⁹ The only additional disclosure requirement beyond that required currently by Exhibit E to Form ATS would be Item 8(c), which would require the NMS Stock ATS to state whether or not the service provider or the service provider's affiliate may transact on the NMS Stock ATS, and if so, the circumstances and means by which they may do so. The Commission preliminarily believes based on its

⁶¹⁴ (Attorney at 2 hours + Compliance Manager at 3 hours) × 46 NMS Stock ATSs = 230 burden hours.

⁶¹⁵ Specifically, Part III, Item 6 of proposed Form ATS-N would require the NMS Stock ATS to: (a) Identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR(s) (or similar functionality) or algorithm(s), if other than the broker-dealer operator; and (b) describe the interaction or coordination between the identified SOR(s) (or similar functionality) or algorithm(s), including any information or messages about orders or other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person.

⁶¹⁶ (Attorney at 4 hours + Compliance Manager at 3 hours + Sr. Systems Analyst at 3 hours) × 46 NMS Stock ATSs = 460 burden hours.

⁶¹⁷ See *supra* Section VII.B.8 describing who would be considered a shared employee of the broker-dealer operator.

⁶¹⁸ (Attorney at 2 hours + Compliance Manager at 2 hours) × 46 NMS Stock ATSs = 184 burden hours.

⁶¹⁹ Exhibit E of Form ATS requires an ATS to provide the name of any entity, other than the ATS, that is involved in the operation of the ATS, including the execution, trading, clearing, and settling of transactions on behalf of the ATS, and to provide a description of the role and responsibilities of each entity.

review of Form ATS Exhibit E disclosures that most, but not all, service providers to ATSs are not typically entities that would transact on the ATS by themselves. Based on Commission experience, affiliates of service providers to some ATSs that transact in NMS stock may subscribe to that ATS. An NMS Stock ATS may have to ask the service provider about the nature of the service provider's affiliates to ensure that such affiliates are not subscribers to the NMS Stock ATS or may otherwise be able to transact on the NMS Stock ATS to complete this disclosure. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 8 for a Form ATS-N would add 3 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 138 hours above the baseline for all NMS Stock ATSs to complete Part III, Item 8 of proposed Form ATS-N.⁶²⁰

Part III, Item 9 of proposed Form ATS-N would require an NMS Stock ATS to identify and describe any service, functionality, or procedure of the NMS Stock ATS available to the broker-dealer operator or its affiliates that is not available or does not apply to a subscriber(s) to the NMS Stock ATS. The Commission is not currently aware of any NMS Stock ATS that provides services, functionalities, or procedures to itself or its affiliates and not to subscribers, although the Commission recognizes that an NMS Stock ATS could do so. To the extent that the services, functionalities, or procedures of the NMS Stock ATS provided to the broker-dealer operator or its affiliates on the NMS Stock ATS differ from those provided to non-affiliated subscribers, the NMS Stock ATS would have to describe all such differences in Item 9. Depending on the extent of such differences, the hourly burden for providing these disclosures would vary. Conversely, if there are no differences between the services, functionalities, or procedures of the NMS Stock ATS that are provided to the broker-dealer operator or its affiliates relative to subscribers, Part III, Item 9 would only require the NMS Stock ATS to note this fact. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 9 for a Form ATS-N would add 2 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 92 hours above the current

baseline for all NMS Stock ATSs to complete Part III, Item 9 of proposed Form ATS-N.⁶²¹

Part III, Item 10 of proposed Form ATS-N would require certain disclosures related to the NMS Stock ATS's written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10) of Regulation ATS.⁶²² As previously discussed, NMS Stock ATSs would be required under the proposed amendments to Regulation ATS to write their policies and procedures under Rule 301(b)(10) of Regulation ATS. Part III, Item 10 of proposed Form ATS-N would require a description of these policies and procedures. Because NMS Stock ATSs would have already incurred an hourly burden in connection with writing its policies and procedures pursuant to Rule 301(b)(10) of Regulation ATS, the Commission preliminarily believes that Item 10 would impose only a minimal burden on NMS Stock ATSs to describe such written policies and procedures. Part III, Item 10(b) of proposed Form ATS-N would also require an NMS Stock ATS to identify the positions or titles of any persons that can access the confidential trading information of subscribers, a description of what information such persons can access, and the circumstances under which such persons can access the confidential trading information. The Commission preliminarily believes that NMS Stock ATSs should, pursuant to their existing obligations under Rule 301(b)(10), be aware of all persons that can access the confidential trading information of subscribers, the circumstances under which such persons can access that information, and what information they can access. As NMS Stock ATSs should already have this knowledge, the Commission preliminarily believes that the proposed disclosures of Item 10(b) would not be overly burdensome for an

⁶²¹ (Attorney at 1.5 hours + Compliance Manager at 0.5 hour) × 46 NMS Stock ATSs = 92 burden hours.

⁶²² Specifically, an NMS Stock ATS would be required to: (1) Describe the means by which a subscriber may consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates); (2) identify the positions or titles of any persons that have access to confidential trading information, describe the confidential trading information to which the persons have access, and describe the circumstances under which the persons can access confidential trading information; (3) describe the written standards controlling employees of the NMS Stock ATS that trade for employees' accounts; and (4) describe the written oversight procedures to ensure that the safeguards and procedures are implemented and followed.

NMS Stock ATS to complete. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 10 for a proposed Form ATS-N would add 2 hours above the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 92 hours above the current baseline for all NMS Stock ATSs to complete Item 10 of Part III of proposed Form ATS-N.⁶²³

Part IV, Item 1 of proposed Form ATS-N would require an NMS Stock ATS to disclose, among other things, information regarding: (1) Any eligibility requirements to access the NMS Stock ATS; (2) the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on the NMS Stock ATS; (3) the types of subscribers and other persons that use the services of the NMS Stock ATS; (4) any formal or informal arrangement the NMS Stock ATS has with liquidity providers; and (5) any circumstances by which access to the NMS Stock ATS can be limited or denied and the procedures or standards that are used to determine such action. For each disclosure, the NMS Stock ATS would also be required to explain whether there are any differences in how these requirements, terms, conditions, criteria, procedures, and/or standards are applied among subscribers and persons.

The Commission notes that the proposed disclosure requirements of Part IV, Item 1 of proposed Form ATS-N are, in large part, already required under current Form ATS. Exhibit A of current Form ATS requires an ATS to describe its classes of subscribers (*e.g.*, broker-dealer, institutional, or retail) and any differences in access to services offered by the ATS to different groups or classes of subscribers. Part IV, Item 1 of proposed Form ATS-N requires the disclosure of similar information to Exhibit A, but Part IV, Item 1 would expressly require significantly more detail, and a greater number of disclosures, than Exhibit A of current Form ATS including with respect to the terms and conditions of use and eligibility to become a subscriber. The Commission notes that ATSs currently vary in the depth of their discussion of subscribers in Exhibit A of their Forms ATS, with some providing a fulsome description that would likely include

⁶²³ (Attorney at 1 hour + Compliance Manager at 1 hour) × 46 NMS Stock ATSs = 92 burden hours.

⁶²⁰ (Attorney at 1 hour + Compliance Manager at 2 hours) × 46 NMS Stock ATSs = 138 burden hours.

most of the express disclosures proposed under Part IV, Item 1 of proposed Form ATS–N, while other ATSs might not, for example, provide details surrounding differing eligibility requirements among subscribers.

Depending on the complexity of the NMS Stock ATS, the different types of subscribers, and, most significantly, the extent to which the terms and conditions vary among subscribers, the disclosure burden related to Part IV, Item 1 of proposed Form ATS–N would likely vary. For example, an NMS Stock ATS with two classes of subscribers with identical terms and conditions of use, eligibility criteria, and the same circumstances and process regarding limiting and denying services of the NMS Stock ATS would likely have less of a burden than an NMS Stock ATS with five groups of subscribers with varying terms and conditions of use, eligibility criteria, and differing circumstances and processes for which they may be limited or denied the services of the NMS Stock ATS. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 1 of a Form ATS–N would add 6 hours to the current baseline for an initial operation report on current Form ATS to respond to the more detailed questions regarding subscribers to the NMS Stock ATS. This would result in an aggregate initial burden of 276 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 1 of proposed Form ATS–N.⁶²⁴

Part IV, Item 2 of proposed Form ATS–N would require an NMS Stock ATS to provide the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered on to the NMS Stock ATS and the time when pre-opening or after-hours trading may occur. It would also require the NMS Stock ATS to explain differences, if any, among subscribers and persons in the times when orders or other trading interest are entered on the NMS Stock ATS. Current Form ATS does not specify similar disclosures, so the Commission preliminarily estimates that respondents would incur additional burdens above the current baseline when preparing the disclosures required under Part IV, Item 2 of proposed Form ATS–N. The NMS Stock ATS should already be aware of the hours during which it operates and whether and when it permits pre-opening or after-hours trading. Based on the experience of the Commission and its staff

reviewing Form ATS and ATS–R filings, the Commission preliminarily believes that most ATSs that currently trade NMS stocks do not provide for after-hours or pre-opening trading of NMS stock. For NMS Stock ATSs for which the times when orders or other trading interest may be sent to the NMS Stock ATS are not the same for all subscribers and persons, the disclosure burden related to Part IV, Item 2 would likely increase. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 2 for a Form ATS–N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 23 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 2 of proposed Form ATS–N.⁶²⁵

Part IV, Item 3 of proposed Form ATS would require an NMS Stock ATS to provide a detailed disclosure of the order types available on the NMS Stock ATS. Part IV Item 3(a) would require an NMS Stock ATS to describe any types of orders that are entered to the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS.⁶²⁶ Part IV, Item 3(b) would require the NMS Stock ATS to describe any differences if the availability of its order types, and their terms and conditions, are not the same for all subscribers and persons. Part IV, Item 3(c) would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, and mixed-lot orders and to describe any differences if the requirements and handling procedures for minimum order sizes, odd-lot, or mixed-lot orders are not the same for all subscribers and persons. Part IV, Item 3(d) would require an NMS Stock ATS to describe any messages sent to or received by the NMS Stock ATS indicating trading interest (e.g., IOIs, actionable IOIs or conditional

⁶²⁵ Compliance Manager at 0.5 hours × 46 NMS Stock ATSs = 23 burden hours.

⁶²⁶ This would include: (i) Priority for each order type; (ii) conditions for each order type; (iii) order types designed not to remove liquidity (e.g., post-only orders); (iv) order types that adjust their price as changes to the order book occur (e.g., price sliding orders or pegged orders) or have a discretionary range; (v) the time-in-force instructions that can be used or not used with each order type; (vi) the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of an order type across these forms of connectivity; (vii) whether an order type is eligible for routing to other trading centers; and (viii) the circumstances under which order types may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS.

orders), including the information contained in the message, the means under which messages are transmitted, the circumstances in which messages are transmitted (e.g., automatically by the NMS Stock ATS, or upon the subscriber's request), and the circumstances in which they may result in an execution on the NMS Stock ATS; the NMS Stock ATS would also be required to describe any differences among subscribers and persons if the terms and conditions regarding these messages, IOIs, and conditional orders are not the same for all subscribers and persons.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 3 of proposed Form ATS–N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. Part IV, Item 3 of proposed Form ATS–N would require significantly more detail, and a greater number of disclosures, in regard to types of orders than Exhibit F of current Form ATS. ATSs that trade NMS stocks currently vary in the extent of their disclosures relating to order types as provided in Exhibit F. Some provide a relatively fulsome discussion of different order types and to whom they are made available, while other ATSs that trade NMS stocks do not provide substantial detail in this area. Depending on the extent to which an ATS that trades NMS stocks already discloses most of the information regarding order types and trading interest on Exhibit F of its Form ATS, as well as the variety and complexity of different order types available, the proposed disclosure burden of Part IV, Item 3 of proposed Form ATS–N will likely vary among NMS Stock ATSs. For example, those NMS Stock ATSs that send and receive actionable IOIs and/or conditional orders would be required to draft a detailed explanation regarding those order types for Part IV, Item 3(d), whereas NMS Stock ATSs without such order types would simply state that they do not send and receive IOIs and conditional orders. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 3 of a Form ATS–N would add 6 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. This would result in an aggregate initial burden of 276 hours above the current baseline for an initial operation report on current Form ATS for all NMS

⁶²⁴ (Attorney at 4 hours + Compliance Manager at 2 hours) × 46 NMS Stock ATSs = 276 burden hours.

Stock ATSs to complete Part IV, Item 3 of proposed Form ATS-N.⁶²⁷

Part IV, Item 4 of proposed Form ATS-N would require an NMS Stock ATS to disclose the means by which subscribers or other persons connect and send orders to the NMS Stock ATS. Part IV, Item 4(a) would require the NMS Stock ATS to describe the means by which subscribers or other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS (e.g., via a direct FIX connection to the ATS or an indirect connection via the broker-dealer operator's SOR, any intermediate functionality, algorithm, or sales desk). This item would also require the NMS Stock ATS to describe any differences if the terms and conditions for connecting and entering orders or other trading interest are not the same for all subscribers and persons. Part IV, Item 4(b) would require the NMS Stock ATS to describe any co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS, the terms and conditions of such co-location services, and to describe any differences if the terms and conditions of the co-location services are not the same for all subscribers and persons.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 4 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the means of access to the ATS. Part IV, Item 4 of proposed Form ATS-N would expressly require significantly more detail, and a greater number of disclosures, in regard to order entry, connectivity, and co-location services than Exhibit F of current Form ATS. ATSs that currently trade NMS stocks vary in the depth of their disclosures related to order entry. Currently, most ATSs that trade NMS stocks do not provide much or any detail regarding the extent to which they provide co-location services or other speed advantages to subscribers or persons trading on the ATS.

Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part IV, Item 4 of proposed Form ATS-N. The Commission preliminarily estimates that, on average, preparing Part IV, Item

4 for a Form ATS-N would add 5 hours to the current baseline for an initial operation report on current Form ATS to provide a more detailed description of the connection and order entry procedures, a description of any co-location or speed-advantage services, as well as any differences among subscribers and other persons with respect to these disclosures. This would result in an aggregate initial burden of 230 hours above the current baseline for all NMS Stock ATSs to complete Item 4 of Part IV of proposed Form ATS-N.⁶²⁸

Part IV, Item 5 of proposed Form ATS-N would require an NMS Stock ATS to explain if and how it segments order flow, the type of notice about such segmentation that it provides to subscribers, and whether subscribers, the broker-dealer operator, or its affiliates may submit order preferencing instructions. Part IV, Item 5(a) would require an NMS Stock ATS to describe any segmentation of orders or other trading interest on the NMS Stock ATS (e.g., classification by type of participant, source, nature of trading activity), and to describe the segmentation categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. This item would require an NMS Stock ATS to describe any differences if the segmented categories, the criteria used to segment these categories, and any procedures for determining, evaluating, or changing segmented categories are not the same for all subscriber and persons. Part IV, Item 5(b) would require the NMS Stock ATS to state whether it notifies subscribers or persons about the segmentation category that a subscriber or a person is assigned and to describe any notice provided to subscribers or persons about the segmented category that they are assigned and the segmentation identified in Item 5(a), including the content of any notice and the means by which any notice is communicated. If the notice is not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 5(c) would require an NMS Stock ATS to describe any means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on

the NMS Stock ATS (e.g., designating an order or trading interest to be executed against a specific subscriber) and how such designations affect order priority and interaction.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 5 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. However, Exhibit F of current Form ATS does not expressly enumerate the level of detail that an ATS must provide in regard to its segmentation of order flow and does not expressly ask for an ATS to describe any notice to subscribers regarding segmentation or explain any means and circumstances for order preferencing, whereas Part IV, Item 5 of proposed Form ATS-N would require detailed disclosures in regard to these subjects.⁶²⁹ Based on its review of Exhibit F disclosures, the Commission understands that most, but not all, ATSs that currently trade NMS stocks segment orders in some manner and that many NMS Stock ATSs allow subscribers to enter some order preferencing criteria or limits. These ATSs vary in the depth of their description as to how they segment order flow and order preferencing. For instance, most ATSs that currently trade NMS stocks do not expressly provide the Commission with a description of the means by which persons might be notified about segmentation, as would be required by Part IV, Item 5(b) of proposed Form ATS-N. Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part IV, Item 5 of proposed Form ATS-N. The Commission preliminarily estimates that, on average, preparing Part IV, Item 5 for a Form ATS-N would add 7 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of how, if at all, the NMS Stock ATS segments order flow, provides any notice to those trading on the NMS Stock ATS regarding segmentation, and allows order preferencing. This would result in an aggregate initial burden of 322 hours above the current baseline for

⁶²⁷ (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 3 hours) × 46 NMS Stock ATSs = 276 burden hours.

⁶²⁸ (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 2 hours) × 46 NMS Stock ATSs = 230 burden hours.

⁶²⁹ Though Exhibit F of current Form ATS, unlike Item 5(b) of Part IV of proposed Form ATS-N, does not expressly require ATSs to describe the content of any notice to subscribers regarding segmentation, Exhibit F does require a copy of any materials currently provided to subscribers, which could include such a notice.

all NMS Stock ATSs to complete Part IV, Item 5 of proposed Form ATS–N.⁶³⁰

Part IV, Item 6(a) of proposed Form ATS–N would require an NMS Stock ATS to describe any means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed. If the display of orders or other trading interest is not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 6(b) of proposed Form ATS–N would require the NMS Stock ATS to identify the subscriber(s) or person(s) (in the case of a natural person, the NMS Stock ATS would only identify the person's position or title) to whom the orders and trading interest are displayed or otherwise made known. Although Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS, Exhibit F does not expressly state that an ATS must explain if and how order information is displayed or otherwise made known outside the NMS Stock ATS. The Commission understands from its review of Forms ATS filings that a majority of ATSs that trade NMS stocks provide some form of IOI or conditional order that would likely need to be described in Part IV, Item 6 of proposed Form ATS–N.⁶³¹ Depending on the variety of trading interest that shares some trading information outside of the NMS Stock ATS and the complexity of such information sharing, the disclosure burden in responding to Part IV, Item 6 would likely vary among NMS Stock ATSs. The Commission also notes that there is currently one ATS that trades NMS stocks that operates as an ECN. This ATS would have to describe in Part IV, Item 6 how it displays orders and other information about trading interest on the ATS. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 6 for a Form ATS–N would add 5 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. This would result in an aggregate initial burden of 230 hours above the current baseline for all NMS Stock ATSs

⁶³⁰ (Attorney at 2 hours + Compliance Manager at 2.5 hours + Sr. Systems Analyst at 2.5 hours) × 46 NMS Stock ATSs = 322 burden hours.

⁶³¹ See *supra* Part IV, Item 6 of proposed Form ATS–N.

to complete Part IV, Item 6 of proposed Form ATS–N.⁶³²

Part IV, Item 7 of proposed Form ATS–N would require an NMS Stock ATS to describe its trading services in detail. Part IV, Items 7(a) and 7(b) of proposed Form ATS–N would require an NMS Stock ATS to disclose the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, as well as the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. Part IV, Item 7(c) would require the NMS Stock ATS to describe any trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality. For all disclosures required under Item 7, the NMS Stock ATS would also be required to describe any differences in the availability of a functionality regarding its trading services among subscribers and persons.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 7 of proposed Form ATS–N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. These required disclosures in Exhibit F of Form ATS are similar to those set forth in Item 7 of proposed Form ATS–N, which would require disclosures relating to matching methodology, order interaction rules, and execution procedures of the NMS Stock ATS. Consequently, the Commission preliminarily believes that NMS Stock ATSs already have some experience completing Exhibit F that would lessen the burden related to responding to the more detailed disclosures in Items 7(a), (b), and (c) of Part IV of proposed Form ATS–N.

Furthermore, Part IV, Item 7 of proposed Form ATS–N would require an NMS Stock ATS to describe how the NMS Stock ATS meets the two prongs necessary to meet the Exchange Act's definition of "exchange" pursuant to Rule 3b–16(a) under the Exchange Act

⁶³² (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 2 hours) × 46 NMS Stock ATSs = 230 burden hours.

in Items 7(a) and (b).⁶³³ Based on reviews of Form ATS submissions, the Commission understands that ATSs that currently trade NMS stocks generally do not explicitly explain how their systems meet the requirements of each prong under Rule 3b–16, which are necessary in order to constitute an ATS. Those systems seeking to operate as NMS Stock ATSs would be required to draft those explanations, or modify existing descriptions of their current system as they may provide currently in Form ATS, to meet the disclosure requirements of Part IV, Item 7 of proposed Form ATS–N.

Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part IV, Item 7 of proposed Form ATS–N. The Commission preliminarily estimates that, on average, preparing Part IV, Item 7 for a Form ATS–N would add 6 hours to the current baseline for an initial operation report on current Form ATS to provide a description of the NMS Stock ATS's trading services. This would result in an aggregate initial burden of 276 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 7 of proposed Form ATS–N.⁶³⁴

Part IV, Item 8 of proposed Form ATS–N would require an NMS Stock ATS to describe any procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or system malfunction. If the procedures governing trading during a suspension or system disruption or malfunction are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences.

Exhibit G of Form ATS requires ATSs to describe the ATS's procedures for reviewing system capacity, security, and contingency planning procedures. The Commission preliminarily believes that the proposed disclosures in Part IV, Item 8 of proposed Form ATS–N relating to system disruptions, malfunctions, or other suspensions relate, in part, to the Exhibit G disclosures on current Form ATS. The Commission notes that some ATSs that trade NMS stocks currently provide

⁶³³ See 17 CFR 240.3b–16 providing, among other things, that an entity must (1) bring together the orders for securities of multiple buyers and sellers; and (2) use established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade).

⁶³⁴ (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 3 hours) × 46 NMS Stock ATSs = 276 burden hours.

some disclosures relating to system disruptions, malfunctions, and other suspensions in their Exhibit F, Exhibit G, or in subscriber manuals (or other materials provided to subscribers) that are required to be provided to the Commission under Exhibit F of current Form ATS. Consequently, the Commission preliminarily believes that NMS Stock ATSs should be able to provide the proposed disclosures in Part IV, Item 8 of proposed Form ATS–N without a significant burden over the current baseline as they should already be aware of how the ATS operates, handles system disruptions, malfunctions or other suspensions. The Commission recognizes, however, that Item Part IV, Item 8 is significantly more specific and detailed in its proposed disclosure requirements than current Form ATS.

Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part IV, Item 8 of proposed Form ATS–N. The Commission preliminarily estimates that, on average, preparing Part IV, Item 8 for a Form ATS–N would add 2.5 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of the NMS Stock ATS's procedures for system disruptions, malfunctions, or other suspensions. This would result in an aggregate initial burden of 115 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 8 of proposed Form ATS–N.⁶³⁵

Part IV, Item 9 of proposed Form ATS–N would require an NMS Stock ATS to describe any opening, reopening and closing processes, and any procedures for after-hours trading. Part IV, Item 9(a) of proposed Form ATS–N would require an NMS Stock ATS to describe any opening and reopening processes, including how orders or other trading interest are matched and executed prior to the start of regular trading hours or following a stoppage of trading in a security during regular trading hours and how unexecuted orders or other trading interest are handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours. The NMS Stock ATS would also be required to describe any differences between pre-opening executions, executions following a stoppage of trading in a security during

regular trading hours, and executions during regular trading hours. Part IV, Items 9(b) and (c) would require an NMS Stock ATS to describe any closing process and after-hours trading procedures, respectively, the manner in which unexecuted orders or other trading interest are handled at the close of regular trading, and how orders and trading interest are matched and executed during after-hours trading. The NMS Stock ATS would also be required to describe any differences between the closing and after-hours executions versus executions during regular trading hours.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 9 of proposed Form ATS–N are incorporated by some ATSs that trade NMS stocks into Exhibit F of their current Forms ATS, which requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. Currently, ATSs that trade NMS stocks vary in the depth of their disclosures relating to opening, reopening, or closing processes, and after-hours trading procedures. The Commission notes that these opening, reopening, or closing processes, and after-hours trading procedures, may vary widely across different NMS Stock ATSs, with some, for example, allowing for pre-opening executions and routing and after-hours trading and routing, while others may not have an opening process and simply commence with regular trading without any option for after-hours trading. In any case, NMS Stock ATSs should already be aware of any opening, reopening or closing processes, and after-hours trading procedures, they may have as well as any differences in trading and execution during the opening, reopening, or closing processes, and during after-hours trading. Accordingly, the Commission preliminarily believes that preparing Part IV, Item 9 of proposed Form ATS–N for a Form ATS–N would not impose a significant additional burden above the current baseline for an initial operation report on current Form ATS. The Commission preliminarily estimates that, on average, preparing Part IV, Item 9 for a Form ATS–N would add 3 hours to the current baseline for an initial operation report on current Form ATS to describe its opening, reopening, or closing processes, and after-hours trading procedures. This would result in an aggregate initial burden of 138 hours above the current baseline for all NMS Stock ATSs to

complete Part IV, Item 9 of proposed Form ATS–N.⁶³⁶

Part IV, Item 10 of proposed Form ATS–N would require an NMS Stock ATS to describe its outbound routing functions. Part IV, Item 10(a) of proposed Form ATS–N would require an NMS Stock ATS to describe the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, including whether outbound routing occurs at the affirmative instruction of the subscriber or at the discretion of the broker-dealer operator, and the means by which routing is performed (*e.g.*, a third party or order management system, or a SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates). Part IV, Item 10(b) of proposed Form ATS–N would require an NMS Stock ATS to describe any differences if the means by which orders or other trading interest are routed from the NMS Stock ATS are not the same for all subscribers and persons. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order execution of the ATS, but it does not specifically state the level of detail an ATS must provide when describing its outbound routing procedures. Additionally, the Commission understands based on disclosures in Form ATS submissions, some ATSs that currently trade NMS stocks do not route orders out of the ATS. Consequently, the disclosure burden related to Part IV, Item 10 of proposed Form ATS–N would likely vary among NMS Stock ATSs depending on whether they route orders at all, the variety of circumstances under which they may route orders, and the variety of destinations or criteria to determine such destinations to which an order or other trading interest may route. Accordingly, the Commission preliminarily believes that the average additional burden above the baseline imposed by Part IV, Item 10 of proposed Form ATS–N may vary significantly among NMS Stock ATSs. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 10 for a Form ATS–N would add 6 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. This would result in an aggregate initial burden of 276 hours above the current baseline for all NMS

⁶³⁵ (Attorney at 1 hour + Compliance Manager at .5 hours + Sr. Systems Analyst at 1 hour) × 46 NMS Stock ATSs = 115 burden hours.

⁶³⁶ (Compliance Manager at 2 hours + Sr. Systems Analyst at 1 hour) × 46 NMS Stock ATSs = 138 burden hours.

Stock ATSs to complete Part IV, Item 10 of proposed Form ATS-N.⁶³⁷

Part IV, Item 11 of proposed Form ATS would require an NMS Stock ATS to describe its sources and uses of market data. Part IV, Item 11(a) would require an NMS Stock ATS to describe the market data used by the NMS Stock ATS and the source of that market data (e.g., market data feeds disseminated by the SIP and market data feeds disseminated directly by an exchange or other trading center or third-party vendor of market data). Part IV, Item 11(b) would require the NMS Stock ATS to describe the specific purpose for which market data is used by the NMS Stock ATS, including how market data is used to determine the NBBO, protected quotes, pricing of orders and executions, and routing destinations. Form ATS does not specifically require an ATS to describe its sources of market data, though, this information is often important to understanding the execution of orders on an ATS. The Commission is aware based on Form ATS filings that many ATSs that trade NMS stocks provide descriptions related to their use of market data, including providing the name of their market data vendor. The Commission preliminarily believes that the proposed disclosures under Part IV, Item 11 would not impose any significant additional burden on NMS Stock ATSs, which should already be aware of the market data that they use and the manner in which they use it. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 11 for a Form ATS-N would add 4 hours to the current baseline for an initial operation report on current Form ATS to describe the sources of market data and the manner in which the NMS Stock ATS uses market data. This would result in an aggregate initial burden of 184 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 11 of proposed Form ATS-N.⁶³⁸

Part IV, Item 12 of proposed Form ATS-N would require an NMS Stock ATS to make certain disclosures regarding its fees, rebates, and other charges. Part IV, Item 12(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any fees, rebates, or other charges of the NMS Stock ATS (e.g., connectivity fees, subscription fees, execution fees, volume discounts) and provide the range (e.g., high and

low) of such fees, rebates, or other charges. Part IV, Item 12(b) of proposed Form ATS-N would require the NMS Stock ATS to describe any differences if the fees, rebates, or other charges of the NMS Stock ATS are not the same for all subscribers and persons. Current Form ATS does not require an ATS to disclose and explain its fee structure, and based on Commission experience, few, if any, do so in their current Form ATS filings. The Commission recognizes that, like national securities exchanges, NMS Stock ATSs may adopt a variety of fee structures that may include rebates, incentives for subscribers to bring liquidity to the NMS Stock ATS, more traditional transaction-based fee structures, and other fees such as a monthly subscriber access fee. Depending on the complexity and variety of an NMS Stock ATS's fee structure and the extent to which these fees are not the same for all subscribers and persons, the proposed disclosure burden related to Part IV, Item 12 of proposed Form ATS-N will likely vary. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 12 for a Form ATS-N would add 5 hours to the current baseline for an initial operation report on current Form ATS to describe the NMS Stock ATS's fee structure and any differences among subscribers and persons relating to fees, rebates, or other charges. This would result in an aggregate initial burden of 230 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 12 of proposed Form ATS-N.⁶³⁹

Part IV, Item 13 of proposed Form ATS would require an NMS Stock ATS to describe any arrangements or procedures for trade reporting, clearance, and settlement on the NMS Stock ATS. Part IV, Item 13(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures for reporting transactions on the NMS Stock ATS and if the trade reporting procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 13(b) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS (e.g., whether the NMS Stock ATS becomes a counterparty, whether it submits trades to a registered clearing agency, or

whether it requires subscribers to have arrangements with a clearing firm). If the clearance and settlement procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. The Commission notes that some of the proposed disclosure requirements of Part IV, Item 13 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires ATSs to describe, among other things, their procedures governing execution, reporting, clearance, and settlement of transactions effected through the ATS. Consequently, ATSs that currently trade NMS stocks already have experience providing disclosures related to how they report, clear, and settle transactions on the ATS.

Accordingly, the Commission preliminarily believes that preparing Part IV, Item 13 for a Form ATS-N would not impose a significant additional burden above the current baseline for an initial operation report on current Form ATS. The Commission preliminarily estimates that, on average, preparing Part IV, Item 13 for a Form ATS-N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS to provide a more detailed description of the NMS Stock ATS's trade reporting, clearance, and settlement arrangements or procedures. This would result in an aggregate initial burden of 23 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 13 of proposed Form ATS-N.⁶⁴⁰

Part IV, Item 14 of proposed Form ATS-N would require an NMS Stock ATS to provide the following information if the NMS Stock ATS displays orders in an NMS stock to any person other than employees of the NMS Stock ATS and executed 5% or more of the average daily trading volume in that NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) The ticker symbol for each NMS stock for each of the last 6 calendar months; (b) a description of the manner in which the NMS Stock ATS displays such orders on a national securities exchange or through a national securities association; and (c) a description of how the NMS Stock ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that exchange or association. Part IV, Item 15 of proposed Form ATS-N would require an NMS Stock ATS to provide the following

⁶³⁷ (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 3 hours) × 46 NMS Stock ATSs = 276 burden hours.

⁶³⁸ (Compliance Manager at 2 hours + Sr. Systems Analyst at 2 hours) × 46 NMS Stock ATSs = 184 burden hours.

⁶³⁹ (Attorney at 1 hour + Compliance Manager at 3 hours + Sr. Systems Analyst at 1 hour) × 46 NMS Stock ATSs = 230 burden hours.

⁶⁴⁰ Compliance Manager at 0.5 hours × 46 NMS Stock ATSs = 23 burden hours.

information if the NMS Stock ATS executed 5% or more of the average daily trading volume in an NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) The ticker symbol for each NMS stock for each of the last 6 calendar months; and (b) a description of the written standards for granting access to trading on the NMS Stock ATS. Current Form ATS does not require an ATS to disclose the information that would be required under Part IV, Items 14 and 15 of proposed Form ATS–N. However, based on the experience of the Commission and its staff, the Commission preliminarily believes that no ATSs currently executed 5% or more of the average daily volume in an NMS Stock as reported by an effective transaction reporting plan for four of the preceding six calendar months, and the Commission preliminarily believes that most—if not all—ATSs that currently trade NMS stocks already have procedures in place to prevent that threshold from being crossed on the ATS's system. Historically, ATSs have crossed these thresholds very rarely, with at most three ATSs that trade NMS stocks crossing either of the thresholds in any given year.

If, however, an NMS Stock ATS were to cross these 5% thresholds, a disclosure burden related to amending a Form ATS–N to complete Part IV, Items 14 and 15 of proposed Form ATS–N would result. Because Items 14 and 15 of Part IV are tied to existing obligations that arise from crossing the 5% thresholds pursuant to Rule 301(b)(3) and Rule 301(b)(5)(ii)(A) of Regulation ATS, respectively, the Commission preliminarily believes that NMS Stock ATSs should already be generally aware of the procedures they would follow if the 5% thresholds were crossed, which should reduce the burden associated with the disclosures that would be required under Items 14 and 15. The Commission notes that an NMS Stock ATS would only have to respond to Part IV, Items 14 or 15 of a Form ATS–N if the NMS Stock ATS previously operated as an ATS and triggered the applicable 5% thresholds. The Commission further notes that NMS Stock ATSs would be less likely to have to complete Item 14 as compared to Item 15 because Item 14 requires as an additional precondition that the NMS Stock ATS displays orders in an NMS stock to a person other than employees of the NMS Stock ATS. For new NMS Stock ATSs (*i.e.*, NMS Stock ATSs that did not previously operate as an ATS), the NMS Stock ATS would not have been in operation for at least four

months to trigger the applicable thresholds, meaning that such NMS Stock ATSs would only be required to complete Item 14 or 15 (or both) in a Form ATS–N Amendment. The Commission preliminarily estimates that completion of Part IV, Item 14 or 15 in a Form ATS–N Amendment (or in a Form ATS–N in the case of an NMS Stock ATS that previously operated as an ATS), would be 5 hours per item.

As explained above, the Commission notes that triggering the 5% threshold, a precondition necessary to require completion of Part IV, Items 14 and 15 of proposed Form ATS–N, currently occurs, and the Commission preliminarily estimates would continue to occur, very infrequently. Based on the review of Form ATS and Form ATS–R disclosures by the Commission and its staff, the Commission preliminarily estimates that 1 NMS Stock ATS would have to complete Item 14 and 2 NMS Stock ATSs would have to complete Item 15 in any given year. Accordingly, the Commission preliminarily estimates that the disclosures that would be required under Part IV, Items 14 and 15 of proposed Form ATS–N would result in an aggregate initial burden of 15 hours above the current baseline.⁶⁴¹

Part IV, Item 16 of proposed Form ATS–N would require an NMS Stock ATS to explain and provide certain aggregate platform-wide market quality statistics that it publishes or otherwise provides to subscribers regarding the NMS Stock ATS. Under Item 16, if the NMS Stock ATS publishes or otherwise provides to one or more subscribers aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS, it would be required to: (i) List and describe the categories of the aggregate platform-wide order flow and execution statistics published or provided; (ii) describe the metrics and methodology used to calculate the aggregate platform-wide order flow and execution statistics; and (iii) attach as Exhibit 5 the most recent disclosure of the aggregate platform-wide order flow and execution statistics published or provided to one or more subscribers for each category or metric as of the end of the calendar quarter. An NMS Stock ATS would not be required to develop or publish any new statistics for purposes of making the required disclosures under Item 16; it would only be required to make the disclosures for statistics it already otherwise collects

⁶⁴¹ (Attorney at 2 hours + Compliance Manager at 1 hour + Sr. Systems Analyst at 2 hours) × 3 NMS Stock ATSs = 15 burden hours.

and publishes in the course of its operations. Thus, NMS Stock ATSs that do not publish or otherwise provide aggregate platform-wide market quality statistics would not incur any additional burden due to the proposed disclosure requirements of Item 16. For NMS Stock ATSs that do provide such statistics, Item 16 would impose an additional burden above the baseline because current Form ATS does not require the disclosure of market quality statistics. The Commission preliminarily estimates that preparing Part IV, Item 16 for a Form ATS–N would add 7 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 322 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 16 of proposed Form ATS–N.⁶⁴²

ii. Estimated Burden above the Current Baseline for a Form ATS–N, Form ATS–N Amendment, and Notice of Cessation on Form ATS–N

A. Proposed Form ATS–N

Based on the above analysis of the estimated additional burden for a proposed Form ATS–N, the Commission preliminarily estimates that a proposed Form ATS–N will, on average, require an estimated 121.3 burden hours above the current baseline for an initial operation report on current Form ATS. This results in an estimated 141.3 hours in total, including the current baseline.⁶⁴³ The Commission notes that ATSs that trade NMS stocks vary in terms of their structure and the manner in which they operate. ATSs that currently trade NMS stocks also vary with respect to the depth and extent of their disclosures on Form ATS. Consequently, the Commission preliminarily believes that the estimated hour burdens herein regarding proposed Form ATS–N would likely vary among NMS Stock ATSs, depending on such

⁶⁴² (Attorney at 1 hour + Compliance Manager at 1 hour + Senior Systems Analyst at 5 hours) × 46 NMS Stock ATSs = 322 burden hours.

⁶⁴³ (Current Baseline at 20 hours) + (Parts I and II at 0.5 hours) + (Part III at an average of 47 hours) + (Part IV at an average of 73.5 hours) + (Access to EFFS at 0.3 hours, *see infra*, Section XII.D.2.b.iv) = 141.3 burden hours. The aggregate totals by professional, including the baseline, are estimated to be approximately 54.8 hours for an Attorney, 43.5 hours for a Compliance Manager, 34.5 hours for a Sr. Systems Analyst, 1 hour for a Sr. Marketing Manager, and 7.5 hours for a Compliance Clerk.

This preliminary estimated burden for a Form ATS–N includes the hour burden associated with completing Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS–N. As explained above, however, the Commission preliminarily believes that the majority of NMS Stock ATSs would not be required to complete those items of the proposed form.

factors as the extent of their current disclosures on Form ATS, the complexity and structure of their system, and the extent of their other broker-dealer activities.

B. Form ATS–N Amendments

As previously noted, the Commission currently estimates that ATSs that trade NMS stocks submit 2 amendments, on average, each year.⁶⁴⁴ The Commission preliminarily estimates that the 46 respondents will file 3 Form ATS–N Amendments each year, for an estimated total of 138 Form ATS–N Amendments. The Commission notes that proposed Rule 304(a)(2) of Regulation ATS will contain the same three general categories of required amendments for proposed Form ATS–N as Rule 301(b)(2) of Regulation ATS currently requires for current Form ATS.⁶⁴⁵ However, due to the greater detail and number of disclosures required by proposed Form ATS–N, the Commission preliminarily believes that respondents may find it necessary to file a greater number of amendments to proposed Form ATS–N than ATSs that trade NMS stocks currently do on Form ATS. For example, many of the disclosures related to the broker-dealer operator of the NMS Stock ATS contained in Part III of proposed Form ATS–N, which are not required disclosures under current Form ATS, would require an NMS Stock ATS to file Form ATS–N Amendments if the information provided on Form ATS–N changed.

As noted above, the Commission currently estimates that the hourly burden related to an amendment to Form ATS is 6 hours.⁶⁴⁶ The Commission preliminarily estimates that the average hourly burden above this current baseline of 6 hours for each Form ATS–N Amendment would be 3 hours to accommodate the more voluminous and detailed disclosures required by Form ATS–N as compared to Form ATS.⁶⁴⁷ An NMS Stock ATS would also be required to provide a brief narrative description of the amendment at the top of Form ATS–N and a redline(s) showing changes to Part III and/or Part IV of proposed Form

ATS–N.⁶⁴⁸ The Commission preliminarily estimates that this requirement would add an additional burden of 0.5 hours to draft the summary and prepare the redline version(s) showing the amendments the NMS Stock ATS is making.⁶⁴⁹ This would result in a total estimated hourly burden, including the baseline, of 9.5 hours for a Form ATS–N Amendment,⁶⁵⁰ and an aggregate annual burden on all NMS Stock ATSs of 1,311 hours.⁶⁵¹ The Commission notes that the frequency and scope of Form ATS–N Amendments would likely vary, similar to amendments to Form ATS, depending on whether the NMS Stock ATS is implementing a significant change requiring substantial revisions to its Form ATS–N or whether the changes are less significant, such as updating the address of the NMS Stock ATS. Some NMS Stock ATSs might not file any Form ATS–N Amendments in a given year, while others—such as NMS Stock ATSs that publish or otherwise provide to one or more subscribers aggregate platform-wide market quality statistics that would be covered by Part IV, Item 16 of proposed Form ATS–N⁶⁵²—may file several Form ATS–N Amendments per year.

C. Notice of Cessation on Proposed Form ATS–N

As previously noted, from 2012 through the first half of 2015, there have been an average of 6 ATSs that trade NMS stocks that cease operations each year.⁶⁵³ Although it is unclear how many NMS Stock ATSs might cease operations each year going forward, for purposes of making a PRA burden estimate, the Commission is estimating that this average would generally remain the same for NMS Stock ATSs using Form ATS–N as economic conditions, business reasons, and other factors may cause some NMS Stock ATSs to cease operations. Accordingly, the Commission preliminarily estimates that 6 respondents may to file a

cessation of operation report on proposed Form ATS–N each year. The Commission preliminarily believes that the burden for filing a cessation of operation report on proposed Form ATS–N will not be significantly greater than that for filing a cessation of operation report on current Form ATS because proposed Form ATS–N does not contain any additional requirements for a cessation of operation report. For both Form ATS and proposed Form ATS–N, the primary requirement is to check the appropriate box indicating that the ATS is ceasing operations. Accordingly, the Commission preliminarily estimates that the average compliance burden for each response would be 2 hours.⁶⁵⁴ This would result in an aggregate annual burden of 12 hours for NMS Stock ATSs that choose to cease operations and submit a cessation of operation report on Form ATS–N.⁶⁵⁵

iii. ATSs That Transact in Both NMS and Non-NMS Stocks

Under proposed Rule 301(b)(2)(viii) of Regulation ATS, an ATS that effects trades in both NMS stocks and non-NMS stocks would have to submit a Form ATS–N with respect to its trading of NMS stocks and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. Under the proposed amendments to Rule 301(b)(9), an ATS that effects trades in both NMS stocks and non-NMS stocks would also be required to file separate Forms ATS–R—one disclosing trading volume in NMS stocks and one disclosing trading volume in non-NMS stocks. Therefore, ATSs that are subject to these proposed requirements would incur: (1) the above baseline burdens related to filing a Form ATS–N and Form ATS–N Amendments;⁶⁵⁶ (2) the additional burden of filing a new Form ATS to only disclose information related to non-NMS stock trading activity on the ATS;⁶⁵⁷ and (3) the burden of completing and filing two Forms ATS–R.⁶⁵⁸

Accordingly, the Commission estimates that the total hourly burden for an ATS to separately file a Form ATS for its non-NMS stock trading

⁶⁴⁴ See *supra* note 594 and accompanying text. During the fiscal year of 2014, the Commission received 101 amendments from ATSs that trade NMS stocks, of which there were approximately 45 at any given time during 2014. Some ATSs that trade NMS stocks filed as many as 3 amendments while others did not file any amendments in 2014.

⁶⁴⁵ See 17 CFR 242.301(b)(2).

⁶⁴⁶ See *supra* note 595 and accompanying text.

⁶⁴⁷ Attorney at 1 hour + Compliance Manager at 2 hours = 3 burden hours above the baseline.

⁶⁴⁸ See Exhibits 3A and 4A to proposed Form ATS–N.

⁶⁴⁹ Compliance Clerk at 0.5 hours. The Commission notes that most word processing software provides for this functionality.

⁶⁵⁰ Attorney at 5.5 hours + Compliance Manager at 2 hours + Compliance Clerk at 2 hours = 9.5 burden hours.

⁶⁵¹ 138 amendments per year × 9.5 hours = 1,311 aggregate burden hours. The Commission further estimates that gaining access to EFFS for one additional person on an annual basis would require 0.15 burden hours for each NMS Stock ATS, or 7 hours annually for all NMS Stock ATSs (46 × 0.15 hours = 6.9 hours). Therefore, the aggregate burden hours equals 1,317.9 hours (1,311 hours + 6.9 hours).

⁶⁵² See *supra* Section VIII.P.

⁶⁵³ See *supra* Section XII.C.

⁶⁵⁴ Attorney at 1.5 hours + Compliance Clerk at 0.5 hours = 4 burden hours. See *supra* note 597, and accompanying text.

⁶⁵⁵ 2 burden hours × 6 NMS Stock ATSs = 12 aggregate annual burden hours.

⁶⁵⁶ See *supra* Sections XII.D.2.b.ii.A and B.

⁶⁵⁷ See *supra* Section XII.D.2.a and accompanying text for the baseline estimates for submitting an IOR for Form ATS and amendments to Form ATS.

⁶⁵⁸ See *supra* note 598 and accompanying text for the baseline estimate for submitting a Form ATS–R.

activity and Form ATS–N for its NMS stock trading activity would be 20 burden hours for the initial operation report on Form ATS for its non-NMS stock trading activity and 141.3 burden hours for its Form ATS–N. The Commission notes that the estimated hour burden related to the initial operation report submission on Form ATS for non-NMS stock trading activity might be less than the estimated 20 burden hours, as, to the extent the NMS Stock ATS in question is currently operating, the description of its non-NMS stock trading activity should already be contained in its existing Form ATS.⁶⁵⁹ As previously noted, there are currently 11 ATSs that trade, or have indicated that they expect to trade in Exhibit B to their Form ATS, both NMS stocks and non-NMS stocks on the ATS. Consequently, the Commission preliminarily estimates that the aggregate initial burden on ATSs to file these separate forms would be 1,774.3 hours, and the aggregate annual burden for filing amendments to both forms would be 445.5 hours.⁶⁶⁰

The Commission estimates that the total burden for completing and filing two Form ATS–R would be 4.5 hours, which is 0.5 hours⁶⁶¹ above the current baseline burden of 4 hours for filing a Form ATS–R.⁶⁶² The Commission preliminarily believes that ATSs required to file two Forms ATS–R would incur an additional burden above the baseline because they would be required to divide their trading statistics between two forms and file each form separately. The Commission does not believe that those ATSs would incur any additional burden to collect the required information because they currently assemble that information when preparing their current Form ATS–R filings. As previously noted, there are currently 11 ATSs that trade, or have indicated that they expect to trade in Exhibit B to their Form ATS,

⁶⁵⁹ The hourly burden related to amendments to its Form ATS and Form ATS–N would remain unchanged: 6 estimated burden hours for amendments to Form ATS, and 9.5 estimated burden hours for Form ATS–N Amendments. See *supra* notes 646–650 and accompanying text.

⁶⁶⁰ (Form ATS initial operation report at 20 hours + Form ATS–N at 141.3 hours) × 11 ATSs = 1,774.3 aggregate burden hours. Using the estimates of 2 amendments each year to Form ATS, see *supra* Section XII.D.2.a, and 3 amendments each year to Form ATS–N, see *supra* Section XII.D.2.b.ii.B, the ongoing aggregate burden for these bifurcated ATSs would be ((2 Form ATS Amendments per year × 6 hours) + (3 Form ATS–N Amendments per year × 9.5 hours)) × 11 respondents = 445.5 aggregate ongoing burden hours per year relating to amendments.

⁶⁶¹ Attorney at .5 hours = .5 burden hours.

⁶⁶² See *supra* note 598 and accompanying text for the baseline estimate for submitting a Form ATS–R.

both NMS stocks and non-NMS stocks on the ATS; those ATSs would be required to file a pair of Forms ATS–R four times annually. Consequently, the Commission estimates that the aggregate annual burden of filing two Forms ATS–R for those ATS that effect transactions in both NMS stocks and non-NMS stocks would be 198 hours.⁶⁶³

iv. Access to EFFS

The Commission proposes that Form ATS–N would be submitted electronically in a structured format and require an electronic signature.⁶⁶⁴ Currently, ATSs that transact in NMS stock do not have the ability to access and submit an electronic form. The proposed amendments to Regulation ATS would require that every NMS Stock ATS have the ability to submit forms electronically with an electronic signature. The Commission's proposal contemplates the use of an online filing system, the EFFS. Based on the widespread use and availability of the Internet, the Commission preliminarily believes that filing Form ATS–N in an electronic format would be less burdensome and a more efficient filing process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing and filing paper forms to the Commission.

To access EFFS, an NMS Stock ATS would have to submit to the Commission an External Account User Application (“EAUA”) to register each individual at the NMS Stock ATS who would access the EFFS system on behalf of the NMS Stock ATS. The Commission is including in its burden estimates the burden for completing the EAUA for each individual at an NMS Stock ATS who would request access to EFFS. The Commission estimates that initially, on average, two individuals at each NMS Stock ATS would request access to EFFS through the EAUA, and each EAUA would take 0.15 hours to complete and submit. Therefore, each NMS Stock ATS would require a total of 0.3 hours to complete the requisite EAUAs,⁶⁶⁵ or approximately 13.8 hours

⁶⁶³ ((Attorney at 3.5 hours + Compliance Clerk at 1 hour) × (4 filings annually)) × 11 ATSs = 198 aggregate burden hours.

⁶⁶⁴ The Commission notes that all estimated burden hours with regard to completing Parts I–V of proposed Form ATS–N, which are explained above and herein, include the estimated burden associated with the proposed requirement that NMS Stock ATSs file proposed Form ATS–N in a structured format, including narrative responses that are block-text tagged.

⁶⁶⁵ 0.15 hours per EAUA × 2 individuals = 0.3 burden hours per NMS Stock ATS. These estimates are based on the Commission and its staff's experience with EFFS and EAUAs pursuant to Rule

for all NMS Stock ATSs.⁶⁶⁶ The Commission also preliminarily estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through the EAUA.⁶⁶⁷ Therefore, the ongoing burden to complete the EAUA would be 0.15 hours annually for each NMS Stock ATS,⁶⁶⁸ or approximately 6.9 hours annually for all NMS Stock ATSs.⁶⁶⁹

In addition, the Commission estimates that each NMS Stock ATS will designate 2 individuals to sign Form ATS–N each year. An individual signing a Form ATS–N must obtain a digital ID, at the cost of approximately \$25 each year. Therefore, each NMS Stock ATS would pay approximately \$50 annually to obtain digital IDs for the individuals with access to EFFS for purposes of signing Form ATS–N,⁶⁷⁰ or approximately \$2,300 for all NMS Stock ATSs.⁶⁷¹

v. Public Posting on NMS Stock ATS's Web Site

Proposed Rule 304(b)(3) would require each NMS Stock ATS to make public via posting on the NMS Stock ATS's Web site a direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2). The Commission preliminarily estimates that each NMS Stock ATS would incur an initial, one-time burden to program and configure its Web site in order to post the required direct URL hyperlink pursuant to proposed Rule 304(b)(3). The Commission preliminarily estimates that this initial, one-time burden would be approximately 2 hours.⁶⁷² Because the Commission preliminarily believes that many broker-dealer operators currently maintain a Web site for their NMS Stock ATSs, the Commission preliminarily estimates that the aggregate initial, one-time

19b–4 under the Exchange Act. The 0.3 hours represents the time spent by two attorneys. The Commission believes it is appropriate to estimate that, on average, each NMS Stock ATS will submit two EAUAs initially.

⁶⁶⁶ 0.30 hours × 46 NMS Stock ATSs = 13.8 burden hours.

⁶⁶⁷ The Commission estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through EAUA to account for the possibility that an individual who previously had access to EFFS may no longer be designated as needing such access.

⁶⁶⁸ 0.15 hours per EAUA × 1 individual = 0.15 burden hours.

⁶⁶⁹ 0.15 hours × 46 NMS Stock ATSs = 6.9 burden hours.

⁶⁷⁰ \$25 per digital ID × 2 individuals = \$50 per NMS Stock ATS.

⁶⁷¹ \$50 per NMS Stock ATS × 46 NMS Stock ATSs = \$2,300.

⁶⁷² Senior Systems Analyst at 2 burden hours.

burden would be approximately 92 hours.⁶⁷³

vi. Recordkeeping Requirements

As noted above, the Commission proposes to amend Rule 303(a)(2)(ii)⁶⁷⁴ of Regulation ATS to provide that all ATSs must preserve copies of all reports filed pursuant to proposed Rule 304 for the life of the enterprise and any successor enterprise.

Rule 303(a)(ii) currently requires an ATS to preserve copies of reports filed pursuant to Rule 301(b)(2), which include all Form ATS filings, for the life of the enterprise and any successor enterprise. Because NMS Stock ATSs that solely trade NMS stocks would be filing Form ATS–N in lieu of Form ATS under this proposal, the Commission believes that the proposed amendment to Rule 303(a)(ii) would not result in any burden for those ATSs that is not already accounted for under the current baseline burden estimate for Rule 303.⁶⁷⁵ For the 11 ATSs that trade, or have indicated in Exhibit B to their Form ATS that they expect to trade both NMS stocks and non-NMS stocks on the ATS, the Commission preliminarily estimates that the burden above the current baseline estimate for preserving records relating to compliance with the proposed amendment to Rule 303(a)(ii) would be approximately 3 hours annually per ATS for a total annual burden above the current baseline burden estimate of 33 hours for all respondents.⁶⁷⁶ Accordingly, the Commission proposes to modify the current PRA burden for Rule 303 to account for the increased burden on ATSs that trade both NMS stocks and non-NMS stocks.

E. Collection of Information Is Mandatory

All collections of information pursuant to the proposed rules would be mandatory for entities that meet the definition of NMS Stock ATS.

F. Confidentiality of Responses to Collection of Information

With respect to the proposed amendments to Rules 301(b)(2)(viii) and 304 of Regulation ATS, including

⁶⁷³ Senior Systems Analyst at 2 hours × 46 NMS Stock ATSs = 92 burden hours.

⁶⁷⁴ 17 CFR 242.303(a)(2)(ii).

⁶⁷⁵ To comply with all of the record preservation requirements of Rule 303, the Commission currently estimates that ATSs spend approximately 1,380 hours per year. See Rule 303 PRA Update, *supra* note 580, 78 FR 43943. At an average cost per burden hour of \$104.20, the resultant total related cost of compliance is \$143,796 per year (1,380 burden hours × \$104.20/hour). See *id.*

⁶⁷⁶ 3 additional burden hours × 11 ATSs = 33 aggregate burden hours.

proposed Form ATS–N, the Commission would make publicly available on its Web site all Forms ATS–N upon being declared effective. The Commission would also make publicly available on its Web site all properly filed Form ATS–N Amendments, and notices of cessation on Form ATS–N. The Commission would not make publicly available on its Web site Forms ATS–N that the Commission has declared ineffective, but these forms would be available for examination by the Commission and its staff, state securities authorities, and self-regulatory organizations. The proposed Form ATS amendments would also require each NMS Stock ATS that has a Web site to post on the NMS Stock ATS's Web site a direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2). The collection of information required by the proposed amendments to Rules 301(b)(10), 303(a)(1)(v), 301(b)(9), and 303(a)(2)(ii) would not be made public, but would be used for regulatory purposes by the Commission and the SRO(s) of which the ATS's broker-dealer operator is a member. In Part III, Item 10 of Form ATS–N, however, NMS Stock ATSs would be required to describe the written safeguards and written procedures to ensure confidential treatment of trading information that would be required under the proposed amendment to Rule 301(b)(10); as explained above, the Commission would make certain Form ATS–N filings publicly available. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential, subject to the provisions of applicable law.

G. Retention Period for Recordkeeping Requirements

All reports required to be made under proposed Rules 301(b)(2)(viii), 301(b)(9), and 304 of Regulation ATS, including Proposed Form ATS–N, would be required to be preserved during the life of the enterprise and any successor enterprise, pursuant to the proposed amendment to Rule 303(a)(2) of Regulation ATS.

ATSs would be required to preserve a copy of their written safeguards and written procedures to protect subscribers' confidential trading information under proposed Rule 301(b)(10) of Regulation ATS for not less than 3 years, the first 2 years in an easily accessible place, pursuant to proposed Rule 303(a)(1)(v) of Regulation ATS.

H. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information shall have practical utility;

2. Evaluate the accuracy of our estimate of the burden of the proposed collection of information;

3. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

4. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File Number S7–23–15. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–23–15 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE., Washington, DC 20549–2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

XIII. Economic Analysis

A. Background

The Commission is concerned that the current regulatory requirements relating to operational transparency for NMS Stock ATSs may no longer fully meet the goals of furthering the public interest and protecting investors. The market for NMS stock execution services consists of registered national securities exchanges, NMS Stock ATSs, and non-ATS broker-dealers that effect OTC transactions. As of the second quarter of 2015, NMS Stock ATSs account for approximately 15.4% of the total dollar volume in NMS stocks and compete with, and operate similar to, registered national securities exchanges.

However, relative to registered national securities exchanges, there is limited and differential information publicly available to market participants about how NMS Stock ATSs operate, including how orders interact, match, and execute, and the activities of the broker-dealer operators and their affiliates. Not only is there a lack of consistency with respect to the quality of information that market participants receive from different NMS Stock ATSs, there are also differences due to the fact that for a given NMS Stock ATS, some subscribers might have more detailed information relative to other subscribers about how orders interact, match, and execute on the ATS.

Currently, NMS Stock ATSs provide the Commission with notice of their initial operations and changes to their operations on Form ATS. Although some NMS Stock ATSs voluntarily make their Form ATS publicly available on their Web site, they are not required to do so, as Form ATS is “deemed confidential when filed.”⁶⁷⁷ In light of this, subscribers to these NMS Stock ATSs may have more information about the operations of these NMS Stock ATSs relative to subscribers to NMS Stock ATSs that do not make their Form ATS public. Moreover, an NMS Stock ATS may also make different information available to certain market participants about its operations than it does to other market participants. The Commission is concerned that this limited and differential level of operational transparency around NMS Stock ATSs may impede market participants’ ability to adequately discern how their orders interact, match, and execute on NMS Stock ATSs, or fully understand the activities of an NMS Stock ATS’s broker-dealer-operator and its affiliates, and the conflicts that may arise from such activities. This could thereby impede a market participant’s ability to evaluate whether submitting order flow to a particular NMS Stock ATS aligns with its business interests and would help it achieve its investing or trading objectives. In addition, the Commission is concerned that the current lack of transparency around the potential conflicts of interest that arise from the activities of the broker-dealer operator and its affiliates hinders market participants’ abilities to protect their interests when doing business on the NMS Stock ATS.

The Commission is concerned that the current market for NMS stock execution services does not address the problems described above. Rather, when demanding services that are typically

offered by NMS Stock ATSs—particularly, dark pools—some market participants trade off the less stringent transparency requirements applicable to NMS Stock ATSs, as compared to national securities exchanges, in exchange for obtaining some perceived advantages of trading on these venues, such as keeping their orders dark prior to execution.⁶⁷⁸ Furthermore, the difficulty involved in comparing the operations and execution quality of an NMS Stock ATS to the operations and execution quality of national securities exchanges or other NMS Stock ATSs may limit the ability of market participants to judge whether that tradeoff actually benefits either themselves or their customers when sending orders to a particular NMS Stock ATS. For example, as noted above, a certain category of subscribers may have access to services offered by an NMS Stock ATS that are not offered to another category of subscribers, but subscribers that fall under the latter category may not be fully aware of any potential disadvantages when submitting orders to that NMS Stock ATS.⁶⁷⁹ Furthermore, the Commission preliminarily believes that the NMS Stock ATS would generally not have a strong incentive to fully reveal how it operates to either category of subscriber under the current regulatory regime.

The Commission is proposing to amend Regulation ATS to adopt new Rule 304, which would provide a process for the Commission to determine if an NMS Stock ATS qualifies for the exemption from the definition of “exchange” pursuant to Rule 3a1–1(a)(2) and declare an NMS Stock ATS’s Forms ATS–N either effective or ineffective. The proposal would also provide a process for the Commission to suspend, limit, or revoke an NMS Stock ATS’s exemption from the definition of “exchange” under certain circumstances. The Commission is also proposing to amend Regulation ATS to require NMS Stock ATSs to file Form ATS–N, which would require NMS Stock ATSs to provide detailed disclosures about their trading operations and the activities of their broker-dealer operators and their affiliates. The Commission is proposing to make certain Form ATS–N filings public by posting them on the Commission’s Web site and requiring each NMS Stock ATS that has a Web site to post on the NMS Stock ATS’s Web site a direct URL hyperlink to the Commission’s Web site that contains the

documents enumerated in proposed Rule 304(b)(2). The Commission is also proposing to amend Rule 301(b)(10) of Regulation ATS to require that all ATSs have their procedures and safeguards to protect subscribers’ confidential trading information in writing. The proposed amendments seek to improve and make more consistent the information available to market participants regarding different NMS Stock ATSs’ operations and the activities of their broker-dealer operators and their affiliates. The proposed amendments also aim to make the level and type of disclosures more consistent between NMS Stock ATSs. The Commission preliminarily believes that making publicly available a more consistent level of information to all market participants would help them to better evaluate NMS Stock ATSs as potential routing destinations for their orders.

The Commission is sensitive to the economic consequences and effects, including the costs and benefits, of its rules. The following economic analysis identifies and considers the costs and benefits—including the effects on efficiency, competition, and capital formation—that may result from the amendments to Regulation ATS being proposed. These costs and benefits are discussed below and have informed the policy choices described throughout this release.⁶⁸⁰

B. Baseline

The enhanced transparency and oversight of NMS Stock ATSs that the Commission preliminarily believes would result from the proposed amendments to Regulation ATS would increase the amount of information and improve the quality of information available to all market participants about the operations of NMS Stock ATSs and the activities of their broker-dealer operators and their affiliates. As a result, this information should better inform market participants making decisions about which trading venue to route their orders to. The proposed amendments would also affect the

⁶⁸⁰ Exchange Act Section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. See 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. See 15 U.S.C. 78w(a)(2).

⁶⁷⁸ See *supra* notes 123–126 and accompanying text.

⁶⁷⁹ See *supra* Section VII.B.4.

⁶⁷⁷ See 17 CFR 242.301(b)(2)(vii).

competitive dynamics between trading venues that compete for order flow. The numerous parties that would be affected by the proposed amendments include: Existing NMS Stock ATSs; potential new NMS Stock ATSs; current and potential subscribers of NMS Stock ATSs; broker-dealers that are affiliated with NMS Stock ATSs and their customers; non-ATS affiliated broker-dealers and their customers; broker-dealers that do not operate NMS Stock ATSs but send order flow to NMS Stock ATSs; institutional investors that periodically transact large trades on NMS Stock ATSs; other persons that seek to effect transactions in NMS stocks on ATSs; and registered national securities exchanges that compete for order flow with NMS Stock ATSs.

The baseline against which economic costs and benefits, as well as the impact of the proposed amendments on efficiency, competition, and capital formation, are measured is the current market and regulatory framework for trading NMS stocks. The baseline, discussed in further detail below, includes statistics on the number of NMS Stock ATSs; current reporting requirements for NMS Stock ATSs; the lack of public disclosure of NMS Stock ATSs' operations, as well as disparate levels of information available to market participants about NMS Stock ATSs' operations and the activities of their broker-dealer operators and their affiliates; and the competitive environment between registered national securities exchanges and NMS Stock ATSs, among NMS Stock ATSs, and between broker-dealers that operate NMS Stock ATSs and broker-dealers that do not operate NMS Stock ATSs.

1. Current NMS Stock ATSs

In a concept release on equity market structure in 2010, the Commission stated that in the third quarter of 2009 there were 37 dark pools and ECNs that traded NMS stocks, and that they accounted for 18.7% of total NMS share volume.⁶⁸¹ From mid-May to mid-September 2014, the trading volume of ATSs accounted for approximately 18% of the total dollar volume in NMS

⁶⁸¹ The Commission used data from the third quarter of 2009. Of these 37 ATSs that traded NMS stocks, 32 were classified as dark pools and 5 were classified as ECNs. These dark pools accounted for 7.9% of total NMS share volume and the ECNs accounted for 10.8% of total NMS share volume. Of the 10.8% attributable to ECNs, 9.8% was attributable to two ECNs that were operated by Direct Edge, which subsequently registered as national securities exchanges. See 2010 Equity Market Structure Release, *supra* note 124, at 3598–3599.

stocks.⁶⁸² During the second quarter in 2015, 38 ATSs traded NMS stocks⁶⁸³ and these 38 ATSs accounted for approximately 59 billion shares traded in NMS stocks (approximately \$2.5 trillion in dollar volume), representing approximately 15.0% of total share trading volume (15.4% of total dollar trading volume) on all registered national securities exchanges, ATSs, and non-ATS OTC trading venues in the second quarter of 2015.⁶⁸⁴ There have been several changes in the market for NMS stocks execution services that may explain the volatility in fraction of share and dollar volume executed on NMS Stock ATSs since 2009. First, two ECNs have now registered as national securities exchanges.⁶⁸⁵ Second, there has been a rise in the number of ATSs operating as dark pools. Since the third quarter of 2009, the number of ATSs operating as dark pools has increased from 32⁶⁸⁶ to more than 40 today.⁶⁸⁷ In 2009, dark pools accounted for 7.9% of NMS share volume⁶⁸⁸ and by the

⁶⁸² See SCI Adopting Release, *supra* note 17, at 72266 n.148 and accompanying text and n.150.

⁶⁸³ See *infra* Table 1, “NMS Stock ATSs Ranked by Dollar Trading Volume—March 30, 2015 to June 26, 2015.”

⁶⁸⁴ See *infra* Table 1 “NMS Stock ATSs Ranked by Dollar Trading Volume—March 30, 2015 to June 26, 2015.” Total dollar trading volume on all exchanges and off-exchange trading in the second quarter of 2015 was approximately \$16.3 trillion and approximately 397 billion shares. See *id.*

⁶⁸⁵ EDGA Exchange, Inc. and EDGX Exchange, Inc. (f/k/a Direct Edge ECN) previously operated as ECNs and are now registered national securities exchanges. See In the Matter of the Applications of EDGX Exchange, Inc., and EDGA Exchange, Inc. for Registration as National Securities Exchanges: Findings, Opinion, and Order of the Commission, Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10–194 and 10–196). Prior to 2009, there were other ECNs that also became national securities exchanges. BATS Exchange Inc. (f/k/a BATS ECN) previously operated as an ECN and is now a registered national securities exchange. See In the Matter of the Application of BATS Exchange Inc. for Registration as National Securities Exchange: Findings, Opinion, and Order of the Commission, Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10–198). NYSE Arca, Inc., (f/k/a Archipelago) previously operated as an ECN and was acquired by the New York Stock Exchange LLC. See Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 3, and 5 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 6 and 8 Relating to the NYSE's Business Combination With Archipelago Holdings, Inc., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77). Finally, The Nasdaq Stock Market LLC, prior to becoming a national securities exchange, acquired Brut ECN and INET ECN. See In the Matter of the Application of the Nasdaq Stock Market LLC for Registration as National Securities Exchange: Findings, Opinion, and Order of the Commission, Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550, n.137 (January 23, 2006) (File No. 10–131).

⁶⁸⁶ See *supra* note 133 and accompanying text.

⁶⁸⁷ See *supra* note 134 and accompanying text.

⁶⁸⁸ See *supra* note 135 and accompanying text.

second quarter of 2015, they accounted for 14.9% of NMS share volume.⁶⁸⁹ In summary, in recent years, the number of NMS Stock ATSs has increased, and the percentage of NMS stocks executed in dark pools has also increased.

2. Current Reporting Requirements for NMS Stock ATSs

Even though ATSs directly compete for order flow in NMS stocks with national securities exchanges, ATSs are exempt from the definition of “exchange” and therefore are not required to register as national securities exchanges with the Commission. An ATS qualifies for an exemption from the definition of “exchange” provided by Exchange Act Rule 3a1–1(a)(2) on the condition that it complies with Regulation ATS, including registering as a broker-dealer, which includes joining a self-regulatory organization, such as FINRA. Thus, ATSs can collect and execute orders in securities electronically without registering as a national securities exchanges under Section 6 of the Exchange Act.

A broker-dealer can become an ATS by filing an initial operation report on Form ATS at least 20 days before commencing operations. Form ATS requires, among other things, that the ATS provide information about: classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; the securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing order entry and execution; and trade reporting and clearance and settlement of trades on the ATS. Form ATS is not approved by the Commission;⁶⁹⁰ rather, it provides the Commission with notice of an ATS's operations prior to commencing operations.⁶⁹¹

An ATS must notify the Commission of any changes in its operations by filing an amendment to its Form ATS initial operation report under three circumstances. First, an ATS must amend Form ATS at least 20 days prior to implementing any material change to the operation of the ATS.⁶⁹² Second, if any information contained in the initial operation report becomes inaccurate and has not already been reported to the

⁶⁸⁹ See *infra* Table 1 “NMS Stock ATSs Ranked by Dollar Trading Volume—March 30, 2015 to June 26, 2015” and based on data compiled from Forms ATS submitted to the Commission as of the end of the second quarter of 2015.

⁶⁹⁰ See *supra* Section II.B.

⁶⁹¹ See Instruction A.1 to Form ATS.

⁶⁹² See 17 CFR 242.301(b)(2)(ii).

Commission as an amendment, the ATS must file an amendment on Form ATS within 30 calendar days after the end of each calendar quarter.⁶⁹³ Third, an ATS must also promptly file an amendment on Form ATS correcting information that it previously reported on Form ATS after discovery that the information was inaccurate when filed.⁶⁹⁴ Regulation ATS also requires ATSs to report certain information about transactions on the ATS and information about certain activities on Form ATS-R within 30 days after the end of each calendar quarter.⁶⁹⁵ Form ATS-R requires that ATSs report both total unit volume and dollar volume of their transactions over the quarter, as well as a list of all subscribers that were participants during the quarter and a list of all securities traded on the ATS at any time during the quarter.⁶⁹⁶ In addition to the reporting requirements of Form ATS and Form ATS-R, there are other conditions under Regulation ATS, including those that address order display and access; fees and fair access; capacity, integrity, and security of automated systems; examinations, inspections, and investigations; recordkeeping; procedures to protect subscribers' confidential treatment of trading information; and limitations on the name of the ATS.⁶⁹⁷

All ATSs are currently members of FINRA and must therefore comply with all FINRA rules applicable to broker-dealers. FINRA rules require ATSs to report transaction volume. For instance, FINRA Rule 4552 requires each ATS to report to FINRA aggregate weekly trading volume on a security-by-security basis.⁶⁹⁸ FINRA publishes the information regarding NMS stocks in the S&P500 Index or the Russell 1000 Index and certain exchange-traded products on a two-week delayed basis, and the information on all other NMS stocks and OTC equity securities on a four-week delayed basis.⁶⁹⁹ In addition to FINRA Rule 4552, other rules pertaining to the operations of NMS Stock ATSs include FINRA Rules 6160 and 6170, which pertain to the use of a Market Participant Identifier ("MPID") for trade reporting purposes.⁷⁰⁰

3. Lack of Public Disclosure of NMS Stock ATS Operations and the Activities of the Broker-Dealer Operator and the Broker-Dealer Operator's Affiliates

Regulation ATS states that information on Form ATS is "deemed confidential when filed."⁷⁰¹ In the Regulation ATS Adopting Release, the Commission stated that preserving confidentiality of information on Form ATS would provide ATSs "with the necessary comfort to make full and complete filings," and noted that information required on Form ATS "may be proprietary and disclosure of such information could place alternative trading systems in a disadvantageous competitive position."⁷⁰²

Although the Commission does not require information provided on Form ATS to be made publicly available, the Commission has observed that some NMS Stock ATSs voluntarily make publicly available their Forms ATS.⁷⁰³ However, even when ATSs publicly disclose their Form ATS filings, it is often not easy for market participants to systematically compare one NMS Stock ATS to another based on these disclosures because the level of detail and the format in which it is presented on these Form ATSs may vary among the NMS Stock ATSs. In addition, the Commission notes that some of these NMS Stock ATSs do not make public the full version of the Form ATS that has been filed with the Commission. Also, NMS Stock ATSs are under no legal obligation to keep current a Form ATS they have made publicly available, so market participants cannot immediately confirm whether a publicly posted Form ATS is the most recent filing of the NMS Stock ATS.

Furthermore, different information is made available to different market participants regarding the operations of NMS Stock ATSs and the activities of NMS Stock ATSs' broker-dealer operators and their affiliates. NMS Stock ATSs that either voluntarily make their Form ATS publicly available, or publish summary information of their operations, may provide to market participants more information about their operations than NMS Stock ATSs that do not make their Forms ATS or

information about their operations publicly available. Furthermore, subscribers to an NMS Stock ATS may have greater access to information about the NMS Stock ATS than other market participants, including the NMS Stock ATS's subscriber manual and access to other subscriber quotes.

NMS Stock ATSs also disclose some execution quality metrics. Exchange Act Rule 605(a) requires every market center, including ATSs, to make publicly available for each calendar month a report containing standardized data on the covered orders in NMS stocks that it receives for execution from any market participant.⁷⁰⁴ Data on execution quality required under Exchange Act Rule 605(a) includes order sizes, execution sizes, effective spreads, price improvement, and quarterly volume of shares traded. As such, market participants have access to actual market quality statistics of execution quality on NMS Stock ATSs. The Commission recognizes that some NMS Stock ATSs may publish or otherwise disclose to subscribers market quality statistics that may be useful to those subscribers in addition to what is currently required by Exchange Act Rule 605. However, the Commission does not believe that such market quality statistics are standardized in terms of how they are calculated, and it does not know how much information subscribers that receive these market quality statistics have about how the NMS Stock ATS calculates the statistics. The Commission preliminarily believes that some subscribers may have access to more information about a given NMS Stock ATS than other ATSs, and also may have more information about that NMS Stock ATS than non-subscribers.

The differences in information that certain subscribers have about an NMS Stock ATS's operations may be manifested through channels other than having differential access to Form ATS, an NMS Stock ATS's subscriber manual, or being granted access to certain market quality statistics as provided by an NMS Stock ATS in addition to what is

⁷⁰⁴ A covered order shall mean any market order or any limit order (including immediate-or-cancel orders) received by a market center during regular trading hours at a time when a consolidated best bid and offer is being disseminated, and, if executed, is executed during regular trading hours, but shall exclude any order for which the customer requests special handling for execution, including, but not limited to, orders to be executed at a market opening price or a market closing price, orders submitted with stop prices, orders to be executed only at their full size, orders to be executed on a particular type of tick or bid, orders submitted on a "not held" basis, orders for other than regular settlement, and orders to be executed at prices unrelated to the market price of the security at the time of execution. See Rule 605(a)(8).

⁷⁰¹ See 17 CFR 242.301(b)(2)(vii). While FINRA Rule 4552 requires dissemination of aggregate weekly trading volume on the ATS by stock, this data does not reveal any information about the ATSs trading operations. Some ATSs such as IEX Trading have voluntarily made public information about order size and fill rates, as well as volume that is matched and routed, on a monthly basis. See, e.g., IEX ATS Statistics, <http://www.iextrading.com/stats/>.

⁷⁰² See Regulation ATS Adopting Release, *supra* note 7, at 70864.

⁷⁰³ See *supra* note 156.

⁶⁹³ See 17 CFR 242.301(b)(2)(iii).

⁶⁹⁴ See 17 CFR 242.301(b)(2)(iv).

⁶⁹⁵ See 17 CFR 242.301(b)(9).

⁶⁹⁶ See Form ATS-R.

⁶⁹⁷ See *supra* Section II.B; see also 17 CFR 242.301(b).

⁶⁹⁸ See FINRA Rule 4552.

⁶⁹⁹ See *id.*

⁷⁰⁰ See FINRA Rules 6160 and 6170.

currently publicly disclosed under Exchange Act Rule 605. To the extent that the NMS Stock ATS provides access to services to certain subscribers and not others, the subscribers with greater access to the services of an NMS Stock ATS could be in a position to obtain more knowledge and information about the operations of NMS Stock ATSs than those subscribers who have limited access to the services of the NMS Stock ATS. Therefore, subscribers who have greater access to services offered by the NMS Stock ATS may be able to make more informed choices about their trading decisions relative to subscribers who have limited access to the services of the NMS Stock ATS. For instance, a broker-dealer operator may offer products or services in connection with a subscriber's use of the NMS Stock ATS, and, as a result, these subscribers may receive more favorable terms from the broker-dealer operator with respect to their use of the NMS Stock ATS. Such favorable terms could include preferential routing arrangements, access to certain order types, or access to a faster connection line to the ATS via a co-location service, as opposed to through the broker-dealer operator's SOR (or similar functionality) or algorithm. Granting access to these favorable terms can result in these subscribers having more detailed information about how their orders will interact, match, and execute relative to those of other subscribers. With this detailed information, these subscribers can make more nuanced decisions about which trading venue suits their trading purposes relative to other subscribers who do not have access to these services, and thus do not possess an informational advantage.

Even if having greater access to the services of an NMS Stock ATS yields additional information about the operations of the NMS Stock ATS to certain subscribers, it is possible that subscribers that do not have full access to services of the NMS Stock ATS, and the resulting additional information, may still want to trade on NMS Stock ATSs in spite of their relative informational disadvantage. It is possible that had these subscribers possessed more detailed information about the operations of the NMS Stock ATS, they may have been able to make more informed—and therefore potentially different—decisions about where to route their orders for execution.

4. NMS Stock ATS Treatment of Subscriber Confidential Trading Information

Under current Rule 301(b)(10) of Regulation ATS,⁷⁰⁵ all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, and, to ensure that those safeguards and procedures are followed, the ATS must also establish adequate oversight procedures.⁷⁰⁶ Furthermore, all ATSs are required to preserve certain records pursuant to Rule 303(a)(1).⁷⁰⁷ However, neither Rule 301(b)(10) nor Rule 303(a)(1) of Regulation ATS currently require that an ATS have in writing and preserve their safeguards and procedures to protect subscribers' confidential trading information, or their related oversight procedures. Based on the experience of the Commission and its staff from periodic examinations or investigations of ATSs, the Commission preliminarily believes that ATSs—in particular, ATSs whose broker-dealer operators are large, multi-service broker-dealers—currently have and maintain in writing their safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed. Nevertheless, under the current regulatory environment for ATSs, absent specific questions in an examination by the Commission or its staff, the Commission is not able to determine the specific ATSs that currently have written safeguards and written procedures to protect subscribers' confidential trading information based on the disclosure requirements of current Form ATS.

5. Current State of Competition Between NMS Stock ATSs and Registered National Securities Exchanges

In the market for NMS stock execution services, NMS Stock ATSs not only compete with other NMS Stock ATSs, but they also compete with registered national securities exchanges. As noted previously, while registered national securities exchanges compete with NMS Stock ATSs for order flow, NMS Stock ATSs and registered national securities exchanges are subject to different regulatory regimes, including different obligations to disclose information about their trading operations and activities.⁷⁰⁸ For

example, ATSs that operate pursuant to the exemption from the definition of "exchange" under Rule 3a1-1(a)(2) must register as broker-dealers,⁷⁰⁹ and provide notice of their operations on Form ATS.⁷¹⁰ This notice of operations is not approved or disapproved by the Commission. Form ATS requires ATSs to disclose only limited aspects of their operations, and ATSs are not required to publicly disclose Form ATS, which is "deemed confidential when filed."⁷¹¹ In addition, ATSs need not publicly disclose changes to their operations and trading functionality because amendments to Form ATS are not publicly disclosed.⁷¹² Some market participants therefore have limited access to information about NMS Stock ATSs, including information related to the types of subscribers, means of access, order types, market data, and procedures governing the interaction and execution of orders on the NMS Stock ATS. On the other hand, national securities exchanges, with which NMS Stock ATSs compete for order flow, must register with the Commission on Form 1, must file proposed rule changes with the Commission under Section 19(b) of the Exchange Act, and are SROs. The proposed rule changes of national securities exchanges must be made available for public comment,⁷¹³ and in general, these proposed rule changes publicly disclose, among other things, details relating to the exchange's operations, procedures, and fees. National securities exchanges and other SROs also have regulatory obligations, such as enforcing their rules and the federal securities laws with respect to their members, which do not apply to market participants such as ATSs.⁷¹⁴

While national securities exchanges have more regulatory burdens than NMS Stock ATSs, they also enjoy certain unique benefits that are not afforded to NMS Stock ATSs. While national securities exchanges are SROs, and are thus subject to surveillance and oversight by the Commission, they can still establish norms regarding conduct, trading, and fee structures for external access. ATSs on the other hand are regulated as broker-dealers, and must comply with the rules of FINRA, which is the SRO to which all ATSs currently belong. Trading venues that elect to register as national securities exchanges may gain added prestige by establishing

⁷⁰⁹ See 17 CFR 242.301(b)(1).

⁷¹⁰ See 17 CFR 242.301(b)(2).

⁷¹¹ See 17 CFR 242.301(b)(2)(vii).

⁷¹² *Id.*

⁷¹³ See 15 U.S.C. 78s(b)(1).

⁷¹⁴ See, e.g., Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b)(1), and Section 6(b) of the Exchange Act, 15 U.S.C. 78f(b).

⁷⁰⁵ 17 CFR 242.301(b)(10).

⁷⁰⁶ 17 CFR 242.301(b)(10).

⁷⁰⁷ See *supra* Section X.

⁷⁰⁸ See *supra* Section I (discussing the different mix of obligations and benefits applicable to ATSs and registered national securities exchanges).

listing standards for their securities. Additionally, national securities exchanges can be direct participants in the NMS plans, such as the ITS, the CTA Plan, Consolidated Quotation System, and the OTC/UTP Plan. Direct participation in these systems may provide a higher degree of transparency and execution opportunity than on NMS Stock ATSS. Furthermore, national securities exchanges are entitled to share in market data revenue generated by the CTA⁷¹⁵ and enjoy limited immunity from private liability with respect to their regulatory functions.

Since the adoption of Regulation NMS in 2005, the market for NMS stock execution services has become more and more fragmented and competitive. Currently there are 11 registered national securities exchanges that effect transactions in NMS stocks, namely, NYSE MKT LLC (formerly NYSE AMEX and the American Stock Exchange), BATS Exchange, Inc. (“BATS–Z Exchange”), BATS Y-Exchange, Inc. (“BATS–Y Exchange”) (“BATS–Z Exchange and BATS–Y Exchange, collectively “the BATS Exchanges”), NASDAQ OMX BX, Inc. (formerly the Boston Stock Exchange), Chicago Stock Exchange, Inc., EDGA Exchange, Inc. (“EDGA”), EDGX Exchange, Inc. (“EDGX”), The Nasdaq Stock Market LLC (“Nasdaq”), New York Stock Exchange LLC (“NYSE”), NYSE Arca, Inc. (“NYSE Arca”), and NASDAQ OMX PHLX, Inc. (formerly Philadelphia Stock Exchange).⁷¹⁶

Several of these national securities exchanges (NYSE Arca, Nasdaq, BATS Z-Exchange, EDGA and EDGX) previously operated as ECNs or acquired ECNs as part of their trading

⁷¹⁵ See Regulation ATS Adopting Release, *supra* note 7, at 70880, 70902–70903 (discussing generally some of the obligations and benefits of registering as a national securities exchange).

⁷¹⁶ As noted above, National Stock Exchange, Inc. ceased trading on its system as of the close of business on May 30, 2014. See *supra* note 118.

platforms.⁷¹⁷ A reason why an ECN might want to register as a national securities exchange is so that it can participate in and earn market data fees from U.S. tape plans, reduce clearing costs and operate a primary listings business.⁷¹⁸

Over the past decade, with the increase in fragmentation in the market for execution services, there has been a shift in the market share of trading volume in NMS stocks across trading venues. For example, there has been a decline in market share of trading volume for exchange-listed stocks of the two traditionally dominant trading venues, NYSE and Nasdaq. The market share of the NYSE in NYSE-listed stocks fell dramatically from approximately 80% in 2005 to 20% in 2013, and for Nasdaq-listed stocks, Nasdaq’s market share fell by approximately half, from 50% in 2005 to 25% in 2013.⁷¹⁹ Over the same time period, there has been an increase in market share on other newer national securities exchanges such as NYSE Arca, BATS–Z, BATS–Y, EDGA and EDGX, and an increase in the market share of off-exchange trading, which includes both internalization by dealers and trading on NMS Stock ATSS.⁷²⁰ As discussed above, there has also been an increase in the number of NMS Stock ATSS that operate as dark pools, and the market share for these NMS Stock ATSS has increased.⁷²¹ Thus, greater fragmentation in the market for NMS stock execution services over the past decade has

⁷¹⁷ See *supra* note 685 and accompanying text.

⁷¹⁸ See BATS Global Markets, Inc., Amendment to Form S–1 Registration Statement, <http://www.sec.gov/Archives/edgar/data/1519917/000119312512125661/d179347ds1a.htm>.

⁷¹⁹ See Angel, James, Lawrence Harris, and Chester Spatt (2013), “Equity Trading in the 21st Century: An Update,” working paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584026.

⁷²⁰ See *id.*

⁷²¹ See *supra* Section XIII.B.1.

resulted in trading volume being executed on different venues, some of which include NMS Stock ATSS, particularly NMS Stock ATSS that operate as dark pools.

As discussed above, NMS Stock ATSS face lower regulatory burdens than national securities exchanges. Because national securities exchanges are SROs, they are subject to certain regulatory obligations, such as enforcing their own rules and the federal securities laws with respect to their members. NMS Stock ATSS do not have such oversight and enforcement responsibilities.⁷²² The Commission recognizes that the growth in the number of NMS Stock ATSS could be driven by these less stringent regulatory obligations.

6. Competition Among NMS Stock ATSS

NMS Stock ATSS also compete amongst each other in a niche in the market for NMS stock execution services. The rise in the number of NMS Stock ATSS has not only affected competition between national securities exchanges and ATSS for order flow of NMS stocks, it has also impacted competition among NMS Stock ATSS. Table 1 depicts the market share of total dollar volume for NMS stocks, and the total share volume for NMS stocks for individual ATSS, based on data collected from ATSS pursuant to FINRA Rule 4552 for 13 weeks of trading from late March 2015 to late June 2015. Even though there are many NMS Stock ATSS, much of the NMS stock dollar volume on ATSS is transacted by only a handful of venues. Table 1 shows that the top eight NMS Stock ATSS ranked by dollar volume accounted for 61.1% of total dollar volume transacted on ATSS and 58.9% of total share volume transacted on ATSS from late March 2015 to late June 2015.

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⁷²² See *supra* note 714.

MPID	ATS Description	Trades	Share Volume	Dollar Volume	% of ATS Dollar Volume	% of ATS Share Volume
CROS	CROS CROSSFINDER	41,672,006	7,551,914,806	\$315,945,661,169	12.61%	12.70%
UBSA	UBSA UBS ATS	43,027,809	6,734,276,556	\$291,180,523,638	11.62%	11.32%
DBAX	DBAX SUPERX	25,242,629	4,678,600,167	\$199,074,916,743	7.94%	7.87%
IEGX	IEGX IEX	18,041,576	4,423,181,973	\$186,499,748,586	7.44%	7.44%
MSPL	MSPL MS POOL (ATS-4)	18,236,411	4,289,819,243	\$156,471,258,204	6.24%	7.21%
DLTA	DLTA DEALERWEB	1,516	764,998,801	\$134,793,690,990	5.38%	1.29%
SGMA	SGMA SIGMA X	18,716,925	3,222,508,033	\$131,407,703,348	5.24%	5.42%
MLIX	MLIX INSTINCT X	15,015,049	3,360,647,845	\$116,747,351,177	4.66%	5.65%
JPMX	JPMX JPM-X	12,258,446	2,837,510,840	\$116,561,158,849	4.65%	4.77%
ITGP	ITGP POSIT	10,227,796	2,900,218,900	\$111,761,968,834	4.46%	4.88%
KCGM	KCGM KCG MATCHIT	14,173,631	2,423,079,322	\$95,254,726,769	3.80%	4.07%
EBXL	EBXL LEVEL ATS	14,048,531	2,272,446,000	\$94,803,590,528	3.78%	3.82%
BIDS	BIDS BIDS TRADING	4,317,658	2,208,466,908	\$94,153,259,495	3.76%	3.71%
LATS	LATS BARCLAYS ATS ("LX")	13,743,582	2,365,482,491	\$92,785,653,009	3.70%	3.98%
ICBX	ICBX INSTINET CONTINUOUS BLOCK CROSSING SYSTEM (CBX)	7,295,533	1,875,009,482	\$70,029,206,516	2.79%	3.15%
XSTM	XSTM CROSSSTREAM	2,678,027	1,158,257,295	\$40,156,942,579	1.60%	1.95%
LQNT	LQNT LIQUIDNET ATS	18,127	712,524,230	\$31,447,183,492	1.25%	1.20%
IATS	IATS IBKR ATS	2,308,101	722,328,435	\$31,399,360,633	1.25%	1.21%
NYFX	NYFX MILLENNIUM	1,801,107	647,366,571	\$26,977,052,943	1.08%	1.09%
CXCX	CXCX CITI CROSS	3,047,670	680,227,091	\$26,237,183,874	1.05%	1.14%
MSTX	MSTX MS TRAJECTORY CROSS (ATS-1)	4,032,146	670,349,940	\$24,101,728,412	0.96%	1.13%
PDQX	PDQX PDQ ATS	2,843,539	519,782,380	\$22,384,657,822	0.89%	0.87%
XIST	XIST INSTINET CROSSING	111,510	493,513,656	\$19,449,543,200	0.78%	0.83%
BLKX	BLKX BLOCKCROSS	38,984	429,983,908	\$17,125,909,759	0.68%	0.72%
LTPL	LTPL LIGHT POOL	2,275,740	403,527,790	\$15,757,610,861	0.63%	0.68%
LQFI	LQFI LIQUIFI	18,322	233,816,558	\$10,054,937,852	0.40%	0.39%
BTBK	BTBK TRADEBOOK	951,569	217,286,935	\$9,105,149,522	0.36%	0.37%
LQNA	LQNA LIQUIDNET H2O	38,256	218,684,500	\$8,397,182,948	0.34%	0.37%
VRTX	VRTX VORTEX	994,257	218,122,351	\$6,968,936,215	0.28%	0.37%
MLVX	MLVX MERRILL LYNCH (ATS-1)	167,416	53,504,500	\$2,509,930,415	0.10%	0.09%
JEFX	JEFX JET-X	162,053	47,294,192	\$1,505,230,591	0.06%	0.08%
AQUA	AQUA AQUA	3,074	33,993,467	\$1,276,459,816	0.05%	0.06%
RCSL	RCSL RIVERCROSS	169,033	35,504,467	\$1,018,621,752	0.04%	0.06%
WDNX	WDNX XE	10,818	16,495,078	\$965,039,562	0.04%	0.03%
BCDX	BCDX BARCLAYS DIRECTEX	371	27,323,975	\$786,374,698	0.03%	0.05%
MSRP	MSRP MS RETAIL POOL (ATS-6)	44,498	16,392,000	\$754,554,611	0.03%	0.03%
APOG	APOG APOGEE	14,960	3,016,349	\$120,888,304	0.00%	0.01%
PROS	PROS PRO SECURITIES ATS	34	57,700	\$1,874,537	0.00%	0.00%
Total (NMS Stock ATS)		277,748,710	59,467,514,735	\$2,505,972,772,257	100.00%	100.00%
Total Consolidated Volume (NMS stock)^[1]		-	397,278,958,163	\$16,272,538,057,045	-	-
NMS Stock ATS as a Fraction of Total Consolidated Volume		-	15.0%	15.4%	-	-
Dark Pools as a Fraction of Total Consolidated Volume^[2]		-	14.9%	15.3%	-	-

Notes: [1] Total Consolidated Volume includes all trading in NMS stocks on all national securities exchanges, ATSs, and non-ATS OTC trading. [2] Dark Pools are defined as all NMS Stock ATSs with the exception of ECNs.

Sources: Data collected from ATSs pursuant to FINRA Rule 4552; Trade and Quote (TAQ) Data; Market Volume Summary, https://www.batstrading.com/market_summary/. Data compiled from Forms ATS filed with the Commission as of the end of, and during the second quarter of 2015.

Table 1—NMS Stock ATSs Ranked by Dollar Trading Volume (March 30, 2015 to June 26, 2015)

This table shows the 38 ATSs that effected transactions in NMS stocks from March 30, 2015 to June 26, 2015, ranked in descending order by dollar volume transacted. ATS data is reported weekly, and these dates approximately correspond to the second quarter of 2015. Dollar volume transacted on an ATS is calculated by multiplying the share volume for a given NMS stock on the ATS in a given week by the average

trade price for that week. Dollar volume for each NMS stock is then aggregated across all NMS stocks that traded on the given ATS in that week. Also reported in this table is the number of trades, share volume, each NMS Stock ATS's market share of all NMS Stock ATS dollar volume and NMS Stock ATS share volume in that quarter.

Table 2, which is based on data collected from NMS Stock ATSs pursuant to FINRA Rule 4552 for 13 weeks of trading from late March 2015 to late June 2015, shows the average

trade size, which is share volume divided by the number of trades on each of the NMS Stock ATSs. The table reveals marked differences in the average trade size of transactions executed on the various NMS Stock ATSs. Six NMS Stock ATSs had average trade sizes in excess of 10,000 shares. This suggests that some NMS Stock ATSs may receive large block orders and execute large trades.⁷²³ One of the

⁷²³ For purposes of this analysis we considered block orders as orders of more than 10,000 shares.

advantages for market participants of trading on block crossing networks is the ability to execute large block orders while minimizing the movement of prices against their trading interest.⁷²⁴

While these NMS Stock ATSs on average execute large size trades, the combined market share of these NMS Stock ATSs is only 7.8% when measured in dollar volume, and 3.7% when measured in share volume. The

vast majority of NMS Stock ATSs have average trade sizes between 150 and 450 shares. The two NMS Stock ATSs with the highest market shares (measured either in dollar volume or share volume) have average trade sizes of 181 and 157 shares, respectively.

Though NMS Stock ATSs compete with each other in a niche in the market for NMS stock execution services, the trade sizes in Table 2 actually suggest

that this niche market may not be very different from the market as a whole. The average trade size on NMS Stock ATSs is 214 shares, which is not significantly different from the average trade size of 181 shares on registered national securities exchanges.⁷²⁵ Thus, on average, the trade size for executions on NMS Stock ATSs and national securities exchanges appears similar.

MPID	ATS Description	Trades	Share Volume	Dollar Volume	Average Trade Size	% of ATS Dollar Volume	% of ATS Share Volume
DLTA	DLTA DEALERWEB	1,516	764,998,801	\$134,793,690,990	504,617	5.38%	1.29%
BCDX	BCDX BARCLAYS DIRECTEX	371	27,323,975	\$786,374,698	73,650	0.03%	0.05%
LQNT	LQNT LIQUIDNET ATS	18,127	712,524,230	\$31,447,183,492	39,307	1.25%	1.20%
LQFI	LQFI LIQUIFI	18,322	233,816,558	\$10,054,937,852	12,762	0.40%	0.39%
AQUA	AQUA AQUA	3,074	33,993,467	\$1,276,459,816	11,058	0.05%	0.06%
BLX	BLX BLOCKCROSS	38,984	429,983,908	\$17,125,909,759	11,030	0.68%	0.72%
LQNA	LQNA LIQUIDNET H2O	38,256	218,684,500	\$8,397,182,948	5,716	0.34%	0.37%
XIST	XIST INSTINET CROSSING	111,510	493,513,656	\$19,449,543,200	4,426	0.78%	0.83%
PROS	PROS PRO SECURITIES ATS	34	57,700	\$1,874,537	1,697	0.00%	0.00%
WDNX	WDNX XE	10,818	16,495,078	\$965,039,562	1,525	0.04%	0.03%
BIDS	BIDS BIDS TRADING	4,317,658	2,208,466,908	\$94,153,259,495	511	3.76%	3.71%
XSTM	XSTM CROSSSTREAM	2,678,027	1,158,257,295	\$40,156,942,579	433	1.60%	1.95%
MSRP	MSRP MS RETAIL POOL (ATS-6)	44,498	16,392,000	\$754,554,611	368	0.03%	0.03%
NYFX	NYFX MILLENNIUM	1,801,107	647,366,571	\$26,977,052,943	359	1.08%	1.09%
MLVX	MLVX MERRILL LYNCH (ATS-1)	167,416	53,504,500	\$2,509,930,415	320	0.10%	0.09%
IATS	IATS IBKR ATS	2,308,101	722,328,435	\$31,399,360,633	313	1.25%	1.21%
JEFX	JEFX JET-X	162,053	47,294,192	\$1,505,230,591	292	0.06%	0.08%
ITGP	ITGP POSIT	10,227,796	2,900,218,900	\$111,761,968,834	284	4.46%	4.88%
ICBX	ICBX INSTINET CONTINUOUS BLOCK CROSSING SYSTEM (CBX)	7,295,533	1,875,009,482	\$70,029,206,516	257	2.79%	3.15%
IEGX	IEGX IEX	18,041,576	4,423,181,973	\$186,499,748,586	245	7.44%	7.44%
MSPL	MSPL MS POOL (ATS-4)	18,236,411	4,289,819,243	\$156,471,258,204	235	6.24%	7.21%
JPMX	JPMX JPM-X	12,258,446	2,837,510,840	\$116,561,158,849	231	4.65%	4.77%
BTBK	BTBK TRADEBOOK	951,569	217,286,935	\$9,105,149,522	228	0.36%	0.37%
MLIX	MLIX INSTINCT X	15,015,049	3,360,647,845	\$116,747,351,177	224	4.66%	5.65%
CXCX	CXCX CITI CROSS	3,047,670	680,227,091	\$26,237,183,874	223	1.05%	1.14%
VRTX	VRTX VORTEX	994,257	218,122,351	\$6,968,936,215	219	0.28%	0.37%
RCSL	RCSL RIVERCROSS	169,033	35,504,467	\$1,018,621,752	210	0.04%	0.06%
APOG	APOG APOGEE	14,960	3,016,349	\$120,888,304	202	0.00%	0.01%
DBAX	DBAX SUPERX	25,242,629	4,678,600,167	\$199,074,916,743	185	7.94%	7.87%
PDQX	PDQX PDQ ATS	2,843,539	519,782,380	\$22,384,657,822	183	0.89%	0.87%
CROS	CROS CROSSFINDER	41,672,006	7,551,914,806	\$315,945,661,169	181	12.61%	12.70%
LTPL	LTPL LIGHT POOL	2,275,740	403,527,790	\$15,737,610,861	177	0.63%	0.68%
SGMA	SGMA SIGMA X	18,716,925	3,222,508,033	\$131,407,703,348	172	5.24%	5.42%
LATS	LATS BARCLAYS ATS ("LX")	13,743,582	2,385,482,491	\$92,785,693,009	172	3.70%	3.98%
KCGM	KCGM KCG MATCHIT	14,173,631	2,423,079,322	\$95,254,726,769	171	3.80%	4.07%
MSTX	MSTX MS TRAJECTORY CROSS (ATS-1)	4,032,146	670,349,940	\$24,101,728,412	166	0.96%	1.13%
EBXL	EBXL LEVEL ATS	14,048,531	2,272,446,000	\$94,803,590,528	162	3.78%	3.82%
UBSA	UBSA UBS ATS	43,027,809	6,734,276,556	\$291,180,523,638	157	11.62%	11.32%
	Total (NMS Stock ATS)	277,748,710	59,467,514,735	\$2,505,972,772,257	-	100.00%	100.00%
	Average Trade Size (NMS Stock ATS)	-	-	-	214	-	-
	Average Trade Size (Registered National Exchanges⁽¹⁾)	-	-	-	181	-	-

Note: [1] Registered national securities exchanges that effect transactions in NMS stocks include NYSE MKT LLC, BATS Exchange, Inc.; BATS Y- Exchange, Inc.; NASDAQ OMX BX, Inc.; Chicago Stock Exchange, Inc.; EDGA Exchange, Inc.; EDGX Exchange, Inc.; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE Arca, Inc.; and NASDAQ OMX PHLX, Inc. National Stock Exchange ceased trading on May 30, 2014, and is therefore not included in the calculation of average trade size on registered national securities exchanges.

Sources: Data collected by ATSs pursuant to FINRA Rule 4552, Trade and Quote (TAQ) Data; Securities Exchange Act Release No. 72107, *supra* note 118.

which is the traditional definition for block orders. See *supra* note 126.

⁷²⁴ See *supra* notes 124–125 and accompanying text.

⁷²⁵ These results are consistent with prior findings that average trade sizes on “lit” national securities exchanges are similar to those taking place on “dark ATSs.” See Tuttle: ATS Trading in NMS Stocks, *supra* note 126. Unlike “lit” national

securities exchanges, dark ATSs do not publicly disseminate top of the limit-order book information. See *id.* See also *supra* note 123 and accompanying text.

Table 2: NMS Stock ATSs Ranked by Average Trade Size (March 30, 2015 to June 26, 2015)

This table shows 38 ATSs that effected transactions in NMS stocks from March 30, 2015 to June 26, 2015, ranked in descending order by average trade size. ATS data is reported weekly, and these dates correspond approximately to the second quarter of 2015. Also reported in this table is the raw number of trades, share volume, dollar volume, and each NMS Stock ATS's market share of all NMS Stock ATS dollar volume and NMS Stock ATS share volume. Dollar volume transacted on an ATS is calculated by multiplying the share volume for a given NMS stock on the ATS in a given week by the average trade price for that week. Dollar volume for each NMS stock is then aggregated across all NMS stocks that traded on the given ATS in that week.

While many NMS Stock ATSs operating today are similar with respect to the limited transparency they provide with respect to their trading model, the Commission understands that the services offered vary significantly across NMS Stock ATSs. Some NMS Stock ATSs offer mid-point matching services exclusively while others may have more complex matching algorithms. Some other NMS Stock ATSs offer preferential treatment in execution priority to some groups of subscribers, but not others, and some NMS Stock ATSs may allow subscribers to avoid trading with specific counterparties. Additionally, order types and their characteristics can also vary significantly across NMS Stock ATSs, including with respect to how particular order types interact with other order types, which could affect execution priorities. Even though an NMS Stock ATS might not be privy to detailed information about the operations of other NMS Stock ATSs, it may be able to garner general information about the differential services offered by its competitors through Web sites and forums,⁷²⁶ enabling it to modify its products and services to better compete within the market for NMS stock execution services. Thus, while an NMS Stock ATS may currently make available certain information about its products and services in an attempt to enable market participants to differentiate the

⁷²⁶ Furthermore, a broker-dealer that operates an ATS may also be a subscriber to one or more ATSs that are owned or operated by other broker-dealers, and in this capacity, may obtain information about how such unaffiliated ATS(s) operate. For example, the broker-dealer operator of an ATS that is a subscriber to an unaffiliated ATS may obtain information about order types and priority rules of the unaffiliated ATS.

ATS's products and services from those of its competitors, an NMS Stock ATS may not be incented to fully reveal how orders interact, match and execute on its platform, because revealing such information may adversely impact the ATS's position within the market by also informing its competitors.

7. Competition Between Broker-Dealers That Operate NMS Stock ATSs and Broker-Dealers That Do Not Operate NMS Stock ATSs

Competition for NMS stock order flow not only exists between national securities exchanges and NMS Stock ATSs and among NMS Stock ATSs, but also exists between the broker-dealers that operate NMS Stock ATSs and those broker-dealer operators that do not operate NMS Stock ATSs. As discussed above, most ATSs that currently transact in NMS stocks are operated by multi-service broker-dealers that engage in significant brokerage and dealing activities in addition to their ATS operations.⁷²⁷ These multi-service broker-dealers operate one or more NMS Stock ATS as a complement to the broker-dealer's other service lines, often using the ATS(s) as an opportunity to execute customer orders "in house" before seeking contra-side interest at outside execution venues. They may also execute orders in NMS stocks internally on non-ATS trading centers by trading as principal against such orders, or crossing orders as agent in a riskless principal capacity, before routing the orders to an ATS that they operate.

The current competitive environment in which NMS Stock ATSs operate suggests that broker-dealers who operate their own NMS Stock ATS(s) may have certain trading advantages relative to broker-dealers that do not operate their own NMS Stock ATS. Broker-dealer owned NMS Stock ATSs may provide their business units or affiliates, that are also subscribers to the NMS Stock ATS, access to certain services, which may result in trading advantages, such as providing faster access to the ATS or priority in executions over other subscribers, such as broker-dealers that do not have their own ATS platform and may route their orders to these ATSs.

8. Effect of NMS Stock ATSs on the Current Market for NMS Stock Execution Services

As discussed above, the current market for NMS stock execution services consists of competition for order flow among national securities exchanges, NMS Stock ATSs, and

⁷²⁷ See *supra* Section III.B.

broker-dealers who operate or control non-ATS trading centers.⁷²⁸ This section specifically discusses the impact that this current market for NMS stock execution services has on trading costs to market participants; the process by which the price of NMS stocks are determined in the market ("price discovery"); and market efficiency.

a. Trading Costs

Since the adoption of Regulation ATS in 1998 and the implementation of Regulation NMS in 2005, trading costs have, on average, declined significantly in the U.S. Institutional trading costs—particularly for large capitalization stocks—are amongst the lowest in the world.⁷²⁹ Since 1998, share and dollar trading volume, has generally increased, and with the exception of the financial crisis, bid-ask spreads (both quoted and effective spreads) have narrowed significantly.⁷³⁰ Some research has suggested that these lower trading costs can, in part, be driven by the rising fragmentation of trading volume and competition for order flow, through the proliferation of new trading venues such as NMS Stock ATSs.⁷³¹

NMS Stock ATSs provide an environment whereby certain market participants can trade at low costs relative to national securities exchanges. For instance, if market participants submit to a national securities exchange a block order or a large "parent" order shredded into smaller "child" orders, they may experience "price impact" when others observe their trading and infer the presence of a large order. That is, the price at which these child orders execute may get subsequently worse from the time of the initial order submission to the time of the final execution of the order. Thus, when working these child orders, the order originator may seek to keep their executions "quiet" to minimize adverse price moves that may otherwise occur as other market participants infer that order originator is an institutional

⁷²⁸ See *supra* Section XIII.A. See also *supra* note 123 (describing dark pools that are not ATSs) and note 387 (describing non-ATS trading centers).

⁷²⁹ See "View Point: US Equity Market Structure: An Investor Perspective," BlackRock, April 2014, <https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-us-equity-market-structure-april-2014.pdf>; and Angel, *supra* note 719.

⁷³⁰ See BlackRock, *supra* note 729; and Angel, *supra* note 719.

⁷³¹ See Foucault, Thierry and A.J. Menkveld, 2008, "Competition for Order Flow and Smart Order Routing Systems," *Journal of Finance* 63, 19–58; O'Hara, M. and M. Ye, 2011, "Is Market Fragmentation Harming Market Quality?" *Journal of Financial Economics* 100, 459–74; and Colliard, J.E. and Thierry Foucault (2012), "Trading Fees and Efficiency in Limit Order Markets," *Review of Financial Studies* 25, 3389–421.

investor that is a large buyer or seller. As such, trading on NMS Stock ATSs may provide a useful tool whereby institutional investors may be able to reduce the extent to which their own trading signals additional trading intentions and obtain enhanced execution quality for their orders.

The current market for NMS stock execution services—which includes NMS Stock ATSs—provides value to market participants. If all NMS Stock ATSs were to cease operations, market participants may incur costs associated with not being able to find an adequate trading venue that offers benefits similar to those that NMS Stock ATSs provide. For example, certain market participants may be unable to find a trading center that adequately minimizes the revelation of their trading interest. Therefore, some of the trades by these market participants, which would have been executed on NMS Stock ATSs, may no longer be executed at all if NMS Stock ATSs cease operations. Even though NMS Stock ATSs provide value to some market participants by allowing them to trade on a venue that mitigates the signaling of information regarding their trading interest while keeping their trading costs at a low level, NMS Stock ATSs are characterized by a lack of transparency regarding their operations and the activities of their broker-dealer operators and the broker-dealer operator's affiliates. Currently, disclosures on Form ATS are not required to be made public, and even when an NMS Stock ATS voluntarily discloses its Form ATS, the information provided tends to be limited. The Commission has also observed that NMS Stock ATSs vary with respect to the depth and extent of their disclosures on Form ATS, including basic aspects of their operations. This heterogeneity in terms of the level of disclosure pertaining to NMS Stock ATS operations has resulted in certain costs for market participants, in that currently a market participant has to expend some effort searching for a trading venue that would serve its investing or trading objectives. A by-product of these search costs for some market participants is uncertainty pertaining to how their orders will be handled. Because there is no current requirement for NMS Stock ATSs to disclose information about their operations to the public, some subscribers to NMS Stock ATSs—particularly subscribers to those NMS Stock ATSs that have not made their Form ATS public—may not fully know how their orders are handled. Furthermore, for a specific NMS Stock ATS, some subscribers may have been

provided more information regarding how their orders will interact, match, and execute on the NMS Stock ATS, exacerbating this uncertainty.

b. Price Discovery

The current market for NMS stock execution services has resulted in the fragmentation of trading volume. While this fragmentation—which has in part been due to the rise in NMS Stock ATSs—has been a factor in currently providing low trading costs for market participants,⁷³² the contributions that this current market for NMS stock execution services provides in terms of price discovery has been mixed. Some academic studies imply that while national securities exchanges and NMS Stock ATSs are regulated differently, their coexistence in the current market has had a positive contribution to price discovery, as it has led to more aggressive competition among market participants in providing liquidity, which in turn has improved price discovery.⁷³³ Other academic studies have suggested that because some NMS Stock ATSs are crossing networks and often derive their prices from national securities exchanges, price impact costs that result from trading on a national securities exchange harm prices on NMS Stock ATSs, resulting in less trading and harming price discovery.⁷³⁴

Some academic studies have also suggested that the coexistence of national securities exchanges and NMS Stock ATSs has led to market segmentation, *i.e.* to the extent that certain subscribers of NMS Stock ATSs have information regarding how orders will interact, match, and execute on an NMS Stock ATS, these subscribers may be able to make more informed decisions about where to route their orders, and, therefore, such subscribers may congregate and trade on either NMS Stock ATSs or national securities exchanges based on that information. These academic studies further suggest that this market segmentation, whereby certain subscribers of NMS Stock ATSs have information regarding how orders will interact, match and execute and, therefore, trade on NMS Stock ATSs or national securities exchanges, can improve price discovery.⁷³⁵

⁷³² See *supra* note 731.

⁷³³ See Boulatov, Alex, and T.J. George, 2013, "Hidden and Displayed Liquidity in Securities Markets with Informed Liquidity Providers," *Review of Financial Studies* 26, 2095–2137.

⁷³⁴ See Ye, Mao, 2011, "A Glimpse into the Dark: Price Formation, Transaction Cost and Market Share of the Crossing Network," working paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521494.

⁷³⁵ See Zhu, Haoxiang, 2014, "Do Dark Pools Harm Price Discovery?" *Review of Financial*

The theory that market segmentation of market participants leads to price discovery relies on the assumption that because trade executions on some NMS Stock ATSs are determined by matching orders, orders of informed market participants are more likely to cluster on one side of the market (either the buy-side or the sell-side).⁷³⁶ For instance, if informed market participants believe that a security is undervalued, they will be more likely to submit a buy-order; and vice-versa if they believe a security is overvalued. This means that if these informed market participants trade on an NMS Stock ATS, their trading interest will likely cluster towards one side of the market and there will not be enough orders to take the opposite side of their trades. As a result, some orders will not be matched and there would be low rates of execution on NMS Stock ATSs. In contrast, orders by uninformed market participants are less likely to be correlated with one another because the reasons for their trading are somewhat idiosyncratic to the market participant.⁷³⁷ These orders by uninformed market participants are, therefore, less likely to cluster on one side of the market, because trades by uninformed market participants are not grounded on fundamental information about the stock. As such, the orders from uninformed market participants will likely have higher rates of execution on NMS Stock ATSs relative to rates of executions for informed participants.⁷³⁸ Accordingly, this academic literature predicts that the set of market participants entering orders on national securities exchanges will contain a proportionately higher level of informed market participants.⁷³⁹ This segmentation of market participants on NMS Stock ATSs and national securities exchanges potentially could result in informed market participants trading on national securities exchanges, and uninformed market participants trading on NMS Stock ATSs.⁷⁴⁰ Because

Studies 27, 747–789. This academic study specifically examines dark pools.

⁷³⁶ See *id.*

⁷³⁷ Uninformed market participants trade for non-informational reasons. In some cases, they are termed "noise traders," since their trades are based on their beliefs and sentiments, and are not grounded on fundamental information. See Vishwanath, Ramanna, and Chandrasekhar Krishnamurti, 2009, "Investment Management: A Modern Guide to Security Analysis and Stock Selection," Springer Publishing.

⁷³⁸ See *supra* note 735.

⁷³⁹ See *id.*

⁷⁴⁰ It should be noted that this academic literature posits one theory regarding how the coexistence of national securities exchanges and NMS Stock ATSs results in segmented trading of informed and uninformed market participants. See *supra* note 735. Contrary to this theory regarding how market

informed market participants have better knowledge about the value of a security than uninformed market participants, this segmentation can improve price discovery on national securities exchanges.⁷⁴¹

Several academic studies suggest that the presence of NMS Stock ATSs in the current trading environment deteriorates price discovery⁷⁴² and liquidity.⁷⁴³ When trading, informed market participants often balance two types of costs, namely price impact costs and execution costs. On a national securities exchange, an informed market participant's order experiences lower execution risk, but because of price impact, each order is subsequently executed at a worse price.⁷⁴⁴ On an NMS Stock ATS, price impact costs are smaller due to there being less informational dissemination than on national securities exchanges, however, the probability of execution decreases as order size increases, due to the increased difficulty in finding a counterparty to take the opposite side of a large trade.⁷⁴⁵ Because trading on a national securities exchange generates price impact, the cost associated with this price impact also could affect a market participant's profit on trades executed on an NMS Stock ATS. The reason for this is that NMS Stock ATSs often match orders at prices derived from national securities exchanges, and if trading on these national securities exchanges generates worse prices due to price impact, this could therefore spill over and affect a market participant's profit on trades executed on the NMS

segmentation of national securities exchanges and NMS Stock ATSs can affect price discovery, a motivation for informed market participants to trade on NMS Stock ATSs is to minimize the price impact of large trades. Thus, it could be the case that the decision by informed market participants of where to trade is reduced to whether the value of minimizing the price impact of their trades outweighs the heightened execution risk (due to the difficulty in finding a counterparty to take the opposite side of the trade, perhaps because a market participant places a large order) they might incur if they trade on NMS Stock ATSs. See *supra* note 734.

⁷⁴¹ See Zhu, *supra* note 736; Comerton-Forde, Carole and T.J. Putnins, 2015, "Dark Trading and Price Discovery," working paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183392. Both these studies specifically examine dark pools.

⁷⁴² See Ye, Mao, 2011, "A Glimpse into the Dark: Price Formation, Transaction Cost and Market Share of the Crossing Network," working paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521494; Degryse, Hans, Frank de Jong and Vincent van Kervel, 2015, "The Impact of Dark Trading and Visible Fragmentation on Market Quality," *Review of Finance* 19, 1587–1622. Both these studies specifically examine dark pools.

⁷⁴³ See Zhu, *supra* note 736.

⁷⁴⁴ See Ye, *supra* note 742.

⁷⁴⁵ See Ye, *supra* note 742.

Stock ATS. This spillover could result in informed market participants trading less aggressively, which could in turn reduce price discovery.⁷⁴⁶ Finally, while low levels of trading on NMS Stock ATSs are not harmful, price discovery is harmed for high levels of trading on NMS Stock ATSs (*i.e.*, when trading on NMS Stock ATSs in a given NMS stock exceeds approximately 10% of dollar volume).⁷⁴⁷ This implies that when most orders are filled on NMS Stock ATSs, market participants may withdraw displayed quotes because of the reduced likelihood of those orders being filled.⁷⁴⁸

Another element that may affect market quality is order internalization by broker-dealers. Academic literature has previously proposed theoretical models where broker-dealer operators have an incentive to internalize uninformed orders, by trading as principal against such orders or crossing orders as agent in a riskless principal capacity, before routing the orders to their respective ATSs.⁷⁴⁹ The literature has also argued that internalization of order flow reduces market depth and price informativeness.⁷⁵⁰ According to this literature, the internalization of order flow by broker-dealers, some of whom operate NMS Stock ATSs, is associated with wider spreads (quoted, effective, and realized), higher price impact per trade, and increased volatility of trades on the registered national securities exchanges, which translates into an increased cost for market participants, where market participants pay approximately \$3.9 million more per security per year.⁷⁵¹ In

⁷⁴⁶ See Ye, *supra* note 742 (for theoretical work on this topic). See also Comerton-Forde and Putnins, *supra* note 741, for empirical work on this topic. Specifically, using Australian data, the latter paper finds that the migration of order flow into dark pools removes valuable information from the price formation process, and leads to increased adverse selection, larger bid-ask spreads (lower liquidity) and larger price impacts on the exchange (lower market quality). Both of these studies specifically examine dark pools.

⁷⁴⁷ See also Comerton-Forde and Putnins, *supra* note 741.

⁷⁴⁸ See CFA Institute, 2012, "Dark Pools, Internalization, and Equity Market Quality," <http://www.cfapubs.org/doi/pdf/10.2469/cfb.v2012.n5.1>. This study specifically examines dark pools.

⁷⁴⁹ See Chordia, Tarun and Avanidhar Subrahmanyam, 1995, "Market making, the tick size, and payment-for-order flow: Theory and evidence," *Journal of Business* 68, 543–75; Easley, Kiefer and O'Hara, 1996, "Cream-skimming or profit-sharing? The curious role of purchased order flow," *Journal of Finance* 51, 811–33.

⁷⁵⁰ See Chakravarty, Sugato and Asani Sarkar, 2002, "A model of broker's trading, with applications to order flow internalization," *Review of Financial Economics* 11, 19–36.

⁷⁵¹ See Weaver, Daniel G., 2014, "The Trade-At Rule, Internalization, and Market Quality," working

the current operational environment of NMS Stock ATSs, based on the Commission's experience, subscribers' orders or other trading interest could be removed from the broker-dealer's NMS Stock ATS and routed to, among other destinations, another trading center operated by the broker-dealer operator for internalization. Thus, the fact that some broker-dealers operate their own NMS Stock ATS, and yet internalize some order flow rather than executing it on their own NMS Stock ATS, may have a deleterious effect on market quality.

c. Market Efficiency

Currently, the coexistence of national securities exchanges and NMS Stock ATSs seems to have beneficial effects on market efficiency. One academic study suggests that while not all trades that execute on NMS Stock ATSs are large block trades, those that are have been seen to be beneficial to market efficiency.⁷⁵² If NMS Stock ATSs were not a viable trading venue for market participants, market participants might not execute large orders at all because of the price impact costs of executing on a national securities exchange. Therefore, the ability for market participants to execute large trades on NMS Stock ATSs generates liquidity. The same study also suggests that small trades that execute on NMS Stock ATSs are beneficial in that they also generate market efficiency.⁷⁵³

C. Economic Effects and Effects on Efficiency, Competition, and Capital Formation

The Commission has considered the economic effects of the proposed amendments to Rule 3a1–1(a) and Regulation ATS. This section provides an overview of the broad economic considerations relevant to the proposed amendments to Rule 3a1–1(a) and Regulation ATS, and the economic effects, including the costs, benefits, and the effects on efficiency, competition, and capital formation. Additional economic effects, including benefits and costs related to specific requirements of the proposed amendments to Rule 3a1–1(a) and Regulation ATS, are also discussed.

The proposed amendments to Rule 3a1–1(a) and Regulation ATS⁷⁵⁴ are designed to generate greater transparency about the operations of NMS Stock ATSs and the activities of their broker-dealer operators and their

paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846470.

⁷⁵² See Comerton-Forde and Putnins, *supra* note 741.

⁷⁵³ See *id.*

⁷⁵⁴ See *supra* Section IV.

affiliates. By requiring NMS Stock ATSs to provide detailed, public disclosures about their operations and the activities of their broker-dealer operators and their broker-dealer operators' affiliates, the Commission preliminarily believes that the proposal would reduce the discrepancy in information that different market participants receive about NMS Stock ATS operations and provide market participants—particularly those that have access to less information about NMS Stock ATS operations—with more information about the means by which orders and trading interest interact, match, and execute on NMS Stock ATSs. The Commission preliminarily believes that the proposal would help market participants make better-informed decisions about where to route their orders in order to achieve their trading or investment objectives, improve the efficiency of capital allocation, and enhance execution quality.

The Commission further understands that the proposed amendments to Regulation ATS may generate some uncertainty for NMS Stock ATSs in that, under the proposal, the Commission would declare a Form ATS–N effective or ineffective (which is not currently the case with respect to Form ATS), and this may act as a potential deterrent for ATSs wishing to transact NMS stocks, or legacy NMS Stock ATSs that would be required to file Form ATS–N. Moreover, the proposed amendments to Rule 3a1–1(a) and Regulation ATS could be costly, because NMS Stock ATSs would have to disclose detailed information about their operations and the activities of their broker-dealer operators and their affiliates. Together, these could harm the competitive dynamics in the market for NMS stock execution services, which includes competition between national securities exchanges and NMS Stock ATSs, among NMS Stock ATSs themselves, and between broker-dealers that operate NMS Stock ATSs and those that do not.⁷⁵⁵ Increased costs associated with disclosure requirements for NMS Stock ATSs could result in some NMS Stock ATSs exiting the market or could create a disincentive for potential NMS Stock ATSs to enter the market. However, in spite of these costs, and as discussed in more detail below, the Commission preliminarily believes that the NMS Stock ATSs that remain in the market may propagate greater interaction between buyers and sellers who trade on these venues, fostering not only trading between one and another, but also facilitating the price discovery

process and capital formation. The consistent set of information that is proposed to be disclosed in Form ATS–N may impact how market participants react in terms of their trading, which may improve market efficiency.⁷⁵⁶

Moreover, the Commission notes that increased transparency regarding the operations of NMS Stock ATSs may impact competition between broker-dealers that operate NMS Stock ATSs and broker-dealers who trade NMS stocks but do not operate an NMS Stock ATS. Because broker-dealers who transact in NMS stocks but do not operate ATSs are not subject to the proposed operational transparency requirements, these broker-dealers may be at a competitive advantage and attract and internalize order flow that would otherwise be entered and executed on NMS Stock ATSs. Furthermore, greater operational transparency of NMS Stock ATSs could also impact competition between NMS Stock ATSs and national securities exchanges, resulting in a larger amount of order flow being executed on national securities exchanges.

Further, the Commission preliminarily believes that the proposed amendments to Rule 301(b)(10) and 303(a)(1) that would require ATSs to establish and preserve written safeguards and written procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed should strengthen the effectiveness of those safeguards and procedures and better enable an NMS Stock ATS to protect confidential subscriber trading information and implement and monitor the adequacy of, and the ATS's compliance with, its safeguards and procedures.⁷⁵⁷ The Commission also preliminarily believes that requiring ATSs to adopt written safeguards and written procedures will benefit the Commission by helping it better understand, monitor, and evaluate how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access.⁷⁵⁸ The Commission also expects that this proposed requirement will help oversight by the SRO of which the NMS Stock ATS's broker-dealer operator is a member.

The Commission has attempted, where possible, to quantify the benefits and costs anticipated by the proposed amendments to Rule 3a1–1(a) and Regulation ATS. The Commission notes,

however, that many of the costs and benefits of the proposed amendments are difficult to quantify with any degree of certainty. For instance, it is unclear how many NMS Stock ATSs might cease operations (or, less likely, switch to trading in a different class of securities) if they are required to publicly disclose information about their operations on proposed Form ATS–N. It is also unclear how many NMS Stock ATSs may decide to register as national securities exchanges, as some ECNs have in previous years, as a result of the proposed amendments to Rule 3a1–1(a) and Regulation ATS.⁷⁵⁹ Therefore, quantifying the effects that the expanded disclosure requirements would have on market liquidity and capital formation is difficult. As the decision for an NMS Stock ATS to continue operating or to exit the market depends on numerous factors, one of which being the extent to which its competitive advantage is driven by its matching methodology or other operational characteristics, the Commission is unable to fully determine the extent to which the proposal would affect this decision. Furthermore, the decision to exit is idiosyncratic to the NMS Stock ATS and the Commission cannot ascertain whether large or small ATSs will be more prone to leaving the market. Additionally, the Commission cannot estimate the fraction of order flow that would be routed to other NMS Stock ATSs or national securities exchanges if some ATSs ceased operations. In light of all of these limitations on available information, the Commission is unable to make reasonable assumptions regarding the number of NMS Stock ATSs that may cease operations and exit the market; the number of NMS Stock ATSs that may register as national securities exchanges; or the fraction of order flow that would be routed to other NMS Stock ATSs or national securities exchanges if some ATSs ceased operations. Given that the Commission is unable to make these assumptions, it is unable to quantify the effect of the proposed amendments to Rule 3a1–1(a) and Regulation ATS on trading volume on the NMS Stock ATS as well as quantify the effects on price discovery and market efficiency.

1. Costs and Benefits of Proposed Enhanced Filing Requirements

As discussed above, the Commission is proposing to amend Rule 3a1–1(a) and Regulation ATS to require ATSs that effect transactions in NMS stocks comply with the requirements of

⁷⁵⁵ See *infra* Section XIII.C.2.

⁷⁵⁶ See *id.*

⁷⁵⁷ See *supra* Section IX.

⁷⁵⁸ See *id.*

⁷⁵⁹ See *supra* note 685 and accompanying text.

proposed Rule 304 in order to qualify for exemption from the definition of “exchange.”⁷⁶⁰ The proposed amendments would require an NMS Stock ATS to file reports and amendments pursuant to proposed Rule 304, which includes the requirement to file proposed Form ATS–N, in lieu of current Form ATS, to disclose information about its operations and the activities of its broker-dealer operator and its affiliates.

As noted above, an NMS Stock ATS may provide some subscribers access to certain trading information or services that it does not provide to others.⁷⁶¹ For example, an NMS Stock ATS may offer certain order types or special fees or rebates to particular subscribers, which might result in those subscribers obtaining an advantage when trading on the ATS. The proposed amendments would require NMS Stock ATSs to describe any such differentiation of services or information among subscribers, which would include certain disclosures related to the operations of their broker-dealer operators. The Commission preliminarily believes that those disclosures would help market participants assess potential conflicts of interest that may adversely impact their trading on the NMS Stock ATS.

Proposed Rule 304 would also provide a process by which the Commission would declare Form ATS–N filings effective or ineffective, and a process by which the Commission would review Form ATS–N Amendments and declare ineffective a Form ATS–N Amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission is also proposing a process by which the Commission could suspend, limit, or revoke an NMS Stock ATS’s exemption from the definition of an “exchange” under Rule 3a1–1(a)(2).⁷⁶² An NMS Stock ATS would not qualify for the exemption from the definition of “exchange” unless the

NMS Stock ATS files Form ATS–N with the Commission and the Commission declares the Form ATS–N effective.⁷⁶³

a. Better Regulatory Oversight and Increased Investor Protection

The Commission preliminarily believes that the proposed amendments to Rule 3a1–1(a) and Regulation ATS would result in better regulatory oversight of NMS Stock ATSs and increased investor protection. Form ATS–N would result in better regulatory oversight of NMS Stock ATSs and increased investor protection. Form ATS–N discloses only limited aspects of an ATS’s operations as compared to the information that would be provided on Form ATS–N by NMS Stock ATSs. Form ATS–N requires, for example, that an ATS provide information about: classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing order entry and execution; and trade reporting, clearance and settlement of trades on the ATS. On the other hand, Form ATS–N would require an NMS Stock ATS to disclose information about the manner of operations of the ATS, including: subscribers; hours of operation; types of orders; connectivity, order entry, and co-location procedures; segmentation of order flow and notice about segmentation; display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling and execution procedures; procedures governing suspension of trading or trading during a system disruption or malfunction; opening, closing, and after hours procedures; outbound routing services; fees; market data; trade reporting; clearance and settlement; order display and execution access (if applicable); fair access (if applicable); and market quality statistics published or provided to one or more subscribers.

In addition, current Form ATS does not require an ATS to disclose information about the activities of the broker-dealer operator and the broker-dealer operator’s affiliates in connection with the ATS whereas the enhanced disclosure requirements under proposed Form ATS–N would require an NMS Stock ATS to disclose information about the activities of its broker-dealer operator and the broker-dealer operator’s affiliates that may give rise to potential conflicts of interest, including: their operation of non-ATS trading

centers and other NMS Stock ATSs; products and services offered to subscribers; arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS; smart order router (or similar functionality) and algorithms used to send or receive orders or other trading interest to or from the ATS; personnel and third parties used to operate the NMS Stock ATS; differences in the availability of services, functionalities, or procedures; and safeguards and procedures to protect subscribers’ confidential trading information. Accordingly, the Commission preliminarily believes that the enhanced disclosure requirements under proposed Form ATS–N would result in better regulatory oversight of NMS Stock ATSs and increased investor protection by providing the Commission, relevant SROs, and market participants with significantly more information with which to analyze and evaluate how orders are handled and executed on NMS Stock ATSs.

The Commission is proposing that Form ATS–N and Form ATS–N Amendments be filed electronically in a text-searchable format. The Commission preliminarily believes that requiring Form ATS–N and Form ATS–N Amendments to be filed in a text-searchable format, coupled with the enhanced disclosure requirements under the proposal, will facilitate a more effective and thorough review and analysis of NMS Stock ATSs by regulators, which should yield greater insights into the operations of NMS Stock ATSs and the activities of their broker-dealer operators and their affiliates. For example, under the proposal, examiners at the Commission and the SRO of which an NMS Stock ATS is a member would be able to run automated processes to review information disclosed on filed Forms ATS–N and Form ATS–N Amendments in order to select NMS Stock ATSs for examination based on certain criteria for the examination. Additionally, examiners would be better able to assemble and review a larger pool of data regarding NMS Stock ATSs to better inform their examinations. Both such benefits could increase investor protection by improving the effectiveness and efficiency of the examination process.

Furthermore, the Commission preliminarily believes that the proposed process of declaring a Form ATS–N effective or ineffective and the process to review and declare, if necessary, Form ATS–N Amendments ineffective would improve the quality of the information regulators receive from NMS Stock ATSs and increase the

⁷⁶⁰ See *supra* Section IV (discussing the proposed amendments). See also proposed Rules 3a1–1(a)(2) and (3), 300, 301, and 304.

⁷⁶¹ See *supra* Section VII.B.10.

⁷⁶² Pursuant to proposed Rule 304(b)(2), the Commission would publicly post on its Web site each: order of effectiveness of a Form ATS–N; order of ineffectiveness of a Form ATS–N; effective Form ATS–N; filed Form ATS–N Amendment; order of ineffectiveness of a Form ATS–N Amendment; notice of cessation; and order suspending, limiting, or revoking the exemption from the definition of an “exchange” pursuant to Rule 3a1–1(a)(2). Proposed Rule 304(b)(3) would also require an NMS Stock ATS that has a Web site to post on its Web site a direct URL hyperlink to the Commission’s Web site that contains the documents enumerated in proposed Rule 304(b)(2). See *supra* Section IV.D.

⁷⁶³ See *supra* Section IV.C.5.

protection of investors. The proposed effectiveness process for a Form ATS–N is designed to provide an opportunity for the Commission to review Form ATS–N filings before an NMS Stock ATS commences operations (in the case of new NMS Stock ATSs), or while it continues operations under its Form ATS filing (in the case of legacy NMS Stock ATSs). The Commission preliminarily believes that the proposed process would allow the Commission to evaluate the adequacy of NMS Stock ATSs' disclosures for compliance with the Form ATS–N requirements before declaring the Form ATS–N effective or ineffective. As a result, once the Commission has made an effectiveness or ineffectiveness determination, only an NMS Stock ATS for which a Form ATS–N has been declared effective would be allowed to transact in NMS stocks without registering as a national securities exchange.

The Commission would make Form ATS–N Amendments public upon filing. As a result, a publicly disclosed Form ATS–N Amendment could contain potentially inaccurate or incomplete disclosures at the time it is posted on the Commission's Web page. Prior to the conclusion of its review of a Form ATS–N Amendment, the Commission would make the public aware of the fact that, though the amendment is posted on the Commission's Web site, it is still pending Commission review and could still be declared ineffective. The Commission preliminarily believes that this process would provide transparency to market participants about the operations of these ATSs and also provide market participants with information about forthcoming changes to the NMS Stock ATS while the Commission's review is pending.

The Commission preliminarily believes that the proposed review and public disclosure process for a Form ATS–N and Form ATS–N Amendments would allow the Commission to better protect investors from potentially inaccurate or incomplete disclosures that could misinform market participants about the operations of an NMS Stock ATS or the activities of its broker-dealer operator, including how their orders may be handled and executed, and thereby impact market participants' decisions about where they should route their orders.

If the Commission declares ineffective a Form ATS–N or Form ATS–N Amendment of an entity, that entity would have the opportunity to address deficiencies in the previously filed form by filing a new Form ATS–N or Form ATS–N Amendment. However, the

Commission recognizes that an ineffectiveness declaration could impose costs on that entity—such as costs from having to cease operations, roll back a change in operations, or delay the start of operations—and could impose costs on the overall market for NMS stock execution services resulting from a potential reduction in competition or the removal of a sole provider of a niche service within the market. Furthermore, the removal of a sole provider of a niche service from the market could also impose costs on individual market participants, as they may have to subscribe to another NMS Stock ATS, or they may have to incur the cost of making changes to their SOR (or similar functionality) or algorithm in order to submit their orders for execution. However, NMS Stock ATSs and market participants would not incur these costs unless the Commission declares a Form ATS–N or a Form ATS–N Amendment ineffective. The Commission preliminarily believes that NMS Stock ATSs would be incentivized to comply with the requirements of Form ATS–N, as well as federal securities laws, including the other requirements of Regulation ATS, to avoid an ineffectiveness declaration, which produces benefits to the market. Therefore, the Commission preliminarily believes that there would be no undue burden imposed in connection with resubmitting Form ATS–N for these entities or from an ineffective declaration in general.

b. Implementation and Ongoing Costs

The Commission understands that both new and existing NMS Stock ATSs would incur implementation costs in order to comply with the proposed amendments to Regulation ATS. Regardless of their size and transaction volume, all NMS Stock ATSs would need to ensure that their disclosures meet the requirements of proposed Form ATS–N and that they correctly file their Form ATS–N. NMS Stock ATSs may develop internal processes to ensure correct and complete reporting on Form ATS–N, which can be viewed as a fixed setup cost, which NMS Stock ATSs may have to incur, regardless of the amount of trading activity that takes place on them. As a result, these implementation costs may fall disproportionately on lower-dollar volume NMS Stock ATSs (as opposed to ATSs transacting greater dollar volume), since all ATSs would likely incur these fixed implementation costs. However, smaller NMS Stock ATSs that are not operated by multi-service broker-dealer operators and do not engage in other brokerage or dealing activities in

addition to their NMS Stock ATSs would likely incur lower implementation costs because certain sections of proposed Form ATS–N (such as several items of Part III) would not be applicable to these NMS Stock ATSs.

Relative to the baseline, the proposed amendments to Regulation ATS would also impose implementation costs for all NMS Stock ATSs, including legacy ATSs, in that they would require NMS Stock ATSs to adhere to heightened disclosure and reporting requirements regarding their operations. Existing NMS Stock ATSs should already comply with the current requirements of Regulation ATS. Therefore, the compliance costs of the proposed amendments should be incremental relative to the costs associated with the existing requirements. Specifically, the Commission preliminarily believes that the incremental costs would consist largely of providing new disclosures and updating records and retention policies necessary to comply with the proposed amendments. Based on the analysis for purposes of the PRA, the Commission preliminarily estimates that the proposed amendments to Regulation ATS relating to Rules 301(b)(2)(viii) and 304 of Regulation ATS, including Proposed Form ATS–N, could result in a one-time burden of 141.3 hours for each NMS Stock ATS,⁷⁶⁴ which would result in an estimated one-time paperwork compliance cost to an NMS Stock ATS of approximately \$42,838.50.⁷⁶⁵ This would result in an aggregate estimated initial hour burden for all NMS Stock ATSs to complete Form ATS–N and comply with proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS of 6,499.8 hours at an estimated cost of \$1,970,571.00.⁷⁶⁶

⁷⁶⁴ See *supra* note 643 and accompanying text.

⁷⁶⁵ (Attorney at \$380 × 54.8 hours) + (Compliance Manager at \$283 × 43.5 hours) + (Senior Systems Analyst at \$260 × 34.5 hours) + (Senior Marketing Manager at \$254 × 1 hour) + (Compliance Clerk at \$64 × 7.5 hours) = \$42,838.50. This preliminary compliance cost estimate for a Form ATS–N includes the estimated costs associated with completing Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS–N, but as explained above, the Commission preliminarily believes that the majority of NMS Stock ATSs would not be required to complete those items of the proposed form. See *supra* Section XII.D.2.b.

⁷⁶⁶ 141.3 burden hours × 46 NMS Stock ATSs = 6,499.8 burden hours. \$42,838.50 × 46 NMS Stock ATSs = \$1,970,571.00. This preliminary aggregate compliance cost estimate assumes that all NMS Stock ATSs would be required to complete Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS–N. However, as noted above, the Commission preliminarily estimates that only 6 NMS Stock ATSs would be required to complete Part III, Item 2, see *supra* note 609, only 1 NMS Stock ATS would be required to complete Part IV, Item 14, see *supra* note 641 and accompanying text, and only 2 NMS Stock ATSs would be required to complete Part IV, Item 15, see *id.*

Furthermore, the Commission preliminarily believes that there would be implementation costs for ATSs that have not reduced to writing their safeguards and procedures to protect subscribers' confidential trading information and their oversight procedures to ensure that those safeguards and procedures are followed, which are required under Rule 301(b)(10) of Regulation ATS.⁷⁶⁷ Based on the analysis for purposes of the PRA, the Commission preliminarily estimates that, in order to comply with the proposed amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS,⁷⁶⁸ it could take approximately 15 ATSs an estimated one-time burden of up to 10 hours each,⁷⁶⁹ resulting in an estimated one-time paperwork cost for each of those 15 ATSs of \$3,484.00 and an aggregate estimated hour burden of 150 hours at an estimated cost of \$52,260.00.⁷⁷⁰

In addition to the implementation costs mentioned above, there are also expected ongoing costs for NMS Stock ATSs to comply with the proposed amendments to Rule 3a1-1(a) and Regulation ATS. For instance, NMS Stock ATSs would incur ongoing costs associated with amending their Forms ATS-N prior to material changes in their operations, or to correct any information that has become inaccurate. Regardless of the reason for filing a Form ATS-N Amendment, the Commission preliminarily estimates for the purposes of the PRA that it could take an NMS Stock ATS approximately 28.5 hours annually⁷⁷¹ to prepare and file its Form ATS-N Amendments at an estimated annual cost of \$8,352.00.⁷⁷² This would result in an estimated aggregate ongoing hour burden for all NMS Stock ATSs to amend their Forms ATS-N and comply with proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS of 1,311 hours at an estimated cost of \$384,192.00 annually.⁷⁷³

Furthermore, the proposed amendments to Rules 301(b)(10) and

303(a)(1)(v) relating to written safeguards and written procedures to protect subscribers' confidential trading information would impose ongoing costs for all ATSs. For the purposes of the PRA, the Commission preliminarily estimates it could take approximately 4 hours annually for each ATS to update and maintain these safeguards and procedures,⁷⁷⁴ resulting in an estimated annual paperwork cost for each ATS of \$888.00.⁷⁷⁵ This would result in an estimated aggregate ongoing hour burden for all ATSs to maintain and update their safeguards and procedures pursuant to proposed Rules 301(b)(10) and 303(a)(1)(v) of 336 hours at an estimated cost of \$74,592.00 annually.⁷⁷⁶

Some existing NMS Stock ATSs that also transact in non-NMS stocks might incur additional costs due to the proposed amendments. As discussed above,⁷⁷⁷ pursuant to the proposed amendments to Regulation ATS, an ATS that effects transactions in both NMS stocks and non-NMS stocks would be subject to the requirements of Rule 304 with respect to its NMS stock trading operations and Rule 301(b)(2) with respect to its non-NMS stock trading operations. Accordingly, NMS Stock ATSs that also transact in non-NMS stocks would incur additional implementation costs when compared to ATSs that only trade NMS stocks because the former group would be required to file both Form ATS-N and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. Those NMS Stock ATSs would also be required to file a pair of Forms ATS-R four times annually. For the purposes of the PRA, the Commission preliminarily estimates that the aggregate initial burden for those ATSs to file a Form ATS-N in regard to their NMS stock trading activity and a current Form ATS in regard to their non-NMS stock trading activity would be 1,774.3 hours⁷⁷⁸ at an aggregate estimated cost of \$530,491.50.⁷⁷⁹ The Commission also

preliminarily estimates that that the aggregate annual burden to file separate Forms ATS-R for those ATSs that effect transactions in both NMS stocks and non-NMS stocks would be 198 hours⁷⁸⁰ at an aggregate estimated cost of \$1,394.⁷⁸¹ Furthermore, the Commission preliminarily estimates that these ATSs that facilitate transactions in both NMS stocks and non-NMS stocks would incur an additional estimated recordkeeping burden of 3 hours annually per ATS, resulting in an estimated cost of \$312.60 per ATS⁷⁸² and an aggregate estimated hour burden of 33 hours at an estimated cost of \$3,438.60, due to the proposed amendments to Rule 303(a)(2)(ii).⁷⁸³

Currently, ATSs that transact in NMS stocks do not have the ability to access and file the Form ATS electronically. The Commission proposes that proposed Form ATS-N would be filed electronically in a structured format and would require an electronic signature. These proposed amendments to Regulation ATS would require that every NMS Stock ATS have the ability to file forms electronically with an electronic signature. The Commission's proposal contemplates the use of an online filing system, the EFFS. Based on the widespread use and availability of the Internet, the Commission preliminarily believes that filing Form ATS-N in an electronic format would be less burdensome and a more efficient filing process than the current paper process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing and filing paper forms to the Commission.

To access EFFS, an NMS Stock ATS would need to submit to the Commission an EAUA to register each individual at the NMS Stock ATS who will access the EFFS system on behalf of the NMS Stock ATS. The

Manager for Form ATS-N at \$254 × 1 hour) + (Compliance Clerk for Form ATS at \$64 × 7 hours) + (Compliance Clerk for Form ATS-N at \$64 × 7.5 hours) × 11 ATSs = \$530,491.50 This preliminary aggregate compliance cost estimate includes the estimated costs associated with completing Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS-N, but as explained above, the Commission preliminarily believes that the majority of NMS Stock ATSs would not be required to complete those items of the proposed form. See *supra* Section XII.D.2.b.

⁷⁸⁰ See *supra* notes 663 and accompanying text.

⁷⁸¹ (Attorney at \$380 × 3.5 hours) + (Compliance Clerk at \$64 × 1 hours) = \$1,394.

⁷⁸² At an average cost per burden hour of \$104.20, see Rule 303 PRA Update, *supra* note 580, 78 FR 43943, the resultant total related cost of compliance for each ATS would be \$312.60 ((3 burden hours) × \$104.20/hour).

⁷⁸³ 3 hours × 11 ATSs = 33 burden hours. \$312.60 × 11 ATSs = \$3,438.60. See *supra* Section XII.D.2.b.vi.

⁷⁶⁷ See 17 CFR 242.301(b)(10).

⁷⁶⁸ See *supra* Section IX.

⁷⁶⁹ See *supra* notes 583–585.

⁷⁷⁰ (Attorney at \$380 × 9 hours) + (Compliance Clerk at \$64 × 1 hour) = \$3,484.00. \$3,484.00 × 15 ATSs = \$52,260.00.

⁷⁷¹ See *supra* notes 644–651 and accompanying text. As explained above, the Commission preliminarily estimates that each NMS Stock ATS would file 3 Form ATS-N Amendments per year, and the hourly burden per amendment would be 9.5 hours.

⁷⁷² (Attorney at \$380 × 16.5 hours) + (Compliance Manager at \$283 × 6 hours) + (Compliance Clerk at \$64 × 6 hours) = \$8,352.00.

⁷⁷³ 28.5 hours × 46 NMS Stock ATSs = 1,311 hours. \$8,352.00 × 46 NMS Stock ATSs = \$384,192.00.

⁷⁷⁴ See *supra* notes 586–587 and accompanying text.

⁷⁷⁵ (Attorney at \$380 × 2 hours) + (Compliance Clerk at \$64 × 2 hours) = \$888.00 annual paperwork cost per ATS.

⁷⁷⁶ 4 annual burden hours × 84 ATSs = 336 annual burden hours. \$888.00 annual paperwork cost per ATS × 84 NMS Stock ATSs = \$74,592.00 aggregate annual paperwork cost.

⁷⁷⁷ See *supra* Section IV.C.2.

⁷⁷⁸ See *supra* notes 659–663 and accompanying text.

⁷⁷⁹ ((Attorney for Form ATS at \$380 × 13 hours) + (Attorney for Form ATS-N at \$380 × 54.8 hours) + (Compliance Manager for Form ATS-N at \$283 × 43.5 hours) + (Senior Systems Analyst for Form ATS-N at \$260 × 34.5 hours) + (Senior Marketing

Commission is including in its estimates the burden for completing the EAU for each individual at an NMS Stock ATS that will request access to EFFS.⁷⁸⁴ For the purposes of the PRA, the Commission preliminarily estimates that initially, on average, two individuals at each NMS Stock ATS will request access to EFFS through the EAU, and each EAU would require 0.15 hours to complete and submit.⁷⁸⁵ Therefore, each NMS Stock ATS would require 0.3 hours to complete the requisite EAUs⁷⁸⁶ at a cost of \$114.00,⁷⁸⁷ and the aggregate initial burden would be approximately 13.8 hours for all NMS Stock ATSs⁷⁸⁸ at a cost of \$5,244.00.⁷⁸⁹ The Commission also preliminarily estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through the EAU.⁷⁹⁰ Therefore, the ongoing burden to complete the EAU would be 0.15 hours annually for each NMS Stock ATS⁷⁹¹ at a cost of \$57.00,⁷⁹² and the aggregate ongoing burden would be approximately 6.9 hours for all NMS Stock ATSs⁷⁹³ at a cost of \$2,622.00.⁷⁹⁴

In addition, the Commission preliminarily estimates that each NMS Stock ATS will designate two individuals to sign Form ATS-N each year. An individual signing a Form ATS-N must obtain a digital ID, at the cost of approximately \$25.00 each year. Therefore, each NMS Stock ATS would require approximately \$50.00 annually to obtain digital IDs for the individuals

⁷⁸⁴ For the purpose of completeness, the Commission has also included the initial estimated burden and costs related to completing the EAU in its burden and cost estimates for the initial ATS-N filings by NMS Stock ATSs. See *supra* note 643.

⁷⁸⁵ See *supra* note 665 and accompanying text.

⁷⁸⁶ 0.15 hours per EAU × 2 individuals = 0.3 burden hours per NMS Stock ATS. These preliminary estimates are based on the Commission and its staff's experience with EFFS and EAUs pursuant to Rule 19b-4 under the Exchange Act. The 0.3 hours represents the time spent by two attorneys. The Commission believes it is appropriate to estimate that, on average, each NMS Stock ATS will submit two EAUs initially.

⁷⁸⁷ Attorney at \$380 × 0.3 hours per EAU = \$114.00.

⁷⁸⁸ 0.30 hours per EAU × 46 NMS Stock ATSs = 13.8 burden hours.

⁷⁸⁹ \$114 cost per NMS Stock ATS × 46 NMS Stock ATSs = \$5,244.00.

⁷⁹⁰ The Commission estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through EAU to account for the possibility that an individual who previously had access to EFFS may no longer be designated as needing such access.

⁷⁹¹ 0.15 hours per EAU × 1 individual = 0.15 hours.

⁷⁹² Attorney at \$380 × 0.15 hours per EAU = \$57.00.

⁷⁹³ 0.15 hours × 46 NMS Stock ATSs = 6.9 hours.

⁷⁹⁴ \$57 cost per NMS Stock ATS × 46 NMS Stock ATSs = \$2,622.00.

with access to EFFS for purposes of signing Form ATS-N,⁷⁹⁵ and the aggregate initial burden would be approximately \$2,300.00 for all NMS Stock ATSs.⁷⁹⁶

The Commission also preliminarily estimates that NMS Stock ATSs would incur a one-time cost to make public via posting on their Web sites a direct URL hyperlink to the Commission's Web site that contains their Form ATS-N filings.⁷⁹⁷ For the purposes of the PRA, the Commission preliminarily estimates that this initial, one-time burden would be approximately 2 hours per NMS Stock ATS at an estimated cost of \$520.00,⁷⁹⁸ and the aggregate estimated burden for all NMS Stock ATSs would be approximately 92 hours⁷⁹⁹ at an estimated cost of \$23,920.00.⁸⁰⁰

2. Costs and Benefits of Public Disclosures of Proposed Form ATS-N

The Commission is proposing Rule 304(b) to mandate greater public disclosure of NMS Stock ATS operations by making Form ATS-N and Form ATS-N Amendments publicly available on the Commission's Web site, requiring each NMS Stock ATS that has a Web site to post a direct URL hyperlink to the Commission's Web site that contains the documents enumerated in proposed Rule 304(b)(2), and providing for the posting of Commission orders related to the effectiveness of Form ATS-N on the Commission's Web site.⁸⁰¹ The Commission's proposal to require such public disclosure is designed, in part, to increase the operational transparency requirements of NMS Stock ATSs in order to bring those requirements more in line with the operational transparency requirements of national securities exchanges.⁸⁰² The Commission preliminarily believes the proposal should assist market participants in evaluating and choosing the NMS Stock ATSs to which they may route orders or become a subscriber due to the proposed enhanced disclosure requirements.

As mentioned above, the proposed amendments to Regulation ATS would make Form ATS-N publicly available, thereby improving the information

⁷⁹⁵ \$25 per digital ID × 2 individuals = \$50.00 per NMS Stock ATS.

⁷⁹⁶ \$50 cost per NMS Stock ATS × 46 NMS Stock ATSs = \$2,300.

⁷⁹⁷ See *supra* Section XII.D.2.b.v.

⁷⁹⁸ Senior Systems Analyst at \$260 × 2 hours = \$520.00.

⁷⁹⁹ 2 hours per NMS Stock ATS × 46 NMS Stock ATSs = 92 burden hours.

⁸⁰⁰ \$520 per NMS Stock ATS × 46 NMS Stock ATSs = \$23,920.00.

⁸⁰¹ See *supra* Section IV.D.

⁸⁰² See *id.*

available to market participants and making that information consistent. The Commission is proposing to amend Regulation ATS to require NMS Stock ATSs to file proposed Form ATS-N in lieu of Form ATS.⁸⁰³ Furthermore, the Commission is proposing to require NMS Stock ATSs to disclose on Form ATS-N detailed information about the activities of the broker-dealer operator of the NMS Stock ATS and the broker-dealer operator's affiliates, including: The operation of non-ATS trading centers and other NMS Stock ATSs; products and services offered to subscribers; arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS by the broker-dealer operator or any of its affiliates; a SOR(s) (or similar functionality) or algorithm(s) used to send or receive orders or other trading interest to or from the ATS; personnel and third parties used to operate the NMS Stock ATS; differences in the availability of services, functionalities, or procedures between the broker-dealer operator or its affiliates and subscribers to the NMS Stock ATS; and safeguards and procedures to protect subscribers' confidential trading information. Proposed Form ATS-N would also require NMS Stock ATSs to provide detailed information about the manner of operations of the ATS, including: Subscribers; hours of operation; types of orders; connectivity, order entry, and co-location procedures; segmentation of order flow and notice about segmentation; display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling and execution procedures; procedures governing suspension of trading and trading during a system disruption or malfunction; opening, closing, and after-hours procedures; outbound routing services; market data; fees; trade reporting; clearance and settlement; order display and execution access (if applicable); fair access (if applicable); and market quality statistics published or provided to one or more subscribers. The Commission is proposing to make certain Form ATS-N filings available to the public on the Commission's Web site and to require an NMS Stock ATS that has a Web site to post on the NMS Stock ATS's Web site a direct URL hyperlink to the Commission's Web site that contains the

⁸⁰³ As discussed above, to the extent an ATS trades both NMS stocks and non-NMS stocks, it would be required to file both a Form ATS and a Form ATS-N. See *supra* Section IV.C.2.

documents enumerated in proposed Rule 304(b)(2).

Despite NMS Stock ATSs' increasing operational complexities and importance as a source of liquidity for NMS stocks, the Commission preliminarily believes that many market participants have limited information about NMS Stock ATSs' order handling and execution practices. As noted above, while the current disclosures on Form ATS are "deemed confidential when filed," some ATSs voluntarily disclose their Form ATS filings.⁸⁰⁴ Accordingly, there is disparate publicly available information regarding the current operations of NMS Stock ATSs. Furthermore, even if an NMS Stock ATS publicly discloses its Form ATS, some subscribers of that ATS may be privy to more detailed information about how their orders are executed, routed and/or prioritized than other subscribers. Accordingly, the Commission preliminarily believes that, often, some subscribers are able to obtain a more complete picture of the operations of an NMS Stock ATS than other subscribers, and as a result, the latter group of subscribers may not be selecting the venue that most suits their investing or trading objectives. In addition, based on Commission experience, the confidentiality of Form ATS has not always resulted in NMS Stock ATSs disclosing significant details regarding their operations, services, and functions. Therefore, the status quo, as discussed above in Section XIII.B, is characterized by variable levels of public and confidential disclosure by NMS Stock ATSs, which makes it more difficult for both market participants to evaluate NMS Stock ATSs as potential trading venues and regulators to oversee NMS Stock ATSs.

a. Effects on Market Participants' Trading Decisions

The Commission preliminarily believes that the public disclosure of Form ATS-N would produce economic benefits for market participants. Specifically, the Commission preliminarily believes that requiring detailed, public disclosures about the operations of NMS Stock ATSs would, among other things, better standardize the type of information market participants receive about those operations. As a result, search costs for market participants would be lower relative to the baseline, as homogenous disclosure requirements for all NMS Stock ATSs as part of the proposed amendments to Regulation ATS should facilitate market participants'

comparison of NMS Stock ATSs when deciding which venue most suits their trading purposes. Accordingly, the Commission preliminarily believes the enhanced operational transparency resulting from the public disclosures on Form ATS-N should aid market participants when evaluating potential trading venues.

The market for NMS stock execution services has also evolved such that national securities exchanges and NMS Stock ATSs have increasingly become direct competitors. However, as explained above, Form ATS filings continue to be "deemed confidential when filed," while national securities exchanges must publicly file proposed rule changes and publicly disclose their entire rulebooks.⁸⁰⁵ The Commission preliminarily believes that replacing the current Form ATS with proposed Form ATS-N and making Form ATS-N public would reduce the discrepancy in information that different market participants receive about NMS Stock ATSs relative to the information they receive about national securities exchanges, which would better enable market participants to compare the stock execution services of NMS Stock ATSs against those of national securities exchanges. For instance, having information allowing a more complete comparison between the trading operations of NMS Stock ATSs and national securities exchanges could reveal to a market participant certain order handling and preferencing differences that might result in superior or inferior treatment of orders handled by an NMS Stock ATS. It could also reveal differences in fee structures among subscribers that may result in costlier or less costly execution on a particular trading platform.

The Commission preliminarily believes that the proposed amendments would appropriately calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, fostering even greater competition for order flow of NMS stocks between those trading platforms. As noted above, the Commission also preliminarily believes that the proposed enhanced disclosure requirements for NMS Stock ATSs would calibrate the level of transparency among different NMS Stock ATSs. Moreover, requiring Form ATS-N to be made public upon being declared effective should lead to additional scrutiny of NMS Stock ATSs by market participants. Therefore, the Commission preliminarily believes that the proposal could foster even greater

competition for order flow of NMS stocks among NMS Stock ATSs and between NMS Stock ATSs and national securities exchanges, which could lead to lower spreads and thereby foster greater capital formation and increased market liquidity relative to the baseline. This in turn could enhance execution quality and lower information opaqueness surrounding an NMS Stock ATS's operations.

The Commission also preliminarily believes that the proposed requirement for NMS Stock ATSs to disclose whether and how they segment their order flow, any criteria used to assign order flow, and their fee structures should provide market participants with a better understanding of the operating environment for NMS Stock ATSs. Search costs to identify which NMS Stock ATSs better serve a market participant's trading interests should be reduced relative to the baseline, as market participants may be more able to predict how their orders will be executed. Broker-dealers might also make better routing decisions for their particular interests, and the interests of their customers, which might therefore lead to better execution quality. Also, the proposed enhanced disclosure requirements for NMS Stock ATSs could better enable market participants to review trading decisions made by their broker-dealers. This in turn could lower the level of uncertainty that was present in the baseline regarding how orders would be executed on NMS Stock ATSs. As such, the Commission preliminarily believes that the proposed amendments to Regulation ATS could help market participants understand how their orders will be executed on an NMS Stock ATS and evaluate any potential conflicts of interest involving the broker-dealer operator and its affiliates when handling such orders.

At the same time, the proposed enhanced disclosure requirements for NMS Stock ATSs could benefit certain ATSs or national securities exchanges. For example, market participants would be aware of which NMS Stock ATSs may offer better execution services or better protection against the dissemination of their non-public trading information, and as a result, these ATSs might attract even more order flow. By attracting greater order flow, NMS Stock ATSs might, in turn, provide benefits to market participants by offering them a trading platform that is more liquid and, possibly, has lower trading costs.

In the adopting release for Regulation ATS, the Commission explained that it believed that the regulatory framework established by Regulation ATS would

⁸⁰⁴ See *supra* notes 155–156.

⁸⁰⁵ See *supra* notes 155–162 and accompanying text.

encourage innovation and encourage the growing role of technology in the securities markets.⁸⁰⁶ Since the establishment of Regulation ATS, the market for order execution services for trading NMS stocks—particularly on ATSs—has flourished. The number of ATSs that trade NMS stocks has increased substantially since the inception of Regulation ATS, and as of the end of the second quarter of 2015, trading volume of NMS stocks on ATSs accounted for 15% of total share volume.⁸⁰⁷ As it is expected to calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, the proposal may foster greater competition for order flow of NMS stocks between these trading platforms. This greater competition for order flow may in turn incentivize NMS Stock ATSs to innovate—particularly in terms of their technology—so that they can attract more trading volume to their venue.

The proposed requirement under Part IV, Item 16 of proposed Form ATS–N to explain and provide aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS, which are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS but still published or otherwise provided to one or more subscribers by the NMS Stock ATS, could have several potential economic effects. The economic effects would depend not only on the extent to which ATSs currently provide or publish such information and the content of the information which the Commission currently does not have (such as what order flow and execution statistics NMS Stock ATSs produce, how they are calculated and whether they are standardized across ATSs, and which subscribers currently receive these statistics),⁸⁰⁸ but also on how NMS Stock ATSs choose to comply with the proposed amendments. Some NMS Stock ATSs may not currently disclose market quality statistics not otherwise required under Exchange Act Rule 605, and these ATSs would not incur costs to comply with the proposed disclosure requirements under Part IV, Item 16 of proposed Form ATS–N; therefore, the proposed disclosure requirements would provide no benefits to market participants in such cases. Additionally, there may be some NMS Stock ATSs that currently provide these aggregate platform-wide order flow and execution statistics not just to their subscribers,

but also to the broader public. In such cases, the proposed disclosure requirements under Part IV, Item 16 of proposed Form ATS–N may not provide any additional benefit to market participants because the information required under Item 16 would already be publicly available.

Furthermore, NMS Stock ATSs that currently provide these aggregate platform-wide order flow and execution statistics to one or more subscribers could continue to provide its subscribers with these market quality statistics, in which case, under the proposal, the NMS Stock ATS would publicly disclose these statistics and how they are calculated in proposed Form ATS–N. Another possibility is that these NMS Stock ATSs may choose to stop providing market quality statistics to subscribers so as not to have to publicly disclose information about those statistics and/or the statistics themselves in Form ATS–N. To the extent that an NMS Stock ATS continues to provide aggregate platform-wide order flow and execution statistics to subscribers only, it would publicly disclose and describe how those statistics are calculated in Form ATS–N, and all market participants, not just subscribers would have access to the information, which the Commission preliminarily believes would improve the opportunity for more market participants to benefit from this information. In addition, to the extent that subscribers that receive those market quality statistics currently do not know how the NMS Stock ATS calculates the market quality statistics, the proposal would help these subscribers better understand the statistics, and such information may be useful when evaluating an NMS Stock ATS as a possible venue to which to route orders in order to accomplish their investing or trading objectives.

However, NMS Stock ATSs that choose to publicly disclose aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS, which are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS but still published or otherwise provided to one or more subscribers by the NMS Stock ATS would incur costs to do so. Therefore, some NMS Stock ATSs may choose to comply with the proposal by ceasing to disclose these market quality statistics to subscribers. As a result, the proposal could reduce transparency to the detriment of the subscribers who currently benefit from the receipt of certain market quality statistics regarding an NMS Stock ATS, which could in turn result in spill-over effects

on the market. Furthermore, the decision of whether to continue to disclose such statistics could depend, in part, on how favorable the statistics make the ATS appear. As such, if some NMS Stock ATSs choose to stop disclosing order flow and execution statistics due to the proposed requirements of Item 16 while others decide to make those statistics public through their Form ATS–N filings, market participants may perceive the latter group of NMS Stock ATSs as having better execution quality, and these trading venues may therefore benefit by attracting even more order flow as a result of such perceptions.

As most NMS Stock ATSs are operated by broker-dealers that also engage in other brokerage and dealing activities, a broker-dealer operator of an NMS Stock ATS, or its affiliates, may have business interests that compete with the ATS's subscribers, or customers of its subscribers, which in turn may give rise to potential conflicts of interest.⁸⁰⁹ For instance, multi-service broker-dealers may execute orders in NMS stocks internally on non-ATS trading centers by trading as principal against such orders, or by crossing orders as agent in a riskless principal capacity. The Commission preliminarily expects that the proposal could discourage broker-dealer operators from trading internally as principal in their NMS Stock ATS under circumstances where such might raise conflict of interest concerns because those operations would be subject to public scrutiny by market participants seeking to trade on the ATS.

In addition to the possible conflicts of interest that may arise from internalization, broker-dealer operators that control and operate multiple NMS Stock ATSs may also face conflicts of interest. This is because such broker-dealers might operate competing trading venues for the execution of orders in NMS stocks without having fully separated the functions of these competing trading centers. As a result of these overlapping functionalities, broker-dealers operating multiple NMS Stock ATSs may provide subscribers of one ATS—which could include business units of the broker-dealer or its affiliates—with access to services or information about the other ATS that it does not provide to other subscribers. The Commission preliminarily believes that the proposed enhanced disclosure requirements should provide market

⁸⁰⁶ See Regulation ATS Adopting Release, *supra* note 7, at 70910.

⁸⁰⁷ See *supra* Section III.A.

⁸⁰⁸ See *supra* Section XIII.B.3.

⁸⁰⁹ The Commission notes that, based on information provided on Form ATS, a small number of ATSs solely limit their broker-dealer business to the operation of an ATS.

participants with information to better evaluate potential conflicts of interest when making trading decisions; any resultant change in order flow to an NMS Stock ATS with such potential conflicts might cause that ATS to alter its operations to reduce such conflicts.

b. Structuring of Proposed Form ATS–N

The Commission is proposing that proposed Form ATS–N be filed electronically through the EDFS system in a structured data format. The Commission is proposing to make public on the Commission's Web site, among other things, an effective Form ATS–N, and each properly filed Form ATS–N Amendment upon filing with the Commission. The Commission would post the Form ATS–N or Form ATS–N Amendment in the same format that the Commission received the data.

The Commission preliminarily believes that by having NMS Stock ATSs file the proposed Form ATS–N in a structured data format, the information's usability for market participants would be enhanced. Once the data is structured, it is not only human-readable, but also becomes machine-readable such that market participants could download the information directly into databases and analyze it using various software. With structured data, what was static, text-based information that had to be manually and individually reviewed, can be searched and analyzed, facilitating the comparison and aggregation across NMS Stock ATSs.

The Commission understands that there are varying costs associated with varying degrees of structuring. The Commission preliminarily believes that its proposed structuring of proposed Form ATS–N has minimal costs and enhanced benefits for market participants' use of proposed Form ATS–N information. The Commission is proposing that Parts I (Name) and II (Broker-Dealer Operator Registration and Contact Information) of proposed Form ATS–N would be provided as fillable forms on the Commission's EDFS system. The Commission is proposing that Part III (Activities of the Broker-Dealer Operator and Affiliates) of proposed Form ATS–N would be filed in a structured format whereby the filer would provide checkbox responses to certain questions and narrative responses that are block-text tagged by Item. The Commission is proposing that Part IV (The NMS Stock ATS Manner of Operations) of proposed Form ATS–N would also be filed in a structured format in that the filer would block-text tag narrative responses by Item. The

Commission is proposing that Part V (Contact Information, Signature Block, and Consent to Service) of proposed Form ATS–N would be provided as fillable forms on the Commission's EDFS system. The Commission also preliminarily believes that requiring NMS Stock ATSs to file proposed Form ATS–N in a structured format could allow market participants to avoid additional costs associated with third party sources who might otherwise extract and structure all the narrative disclosures, and then charge for access to that structured data. The Commission notes that the structuring of Form ATS–N can be in a variety of manners. For example, some or all of the information provided on Form ATS–N could be structured according to a particular standard that already exists, or a new taxonomy that the Commission creates, or as a single machine-readable PDF. The Commission seeks comment on the manner in which proposed Form ATS–N could be structured to enable the Commission and market participants to better collect and analyze the data.

c. Effects on Entry and Exit of NMS Stock ATSs

From an NMS Stock ATS's perspective, the proposed amendments to Regulation ATS may beget uncertainty as to whether its proposed Form ATS–N will be deemed effective or ineffective. Greater uncertainty surrounding this proposed process may act as a deterrent for potential ATSs wishing to effect transactions in NMS stocks. The disclosures required by proposed Form ATS–N would be more comprehensive and require significantly more detail than those required on current Form ATS, which in turn could delay the start of operations for new NMS Stock ATSs. Therefore, the proposed amendments could raise the entry barrier for new entrants to the market for NMS stock execution services.

The Commission is proposing that a legacy NMS Stock ATS would be able to continue its operations pursuant to a previously filed initial operation report on Form ATS pending the Commission's review of its initial Form ATS–N. However, if after notice and opportunity for hearing, the Commission declares the Form ATS–N filed by a legacy NMS Stock ATS ineffective, the ATS would be required to cease operations. The NMS Stock ATS would then have the opportunity to address deficiencies in the previously filed form by filing a new Form ATS–N.⁸¹⁰ The Commission is also proposing

to make Form ATS–N Amendments public upon filing and also to make the public aware of which Form ATS–N Amendments filed by NMS Stock ATSs posted on the Commission's Web site are pending Commission review and could still be declared ineffective. The Commission preliminarily believes that this process would provide immediate transparency to market participants about an NMS Stock ATS's current operations while also notifying market participants that the disclosures in a filed Form ATS–N Amendment are still subject to Commission review. If the Commission declares a Form ATS–N Amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to the ineffective Form ATS–N Amendment. The NMS Stock ATS could, however, continue to operate pursuant to a Form ATS–N that was previously declared effective.⁸¹¹ Given the uncertainty that may surround the process to declare Form ATS–N effective or ineffective or Form ATS–N Amendments ineffective, coupled with the number and complexity of the new disclosures that would be required under proposed Form ATS–N, some broker-dealer operators of legacy NMS Stock ATSs may find that the costs of compliance with this proposal outweigh the benefits of continuing to operate their NMS Stock ATS, particularly if the operation of the ATS does not constitute a significant source of profit for a broker-dealer operator. As such, the NMS Stock ATS may exit the market.

As explained above, NMS Stock ATSs would incur both implementation and ongoing costs to meet the regulatory requirements under proposed Rule 304. In particular, the proposed rules would require an NMS Stock ATS to file amendments on proposed Form ATS–N to notice a material change to its operations at least 30 days prior to implementing that material change. Under the proposal, if the Commission declares a material amendment ineffective after this advance notice period has expired, the NMS Stock ATS would be required to unwind the material change if it has already been implemented on the ATS or be precluded from proceeding to implement the change if it was not already implemented. This uncertainty regarding an NMS Stock ATS's ability to implement material changes may also result in some NMS Stock ATSs exiting the market.

⁸¹¹ Nothing would preclude the NMS Stock ATS from later submitting a new or revised Form ATS–N Amendment for consideration by the Commission.

⁸¹⁰ See *supra* Section IV.C.

Once an NMS Stock ATS's initial Form ATS-N is declared effective by the Commission, the information disclosed on Form ATS-N would be made available to the broader investing public. Proposed Form ATS-N Amendments would be made public upon filing, and in the case the amendments are not declared ineffective by the Commission, the Commission would no longer indicate that the Form ATS-N Amendment is under Commission review.⁸¹² Examples of the operational information that could be disclosed to a given NMS Stock ATS's competitors and the public on proposed Form ATS-N would include: Characteristics and use of order types (including indications of interest and conditional orders); order handling and priority distinctions among types of orders and/or subscribers; order entry and display procedures; the allocation and matching of orders, quotes, indications of interest and conditional orders; execution and trade reporting procedures, and aggregate platform-wide market quality statistics regarding the NMS Stock ATS that the NMS Stock ATS currently only provides to subscribers.

While the information elicited on proposed Form ATS-N would be similar to the information that national securities exchanges are required to publicly disclose, the Commission preliminarily believes that the disclosure of this previously non-public information could have some impact on the direction of order flow in the market. For instance, to the extent that an NMS Stock ATS's competitive advantage in the market is driven by its matching methodology, other operational characteristics that are currently confidential, or the non-public disclosure of certain aggregate platform-wide market quality statistics provided to subscribers, the disclosure of this information could result in other NMS Stock ATSs implementing similar methodologies, which might cause market participants to direct more order flow to those other NMS Stock ATSs. In addition, some order flow may be directed away from NMS Stock ATSs and towards national securities exchanges or broker-dealers that operate non-ATS trading centers if market participants discover that their orders could receive lower execution quality on an NMS Stock ATS relative to these other trading centers. As such, the proposal may result in lower revenues for some NMS Stock ATSs, and those ATSs may then find it unprofitable to

stay in the market. The Commission preliminarily believes that fewer trading venues in the market will affect competition between existing NMS Stock ATSs and national securities exchanges as well as among existing NMS Stock ATSs, which would in turn affect market participants.

Not only could an NMS Stock ATS's competitive advantage be driven by its current matching methodology or other operational characteristics, it could also be driven by the NMS Stock ATS's ability to improve these methodologies through technological innovation or enhancements. Under the proposal, the Commission preliminarily believes that the disclosure of an NMS Stock ATS's innovations in proposed Form ATS-N Amendments could potentially result in certain NMS Stock ATSs losing their technological advantage. If NMS Stock ATSs cannot innovate fast enough to regain their competitive advantage in the market, orders may also flow away from those NMS Stock ATSs, and as a result, these trading venues may choose to exit the market if operating the ATS becomes unprofitable for the broker-dealer operator.

Both large and small NMS Stock ATSs may be affected by the detailed disclosures required under proposed Rule 304 and Form ATS-N, though, the proposal may affect the ability of each type of ATS to stay in the market differently. As noted above, to the extent that an ATS's dominance in the market—in terms of being able to attract substantial NMS stock trading volume—is driven by its matching methodology or other operational characteristics that are currently confidential, the public disclosure of this information may result in lower revenue for the NMS Stock ATS. If this is the case for a small NMS Stock ATS, or a large ATS without a substantial profit margin, the broker-dealer operator may no longer view the ATS as being profitable and may potentially exit the market altogether. Alternatively, if this is the case for a large NMS Stock ATS or a smaller NMS Stock ATS with large profit margins, while the NMS Stock ATS may not exit the market, such an ATS may need to engage in costly research in order to develop new matching methodologies to stay profitable in the market. Further, if revenue and earnings margins for operating an NMS Stock ATS are below the average for the entire market, the NMS Stock ATS risks being squeezed out by its competitors and would potentially exit the market.⁸¹³ The result

of this may be that there would be fewer trading venues in the market for NMS stock execution services. This could affect the competition between existing NMS Stock ATSs and national securities exchanges as well as among existing NMS Stock ATSs, which would in turn affect market participants. The Commission notes, however, that many smaller NMS Stock ATSs may not engage in other brokerage or dealing activities in addition to the operation of their NMS Stock ATS. Therefore, certain aspects of proposed Form ATS-N (such as several items of Part III) may not be applicable to smaller NMS Stock ATSs, which would reduce the burdens and mitigate the effects of the proposed disclosure requirements on these smaller NMS Stock ATSs.

The Commission expects that the implementation and ongoing costs associated with filing proposed Form ATS-N could also affect the nature of competition. As Table 1 shows, there is a significant degree of difference in the size of NMS Stock ATSs, when measured by dollar or share volume. If the costs associated with filing proposed Form ATS-N become disproportionately greater for smaller volume NMS Stock ATSs, some of these legacy NMS Stock ATSs might cease operations, and exit the market for NMS stock execution services. As explained above, based on analysis for purposes of the PRA, the Commission has calculated preliminary estimates of the implementation and ongoing costs for the proposed amendments to Regulation ATS. The Commission preliminarily believes that the estimated implementation cost is a fixed cost that would be roughly similar across NMS Stock ATSs, regardless of their dollar volume size; this implies that implementation costs will represent a larger fraction of revenue generated on a small NMS Stock ATS relative to that percentage on a large NMS Stock ATS, which could cause some smaller NMS Stock ATSs to exit the market. However, it could be the case that if the NMS Stock ATSs that decide to exit due to this fixed implementation cost only transact small dollar (or share) volume, the Commission may not expect to see a large impact on the overall competitive structure of the NMS Stock ATSs that would remain in the market. More so, the order flow that was being traded on these small NMS Stock ATSs might in fact be absorbed and redistributed amongst these larger surviving NMS Stock ATSs.

⁸¹² See *supra* Section IV.D. See also proposed Rule 304(b)(2).

⁸¹³ See Singhvi, Surrendra S. and Harsha B. Desai, 1971, "An Empirical Analysis of the Quality of

Corporate Financial Disclosure," *Accounting Review* 46, 129–138.

Another effect that the proposal could have on competition is that the greater disclosure requirements of NMS Stock ATSs, particular the disclosures related to the other business activities of the broker-dealer operator and its affiliates, may influence a broker-dealer operator's decisions with respect to its operations of the NMS Stock ATS. Given the proposed disclosure requirements regarding the activities of broker-dealer operators and their affiliates, a multi-service broker-dealer operator of an NMS Stock ATS may cease operating its NMS Stock ATS and send its order flow, which would have gone to the broker-dealer operator's NMS Stock ATS, to other trading centers. For example, a multi-service broker-dealer operator could internalize the order flow that it would typically send to its ATS or send that order flow to a broker-dealer that, does not operate an NMS Stock ATS, to internalize. Alternatively, the broker-dealer operator might send the order flow to a non-affiliated NMS Stock ATS that is operated by a non-multi-service broker-dealer, who would likely not encounter the same potential conflicts of interest as a multi-service broker-dealer that operates an NMS Stock ATS. Finally, the broker-dealer operator could also send its order flow to national securities exchanges for execution.

Overall, the Commission preliminarily believes that the possible exit of NMS Stock ATSs from the market, or the reduced entry of new NMS Stock ATSs, due to the requirements under proposed Rule 304 and Form ATS-N might be potentially harmful to competition in the market for NMS stock execution services. The potential exit by existing NMS Stock ATSs and the reduced entry into the market by prospective NMS Stock ATSs may impact market participants by reducing the number of NMS stock trading venues and thus, reducing a market participant's opportunities to minimize its trading costs by sending orders to different trading platforms. As such, the possible exit of NMS Stock ATSs from the market for NMS stock execution services and lower rate of entry for new NMS Stock ATSs may result in greater costs relative to the baseline cost savings that NMS Stock ATSs currently afford market participants.⁸¹⁴ The Commission, however, is unable to predict whether legacy NMS Stock ATSs will exit the market and therefore, cannot quantify the ultimate effect that this will have on competition.

⁸¹⁴ See *supra* Section XIII.B.7.

d. Effects on Trading Costs, Price Discovery and Market Efficiency

As discussed above, the proposed heightened disclosure requirements for NMS Stock ATSs might cause some NMS Stock ATSs to cease operations, which could result in reduced competition among and between NMS Stock ATSs. If it is the case that the NMS Stock ATSs that face the highest cost of disclosure are the ones that have worse execution quality, the surviving NMS Stock ATSs might enhance execution quality and may allow market participants to transact at lower prices. If order flow is directed towards these surviving NMS Stock ATSs after the trading venues that face the highest cost of disclosure cease operations, then a smaller number of surviving trading venues might mean that there would be a higher likelihood that the orders of buyers and sellers on an NMS Stock ATS would interact and execute, which could improve liquidity. Even if some of the order flow from NMS Stock ATSs that cease operations does not migrate to the surviving NMS Stock ATSs, but migrates towards national securities exchanges, greater order interaction between buyers and sellers on a national securities exchange might be fostered, thereby improving price discovery. Moreover, because some NMS Stock ATSs operate as crossing networks and derive their prices from national securities exchanges, greater price discovery on a national securities exchange could spill over to affect the execution prices on the surviving NMS Stock ATSs and thereby potentially reduce market participants' trading costs. Additionally, given the fairly standardized set of information that would be publicly disclosed on proposed Form ATS-N and that trading in the market by NMS Stock ATSs may in fact be concentrated on fewer NMS Stock ATSs as a result of this proposal, market participants may process, and react more quickly to, information pertaining to changes in an NMS Stock ATS's operations when evaluating potential trading venues. As such, the proposed amendments to Regulation ATS might improve market efficiency.

Alternatively, heightened disclosure requirements pertaining to the public disclosure of proposed Form ATS-N could have a contrary effect, by increasing market participants' trading costs relative to the baseline. Institutional investors may use NMS Stock ATSs in an attempt to minimize the price impact of their trades. Even though the size of the average order on NMS Stock ATSs has been shown to be roughly equivalent to that on national

securities exchanges, smaller orders on NMS Stock ATSs can be the result of shredding larger orders.⁸¹⁵ Preventing information regarding those orders from becoming public can minimize adverse price moves that may occur when proprietary traders learn that there may be large buyers or sellers in the market. Thus, NMS Stock ATSs represent a tool for institutional investors to help control information leakage. If some NMS Stock ATSs exit the market as a result of the proposed amendments, there could be a reduction in the number of trading platforms that allow institutional investors to control their price impact costs. Institutional investors, who would have traded on these NMS Stock ATSs if they did not exit the market, may now have to trade on other trading venues, such as other NMS Stock ATSs or national securities exchanges. If institutional investors execute their orders on a national securities exchange, they may have to absorb price impact costs, because national securities exchanges may not offer a means for reducing these costs. Insofar that an NMS Stock ATS's competitive advantage is driven by its matching methodology or other operational characteristics that are currently confidential, the Commission understands such disclosure could impact this competitive advantage. However, the Commission does not know the extent to which the proposal would affect an NMS Stock ATS's decision to continue operations or exit the market, and, therefore, cannot estimate the number of ATSs that may exit. Furthermore, the Commission does not have information in order for it to make reasonable assumptions about the fraction of displaced volume—from NMS Stock ATSs that would cease operations—that would be directed towards national securities exchanges, NMS Stock ATSs, or non-ATS OTC trading centers. Therefore, the Commission cannot estimate the impact that the proposal would have on an NMS Stock ATS's price impact costs.

The price impact cost institutional investors face on a national securities exchange is related to the depth of the market, and the depth of the market is often related to the market capitalization of a stock and its liquidity.⁸¹⁶ For instance, if an institutional investor were to trade a large capitalization stock on a national securities exchange as opposed to on an NMS Stock ATS,

⁸¹⁵ See Tuttle: ATS Trading in NMS Stocks, *supra* note 126.

⁸¹⁶ A deep market is one in which larger orders do not have a much greater impact on prices than smaller orders. See Foucault, Pagano and Roell, 2013, "Market Liquidity," *Oxford University Press*.

given that the large capitalization stock might be more liquid than a small capitalization stock, and thereby have greater market depth outside the inside quote, the institutional investor may suffer little difference in price impact costs by executing the order on a national securities exchange. On the other hand, a small capitalization, low priced stock might have much lower market depth outside the inside quote, and, therefore, the difference in price impact costs for executing orders of these stocks on an exchange might be substantial.⁸¹⁷ Furthermore, because NMS Stock ATSs trade larger dollar volume in small capitalization, low priced stocks, the price impact costs for institutional investors that trade in such stocks may in fact be severe if many NMS Stock ATSs decided to exit the market.⁸¹⁸ As mentioned above, while the Commission is unable to estimate the number of NMS Stock ATSs that may potentially exit the market, the Commission also does not know whether firms will send their small capitalization stock orders to other surviving NMS Stock ATSs, national securities exchanges, or non-ATS trading centers. Therefore, the Commission cannot estimate what price market participants would receive for the small capitalization stock orders and thus, the Commission cannot estimate the price impact costs associated with these small capitalization stock orders.

3. Written Safeguards and Written Procedures To Protect Subscribers' Confidential Trading Information, and Proposed Recordkeeping Requirements

The Commission is also proposing to amend existing Rules 301(b)(10)⁸¹⁹ and 303(a)(1)⁸²⁰ of Regulation ATS to require all ATSs to adopt and preserve written safeguards and written procedures to protect subscribers' confidential trading information, as well as written oversight procedures to ensure those safeguards and procedures are followed. As explained above, the Commission preliminarily believes that these proposed amendments should both strengthen the effectiveness of

ATS' safeguards and procedures and improve those ATSs' ability to implement and monitor the adequacy of, and the ATSs' compliance with, their safeguards and procedures.⁸²¹ Furthermore, the Commission preliminarily believes that requiring ATSs to adopt written safeguards and written procedures will benefit the Commission by helping it better understand, monitor, and evaluate how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access.⁸²² The Commission also expects that this proposed requirement will help oversight by the SRO of which the NMS Stock ATS's broker-dealer operator is a member.

Under Rule 301(b)(10), all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information and adequate oversight procedures to ensure that the safeguards and procedures established to protect such trading information are followed. However, neither Rule 301(b)(10) nor the recordkeeping requirements under Rule 303(a)(1) of Regulation ATS require that an ATS have and preserve those safeguards and procedures in writing. As explained above, the Commission preliminarily believes that the proposal to require written safeguards and written procedures would better enable ATSs—in particular, those ATSs that do not currently maintain written safeguards and procedures—to protect confidential subscriber trading information and implement and monitor the adequacy of, and the ATS's compliance with, its safeguards and procedures.⁸²³

The Commission is also proposing to amend the recordkeeping rules relevant to the proposed amendments to Rule 301 and proposed Rule 304. The Commission is proposing that NMS Stock ATSs shall preserve Form ATS–N, Form ATS–N Amendments, and a Form ATS–N notice of cessation for the life of the enterprise and any successor enterprise pursuant to Rule 303(a)(2)⁸²⁴ of Regulation ATS.⁸²⁵ The Commission is also proposing to amend Rule 303(a)(1)⁸²⁶ so that ATSs must preserve for a period of not less than three years, the first two in an easily accessible

place, the written safeguards and procedures that would be required under the proposed amendments to Rule 301(b)(10). The Commission understands that these proposed amendments regarding recordkeeping requirements may require NMS Stock ATSs to set up systems and procedures, and these are expected to account for a portion of the implementation costs under this proposal.⁸²⁷

D. Alternatives

1. Require NMS Stock ATSs To Publicly Disclose Current Form ATS

One alternative would be to allow NMS Stock ATSs to continue to describe their operations on current Form ATS, but either make Form ATS public by posting on the Commission's Web site or require NMS Stock ATSs to publicly disclose their initial operation reports, amendments, and cessation of operations on Form ATS. Non-NMS Stock ATSs' Form ATS filings would continue to remain confidential.

Use of current Form ATS would lower the cost of compliance for current and future NMS Stock ATSs compared to compliance costs under the proposal. However, because the content of Form ATS would not change under this alternative, market participants would continue to receive limited information regarding how orders interact, match, and execute on NMS Stock ATSs and the activities of NMS Stock ATSs' broker-dealer operators and their affiliates. Relative to the proposal, market participants' search costs in identifying which NMS Stock ATS may better serve their trading interests would increase. As a result, their trading costs may increase and the execution quality related to their orders may be reduced. The Commission expects public disclosure of Form ATS could have some harmful effects on the competitive dynamics of NMS Stock ATSs and result in some exiting the market. However, such effects would likely be smaller than those expected under the proposal because, under this alternative, Form ATS would require disclosure of less information about the operations of NMS Stock ATSs than the more expansive and granular information that NMS Stock ATSs would be required to disclose in Form ATS–N.

Requiring NMS Stock ATSs to publicly disclose initial operation reports, amendments, and cessation of operations on Form ATS would place NMS Stock ATSs under greater public scrutiny, which could improve the quality of the filings compared to the

⁸¹⁷ See Collver, Charles, 2014, "A Characterization of Market Quality for Small Capitalization US Equities," *SEC Division of Trading and Markets Working Paper*, http://www.sec.gov/marketstructure/research/small_cap_liquidity.pdf.

⁸¹⁸ The Commission notes that it is difficult to quantify the increase in price impact costs faced by institutional traders because it is unclear how many NMS Stock ATSs may cease operations, and more so, it is unclear whether these institutional traders who would like to execute large orders will route them to other ATSs that may continue to operate.

⁸¹⁹ See 17 CFR 242.301(b)(10).

⁸²⁰ See 17 CFR 242.303(a).

⁸²¹ See *supra* Section IX.

⁸²² See *id.*

⁸²³ See *id.*

⁸²⁴ See 17 CFR 242.303(a)(2).

⁸²⁵ The Commission notes that an NMS Stock ATS that had previously made filings on Form ATS would be required to preserve those filings for the life of the enterprise, as well as filings made going forward on Form ATS–N.

⁸²⁶ See 17 CFR 242.303(a)(1).

⁸²⁷ See *supra* Section XIII.C.1.

current baseline. Regulators' oversight of NMS Stock ATSs under this alternative would be similar to that under current Regulation ATS, so they would not be able to offer the same level of protection to market participants as under the proposal.

2. Require Proposed Form ATS-N But Deem Information Confidential

Another alternative would be to require NMS Stock ATSs to file proposed Form ATS-N with the Commission but not make Form ATS-N publicly available. Proposed Form ATS-N would include detailed disclosures about the NMS Stock ATS's operations and the activities of its broker-dealer operator and its affiliates, and the Commission would declare filings on Form ATS-N either effective or ineffective.

This alternative would improve the quality of NMS Stock ATSs' disclosures to the Commission because proposed Form ATS-N would require more information about the operations of NMS Stock ATSs than is currently solicited on Form ATS. In addition, proposed Form ATS-N would require information about the activities of the broker-dealer operator and its affiliates, whereas current Form ATS does not require such information. This alternative, which would include a process for the Commission to determine whether an NMS Stock ATS qualifies for the exemption from the definition of "exchange," and declare a proposed Form ATS-N effective or ineffective, would strengthen the Commission's oversight of NMS Stock ATSs.

However, this alternative would not make NMS Stock ATSs' operations more transparent for market participants. The lack of public disclosure of the means of order interaction, display and routing practices by NMS Stock ATSs could result in market participants making less informed decisions regarding where to route their orders and therefore result in lower execution quality than they would obtain under the proposal. Additionally, this alternative would not reduce the search costs for subscribers to identify potential routing destinations for their orders. Because proposed Form ATS-N would not be publicly disclosed under this alternative, the level of competition between NMS Stock ATSs would stay the same, and the lack of transparency about an NMS Stock ATS's operations and activities of the broker-dealer operator and its affiliates would be expected to persist.

3. Require NMS Stock ATSs To Publicly Disclose Proposed Form ATS-N But Not Declare Proposed Form ATS-N Effective or Ineffective

Under this alternative, the Commission would require NMS Stock ATSs to file proposed Form ATS-N and would make it public, but the Commission would continue to use the current notice regime instead of declaring Form ATS-N effective or ineffective. The Commission would not determine whether an NMS Stock ATS qualifies for the exemption from the definition of "exchange," and would not declare proposed Form ATS-N filings effective or ineffective.

Benefits of maintaining the current notice regime would include a lower demand for Commission and its staff resources to determine whether an NMS Stock ATS qualifies for the exemption from the definition of "exchange" and whether the Commission should declare a proposed Form ATS-N effective or ineffective, and to assess whether the Commission should suspend, limit, or revoke the effectiveness of an NMS Stock ATS's Form ATS-N. In addition, maintaining the current notice regime as opposed to declaring the proposed Form ATS-N effective or ineffective could be cost-effective to NMS Stock ATSs and could lower the barriers to entry for new NMS Stock ATSs compared to such barriers under the proposal.

Without a process to declare proposed Form ATS-N effective or ineffective, there would be less assurance that disclosures by NMS Stock ATSs would be accurate, current, and complete. Under this alternative, it would be more difficult for the Commission to exercise its oversight responsibilities with respect to the accuracy, currency, completeness and fair presentation of disclosures on proposed Form ATS-N than under the proposal, which would provide a process for the Commission to declare a proposed Form ATS-N effective or ineffective. Moreover, continued use of a notice regime could lessen the benefit of enhanced transparency relative to such benefit under the proposal and as a result, this alternative might not provide the same level of protection to market participants as the proposal.

4. Initiate Differing Levels of Public Disclosure Depending on NMS Stock ATS Characteristics

Under this alternative, the Commission would require different levels of disclosure among NMS Stock ATSs based on dollar trading volume. For instance, NMS Stock ATSs with lower transaction volumes would be

subject to lower levels of disclosure on proposed Form ATS-N. As a result, their compliance costs would be lower, which could lower their entry barriers relative to such barriers under the proposal. Because these small NMS Stock ATSs would not have to disclose as much information pertaining to their operations, they could have more time to innovate without disclosing such innovation to competitors. This could allow these small NMS Stock ATSs to better compete with more established NMS Stock ATSs, national securities exchanges, and broker-dealers and put more competitive pressure on the market. Furthermore, reduced regulatory burdens for small NMS Stock ATSs may result in greater innovation relative to the proposal because these small NMS Stock ATSs would not have to be concerned about disclosing proprietary information. Greater innovation for small NMS Stock ATSs could give them a greater competitive advantage in attracting order flow relative to large NMS Stock ATSs. This competitive advantage for small NMS Stock ATSs could spill over to market participants who execute on these ATSs, by increasing the execution quality of their trades.

However, under this alternative, broker-dealer operators of NMS Stock ATSs could seek to allocate order flow to multiple NMS Stock ATSs operated by either the broker-dealer or its affiliates to avoid reaching threshold volumes that would trigger additional disclosure requirements. This could create some information opaqueness in the market, which could lead to lower execution quality for market participants relative to that under the proposal. The Commission notes, however, that although Regulation ATS currently has volume thresholds for fair access and quote transparency requirements, the Commission has not observed any ATSs using such tactics to avoid crossing thresholds.

5. Require NMS Stock ATSs To Register as National Securities Exchanges and Become SROs

Under this alternative, the Commission would eliminate the exemption from the definition of "exchange" for NMS Stock ATSs under Exchange Act Rule 3a1-1(a) so that an NMS Stock ATS would be required to register as a national securities exchange and become an SRO. This alternative would provide market participants with the same protections that accompany the regulatory regime that applies to national securities exchanges. Without the benefit of the exemption from the definition of "exchange," an NMS Stock

ATS would be required, among other things, to file proposed rule changes publicly on Form 19b-4 and make publicly available its entire rule book. Moreover, as a national securities exchange, an NMS Stock ATS would not be allowed to have conflicts of interest that it can as an NMS Stock ATS. More information about the priority, order interaction, display, and execution procedures would help market participants make better informed decisions about where to route their orders for best execution. If most NMS Stock ATSs decided to register as national securities exchanges and some NMS Stock ATSs withdrew from the market and stopped operating, competition among and between these trading venues could increase, leading to greater market liquidity and market efficiency. Further, this alternative could strengthen Commission oversight, thus benefitting market participants.

While NMS Stock ATSs would no longer need to register as broker-dealers or comply with Regulation ATS, registration as national securities exchanges would create high startup costs and high ongoing operational costs compared to what they would incur under the proposal.⁸²⁸ Under this alternative, these new national securities exchanges, which would be SROs, would, among other things, be required to comply with Section 6 of the Exchange Act. Because national securities exchange are SROs, a new national securities exchange would bear certain regulatory costs that are higher than those associated with registering as a broker-dealer. For example, a national securities exchange would bear expenses associated with joining the national market system plans and surveilling trading activity and member conduct on the exchange.⁸²⁹

6. Discontinue Quarterly Volume Reports on Form ATS-R

Another alternative would be to amend Regulation ATS so that NMS Stock ATSs would no longer be required to file quarterly volume reports on Form ATS-R because, as noted above, FINRA rules currently require ATSs that transact in NMS stocks to report aggregate weekly volume information

⁸²⁸ Newly registered national securities exchanges must establish appropriate surveillance and disciplinary mechanisms, and as a result incur start-up costs associated with such obligations, such as writing a rule book. See Regulation ATS Adopting Release, *supra* note 7, at 70897. Furthermore, the cost of acquiring the necessary assets and the operating funds to carry out the day-to-day functions of a national securities exchange are significant. See *id.*

⁸²⁹ See Regulation NMS Adopting Release, *supra* note 7, at 70903.

and the number of trades to FINRA in certain equity securities, including NMS stocks.⁸³⁰

Instead, NMS Stock ATSs would be required to disclose, in quarterly amendments to Form ATS-N, the information that is currently captured by Form ATS-R that is not captured by FINRA reporting requirements. The Commission notes that, in addition to requiring unit volume of transactions, Form ATS-R, which is “deemed confidential when filed,”⁸³¹ requires ATSs to report dollar volume of transactions during the quarter, a list of all subscribers that were participants on the ATS during the quarter, a list of all securities that were traded on the ATS during the quarter, and, if the ATS is subject to fair access requirements under Rule 301(b)(5), information about all persons that were granted, denied or limited access during the quarter.

The benefit of this alternative would be that NMS Stock ATSs would no longer be required to report quarterly on Form ATS-R information that is otherwise available. In addition, information that is currently deemed confidential on Form ATS-R would be made publicly available in quarterly amendments to Form ATS-N. NMS Stock ATSs would, however, be required to submit such quarterly amendments, which an NMS Stock ATS would not otherwise be required to do if the NMS Stock ATS did not have any other material changes to report during the quarter.

The Commission does not believe that this alternative would create significant new costs in preparing a quarterly Form ATS-N because the costs would be comparable to the costs of preparing Form ATS-R. However, as a result of the effective merging of proposed Form ATS-N and current Form ATS-R under this alternative, some of the information that would be made public on proposed Form ATS-N, such as the ATS’s subscriber list and the list of persons granted, denied, or limited access during the reporting period (which is not being solicited under the proposed Form ATS-N) could be proprietary. Making such information public could harm the NMS Stock ATS as well as persons denied access.

7. Require NMS Stock ATSs To Operate as Limited Purpose Entities

Another alternative would be to amend Regulation ATS to require an

⁸³⁰ See *supra* note 122. Each ATS is also required to use a unique MPID in its reporting to FINRA, such that its volume reporting is distinguishable from other transaction volume reported by the broker-dealer operator of the ATS.

⁸³¹ See 17 CFR 242.301(b)(2)(vii).

NMS Stock ATS to operate as a “stand-alone” entity, which would exist only to operate the ATS and have no affiliation with any broker-dealer that seeks to execute proprietary or agency orders on the NMS Stock ATS. Under this alternative, NMS Stock ATSs would be required to publicly disclose proposed Form ATS-N, proposed Form ATS-N Amendments, and notices of cessation on proposed Form ATS-N, and would be limited purpose entities that could not engage in any activities other than operation of the ATS. This alternative would prohibit the broker-dealer operator of the NMS Stock ATS from engaging in any other broker-dealer activity, and would consequently prohibit the operation of an NMS Stock ATS by a multi-service broker-dealer.

The benefit of this alternative would be to eliminate potential conflicts of interest by requiring a broker-dealer that operates an NMS Stock ATS to have only a single business function, namely, operating the ATS. The broker-dealer would be required to eliminate any other functions, such as trading on a proprietary basis or routing customer orders.

However, this alternative may discourage broker-dealers from creating and operating innovative NMS Stock ATS platforms, and instead drive them to execute their own proprietary trades internally on their other broker-dealer systems. In addition, if they were no longer able to trade on a proprietary basis or route customer orders to their own NMS Stock ATS, many broker-dealers may choose to file a cessation of operations report and shut down the operations of their NMS Stock ATS.⁸³² Shutting down their NMS Stock ATS operations could result in similar (though potentially more severe) effects on the competitive dynamics of the ATS market as under the proposal. This could push more liquidity to less transparent venues (*i.e.*, non-ATS OTC trading centers) or could result in more liquidity moving to national securities exchanges. The remaining NMS Stock ATSs, which would likely be fewer in number as some broker-dealer operators choose to cease operations of the ATSs, could become popular trading destinations because the absence of conflicts of interest could encourage market participants to route orders to those trading centers. Market

⁸³² Alternatively, current broker-dealer operators of ATSs that trade NMS stocks may choose to spin-off or sell their ATS rather than cease operations. The expected number of broker-dealer operators selling their ATSs at once could affect the value the broker-dealer operator could receive from the sale and, as such, could factor into the decision of whether to spin-off, sell, or fold their ATS.

participants would likely still have a need for anonymous trading, which could further contribute to liquidity still flowing to the stand-alone NMS Stock ATSS. Thus, if multi-service broker-dealers that operate their own NMS Stock ATS cease operating the ATSS, liquidity might move to other trading venues, including both transparent venues, such as national securities exchanges, and less transparent venues, such as non-ATS OTC trading centers. On the other hand, cessation of operations of NMS Stock ATSS owned by multi-service broker dealers could also result in stand-alone NMS Stock ATSS, which would not have the potential conflicts of interest discussed above, attracting more liquidity.

8. Lower the Fair Access Threshold for NMS Stock ATSS

As discussed above, NMS Stock ATSS are not required to provide fair access to the services of the NMS Stock ATS unless the ATS reaches the 5% trading volume threshold in a stock under Rule 301(b)(5) of Regulation ATS.⁸³³ As an alternative to the proposed enhancements to the conditions to the exemption from the definition of “exchange” pursuant to Rule 3a1-1(a) for NMS Stock ATSS, which would include NMS Stock ATSS making the disclosures required by Form ATS-N so that market participants could make more informed decisions about an NMS Stock ATS as a potential trading venue,⁸³⁴ the Commission considered lowering the fair access threshold under Rule 301(b)(5) of Regulation ATS⁸³⁵ for NMS Stock ATSS to a level sufficiently low such that most NMS Stock ATSS would be prohibited from engaging in many discriminatory practices.⁸³⁶

One of the principal aims of this proposed rulemaking is to provide market participants with more information about the activities of the broker-dealer operator, its affiliates, and the operations of the NMS Stock ATS, so they may better assess NMS Stock ATSS as potential trading venue for their orders. For example, as discussed above, the Commission is concerned that market participants have limited or different levels of information about

how the NMS Stock ATSS operate, and the activities of broker-dealer operators and their affiliates.⁸³⁷ The Commission could propose new rules that would expressly prohibit or limit organizational structures that might raise conflicts of interest, or could expressly prohibit or limit the manner by which an ATS discriminates among or between subscribers. Lowering the threshold that triggers the fair access requirements would be one of the means of prohibiting or limiting certain discriminatory practices.

The Commission preliminarily believes that lowering the fair access threshold for NMS Stock ATSS would require the Commission to consider lowering the fair access threshold to zero, or to some threshold between zero and 5%. If the fair access threshold remained at a threshold above zero, the benefit of this approach, as compared to the proposed disclosure requirements that would apply to all NMS Stock ATSS, could be further limited by the fact that the fair access requirements would apply only to the NMS stocks for which the NMS Stock ATS had crossed the fair access threshold. The Commission could address that situation by proposing further amendments to the fair access requirements that would extend an ATS's fair access duties to all NMS stocks once the fair access threshold had been crossed by an ATS in a certain number of NMS stocks, to revise the duties incurred when the threshold is crossed, or to simply lower the threshold to zero, which would have the effect of requiring all NMS Stock ATSS to immediately comply with the fair access requirements for all NMS stocks. However, the Commission preliminarily believes that the disclosures that would be required by proposed Form ATS-N requirements would be a cost effective and simpler approach than proposing fundamental revisions to the fair access requirements that would achieve the aim of providing market participants with information to better assess NMS Stock ATSS as potential trading venues.

9. Apply Proposed Rule 304 to ATSS That Trade Fixed Income Securities and ATSS That Solely Trade Government Securities

Another alternative would be to amend Regulation ATS to require ATSS that trade fixed income securities and ATSS that solely trade government securities to also report information about their operations and activities of the broker-dealer operator and affiliates on Form ATS-N. Under this alternative,

NMS Stock ATSS, as well as ATSS that trade fixed income securities and ATSS that solely trade government securities, would be required to publicly disclose proposed Form ATS-N, proposed Form ATS-N Amendments, and notices of cessation on proposed Form ATS-N.

The benefit of this alternative is that it may provide market participants with clearer transparency regarding the operations and activities of all types of ATSS, not just NMS stock ATSS. To the extent that there may be market participants who predominately trade orders of NMS stock, fixed income securities, and government securities on ATSS, these market participants would benefit from the added transparency regarding how these venues operate and the activities of their broker-dealer operators and affiliates.

ATSS that effect trades in fixed income securities primarily compete against other trading venues with limited or no operational transparency requirements or standards. This is not the case with NMS Stock ATSS, which provide limited information to market participants about their operations and compete directly with national securities exchanges, which are required to publicly disclose information about their operations in the form of proposed rule changes and a public rule book.⁸³⁸ With government securities, trading occurs in bilateral transactions or on centralized electronic trading platforms that generally operate with limited transparency.⁸³⁹ Because the market structure for and transparency requirements related to trading each of these types of securities (NMS Stock ATSS, fixed income, government securities) differ, Form ATS-N under this alternative would need to include different or additional disclosure requirements related to the operations and activities of each of these types of ATSS, so as to capture the nuances in each particular market. As a result, Form ATS-N under this alternative would need to be much more complex than the proposed Form ATS-N, increasing the costs for investors to efficiently use Form ATS-N for a given type of security trading and for NMS Stock ATSS, reducing the benefits from Form ATS-N in NMS stocks. In addition, fixed income ATSS would incur costs to comply with the additional disclosures, which could result in an exit of existing fixed income ATSS, discourage innovation in surviving fixed income ATSS, and increase barriers to entry for new fixed income ATSS. Because the corporate

⁸³³ See *supra* notes 92–95 and accompanying text.

⁸³⁴ As discussed above in Sections VII and VIII, the information that would be disclosed on Form ATS-N would include, among other things, whether different classes of subscribers or persons have differing access to the services of the ATS.

⁸³⁵ 17 CFR 242.301(b)(5).

⁸³⁶ As discussed above in Section VII.B, the requirements of Rule 301(b)(5) that prohibit or limit discriminatory practices of ATSS only apply to NMS Stock ATSS that cross the fair access threshold, and then, apply only with respect to the NMS stocks in which an ATS crosses the threshold.

⁸³⁷ See *supra* Section III.C.

⁸³⁸ See *supra* Section IV.B.

⁸³⁹ See *id.*

and municipal fixed income markets lack much of the automation present for venues that trade NMS stocks, such costs could be more critical in the development of the fixed income market than in the markets for NMS stocks. Furthermore, as discussed above, ATSS that solely trade government securities are exempt from compliance with Regulation ATS.⁸⁴⁰ To the extent that this exemption is removed and such ATSS were required to comply with Regulation ATS, including proposed Rule 304, these ATSS would incur costs associated with the public reporting and recordkeeping requirements of Regulation ATS.

Request for Comment on the Economic Analysis

The Commission is sensitive to the potential economic effects, including the costs and benefits, of the proposed amendments to Regulation ATS. The Commission has identified above certain costs and benefits associated with the proposal and requests comment on all aspects of its preliminary economic analysis. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits. In particular, the Commission seeks comment on the following:

506. Do you believe the Commission's analysis of the potential effects of the proposed amendments to Regulation ATS is reasonable? Why or why not? Please explain in detail.

507. Do you believe the Commission's assessment of the baseline for the economic analysis is reasonable? Why or why not? Please explain in detail.

508. Do you believe that the proposing release provides a fair representation of current practices and how those current practices would change under the proposed amendments to Regulation ATS? Why or why not? Please explain in detail.

509. Do you believe that the Commission has reasonably described how the competitive landscape for the market for NMS stock execution services would be affected under the proposed amendments to Regulation ATS? Why or why not? Please explain in detail. Does the release discuss all relevant forms of competition and whether the proposal could alter them? If not, which additional forms of competition could the proposal impact and how? Please explain in detail.

510. Do you believe that the Commission has reasonably identified all market participants that would be

affected by the proposed amendments to Regulation ATS? If so, why? If not, why not, and which market participants do you believe are not reasonably excluded or would be affected by the proposed amendments? Please explain in detail.

511. Do you believe that the Commission has reasonably described how market participants would be affected by the proposed amendments to Regulation ATS? Why or why not? Please explain in detail.

512. Do you believe that the Commission has reasonably described the information market participants currently receive? If so, why? If not, why not? Please explain in detail.

513. Do you believe that the Commission has reasonably described the benefits market participants would receive from the information that would be required to be disclosed by the proposed amendments to Regulation ATS? Why or why not? Please explain in detail.

514. Do you believe that market participants currently have all relevant information concerning the activities of the broker-dealer operator of the NMS Stock ATS and its affiliates as such activities relate to the NMS Stock ATS? Why or why not? Do you believe there is information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

515. Do you believe that market participants currently have all relevant information concerning the subscribers to the NMS Stock ATS where their orders are executed? Why or why not? Do you believe there is information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

516. Do you believe that market participants currently have all relevant information concerning the trading operations of the NMS Stock ATS where their orders are executed? Why or why not? Do you believe there is information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

517. Do you believe that market participants currently have all relevant information concerning the services offered by the NMS Stock ATS where

their orders are executed and their fee structures? Why or why not? Do you believe there is information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

518. Do you believe that market participants currently have all relevant information concerning the safeguards and procedures that NMS Stock ATSS have instituted to protect their confidential trading information? Why or why not? Is there information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

519. Do you believe that the Commission has reasonably described its analysis of the costs and benefits of each proposed amendment to Regulation ATS? Why or why not? Please explain in detail.

520. Do you believe that there are additional benefits or costs that could be quantified or otherwise monetized? Why or why not? If so, please identify these categories and, if possible, provide specific estimates or data.

521. Do you believe there are there any additional benefits that may arise from the proposed amendments to Regulation ATS? If so, what are such benefits? Please explain in detail.

522. Do you believe there are benefits described above that would not likely result from the proposed amendments to Regulation ATS? If so, please explain these benefits or lack of benefits in detail.

523. Do you believe there are any additional costs that may arise from the proposed amendments to Regulation ATS? If so, do you believe there are methods by which the Commission could reduce the costs imposed by the proposed amendments to Regulation ATS while still achieving the goals? Please explain in detail.

524. Do you believe there are any potential unintended consequences of the proposed amendments to Regulation ATS? If so, what are they? If not, why not?

525. Do you believe there are costs described above that would not likely result from the proposed amendments to Regulation ATS? Why or why not? Please support your arguments.

526. Do you believe that the proposing release appropriately describes the potential effects of the proposed amendments to Regulation

⁸⁴⁰ See *supra* note 64.

ATS on the promotion of efficiency, competition, and capital formation? Why or why not? If possible, please provide analysis and empirical data to support your arguments on the competitive or anticompetitive effects, as well as the efficiency and capital formation effects, of the proposed amendments.

527. Do you believe that there are alternative mechanisms for achieving the Commission's goal of improving transparency of NMS Stock ATS's trading operations and regulatory oversight while promoting competition and capital formation? If so, what are such mechanisms? Please explain in detail.

528. Do you believe that market participants would change their behavior in response to the proposed amendments to Regulation ATS in any way? Why or why not? If so, which market participants would change their behavior and how? If not, why not? What would be the benefits and costs of these changes? How would these changes affect efficiency, competition, and capital formation? How would these changes affect market quality and market efficiency? Please support your arguments.

529. Do you believe there are benefits that may arise if the Commission were to apply proposed Rule 304, in whole or in part, to fixed income ATSs? If so, what are such benefits? Please explain in detail.

530. Do you believe there are costs that may arise if the Commission were to apply proposed Rule 304, in whole or in part, to fixed income ATSs? If so, what are such costs? Please explain in detail.

531. Do you believe that the proposed amendments could result in NMS Stock ATSs selecting to trade fixed income securities instead of NMS stocks, because, under the proposed amendments, Rule 304 would not apply to fixed income securities? Please explain in detail.

532. Do you believe that if the Commission were to apply proposed Rule 304 to fixed income ATSs, this could alter the nature of competition in the market for order execution services for fixed income securities? Why or why not? Please support your arguments.

533. Do you believe that if the Commission were to apply proposed Rule 304 to fixed income ATSs, this could promote greater efficiency, competition, and capital formation relative to the current proposal? If so, please explain in detail.

534. Do you believe there are benefits that may arise if the Commission should adopt amendments to Regulation ATS to

remove the exemption under Rule 301(a)(4)(ii)(A) of Regulation ATS for ATSs whose trading activity is solely in government securities? If so, what are such benefits? Please explain in detail.

535. Do you believe that there are benefits that may arise if the Commission enhances the transparency requirements applicable to ATSs that effect transactions solely in government securities? If so, what are such benefits? Please explain in detail.

536. Do you believe there are costs that may arise if the Commission adopted amendments to Regulation ATS to remove the exemption under Rule 301(a)(4)(ii)(A) of Regulation ATS for ATSs whose trading activity is solely in government securities? If so, what are such costs? Please explain in detail.

537. Do you believe that there are costs that may arise if the Commission were to apply Rule 304 to ATSs that effect transactions solely in government securities? If so, what are such costs? Please explain in detail.

538. Do you believe that the proposed amendments could result in ATSs selecting to solely trade government securities instead of NMS stocks, because, under the proposal, Rule 304 would not apply to government securities? Please explain in detail.

539. Do you believe that if the Commission were to apply Rule 304 to ATSs that solely trade government securities, this could alter the nature of competition in the market for order execution services for government securities? Why or why not? Please support your arguments.

540. Do you believe that if the Commission were to apply proposed Rule 304 to ATSs that solely trade government securities, this could promote greater efficiency, competition, and capital formation relative to the current proposal? If so, please explain in detail.

541. Do you believe that requiring NMS Stock ATSs to do something more to ensure compliance with proposed Rule 304 than the certification required under FINRA Rule 3130 would have effects on regulatory oversight and investor protection? If so, please explain in detail.

542. Do some NMS Stock ATSs currently disclose aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS to one or more subscribers by the NMS Stock ATS? If so, what order flow and execution statistics are provided? How widely disseminated is the information? To what extent do the NMS Stock ATSs

disclose how they calculate the statistics? Please explain in detail.

543. Do you believe that there are benefits to market participants from having NMS Stock ATSs publicly disclose aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS but still published or otherwise provided to one or more subscribers by the NMS Stock ATS, and from having NMS Stock ATSs describe how those statistics are calculated? If so, please explain in detail. Do you believe that there are costs to NMS Stock ATSs from having them publicly disclose those market quality statistics and describe how those statistics are calculated? If so, please explain in detail.

544. Do you believe that there are benefits to market participants if the Commission were to require NMS Stock ATSs to provide disclosure about their governance structure, compliance programs and controls to comply with Regulation ATS? If so, please explain in detail.

545. Do you believe that there are costs to NMS Stock ATSs if the Commission were to require them to provide disclosure about their governance structure, compliance programs and controls to comply with Regulation ATS? If so, please explain in detail.

546. Should proposed Form ATS-N be submitted or made publicly available on EDGAR instead of through the EDFS system and the Commission's Web site? What would be the advantages to the public or to NMS Stock ATSs of access through EDGAR instead of the Commission's proposed process?

547. Should some or all of the information in proposed Form ATS-N be submitted in a particular financial reporting language such as the FIX Protocol, eXtensible Business Reporting Language (XBRL), or some other open standard that is widely available to the public and at no cost? Should the Commission create a new taxonomy for submitting the information in proposed Form ATS-N?

548. Should the Commission require that some or all of the information in proposed Form ATS-N be tagged using standard electronic definitions of a particular taxonomy, and what would be the additional compliance costs associated with tagging the information?

549. Would requiring any of the information in the narrative responses to be submitted in a tagged format enhance the public's use of the data beyond the Commission's proposal? If so, how?

550. Could a format other than the one proposed to be accepted by the EFFS system reduce the burden on NMS Stock ATSs in filing the required disclosures with the Commission? For example, could a single machine-readable PDF reduce the filing burden on NMS Stock ATSs? If so, please identify the alternative format and the reduced filing burdens associated with it.

551. Should proposed Form ATS-N be structured in a more granular detail, and if so, how? In addition, how would the more granular detail enhance the public's use of the data beyond the Commission's proposal? What would be the costs of providing more granular detail?

552. Would the public's usability of the data be enhanced if it were structured in another format? If so, please identify the other format and describe how the public's use of the data would be enhanced by the other format. If possible, discuss factors about the other format such as how commonly available it is, whether it is viewer-independent, whether it is an open standard, how it has been adopted internationally and in other regulatory contexts, and how it supports document attachments or references as well as narrative and numeric data.

553. Do you believe that the Commission articulated all reasonable alternatives for the proposed amendments to Regulation ATS? If not, please provide additional alternatives and how their costs and benefits, as well as their potential impacts on the promotion of efficiency, competition, and capital formation, would compare to the proposed amendments.

554. Do you believe that the Commission has reasonably described the costs and benefits for the alternatives described above? If not, please provide more accurate descriptions of costs and benefits, including any data or statistics that support those costs and benefits.

555. Do you believe that the Commission has reasonably described the potential impacts on the promotion of efficiency, competition, and capital formation of the alternatives described above relative to the proposed amendments? If not, please explain in detail which impacts for which alternatives the Commission has not reasonably described, and support your arguments with any applicable data or statistics.

556. The Commission generally requests comment on the competitive or anticompetitive effects, as well as the efficiency and capital formation effects, of the proposed amendments to

Regulation ATS on market participants if the proposed rules are adopted as proposed. Commenters should provide analysis and empirical data to support their views on the competitive or anticompetitive effects, as well as the efficiency and capital formation effects, of the proposed amendments to Regulation ATS.

557. The Commission generally requests comment on whether the benefits of the proposed amendments to Regulation ATS justify the costs. Please be specific and provide details. Commenters should provide analysis and empirical data to support their views on the benefits and costs of the proposed amendments to Regulation ATS.

558. Do you believe that the Commission has solicited the right set of information on proposed Form ATS-N, which will be made available to the public? Is there any other information the Commission should ask NMS Stock ATSs to provide on Form ATS-N? If so, please provide details.

XIV. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,⁸⁴¹ the Commission requests comment on the potential effect of the proposed amendments and Form ATS-N on the United States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

XV. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980⁸⁴² ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of the impact of the proposed rule amendments on small entities unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.⁸⁴³ For purposes of Commission rulemaking in connection with the RFA,⁸⁴⁴ a small

entity includes a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,⁸⁴⁵ 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 (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.⁸⁴⁶ With regard to national securities exchanges, a small entity is an exchange that has been exempt from the reporting requirements of Rule 601 under Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.⁸⁴⁷

All ATSs, including NMS Stock ATSs, would continue to have to register as broker-dealers.⁸⁴⁸ The Commission examined recent FOCUS data for the 46 broker-dealers that currently operate ATSs that trade NMS stocks and concluded that 1 of the broker-dealer operators of ATSs that currently trade NMS stock had total capital 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).⁸⁴⁹ The Commission notes that this broker-dealer operator has never

relevant to this proposed rulemaking, are set forth in Rule 0-10 under the Exchange Act, 17 CFR 240.0-10. See Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS-305).

⁸⁴⁵ 17 CFR 240.17a-5(d).

⁸⁴⁶ See 17 CFR 240.0-10(c). See also 17 CFR 240.0-10(i) (providing that a broker or dealer is affiliated with another person if: such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person; or such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries such accounts on a fully disclosed basis).

⁸⁴⁷ See 17 CFR 240.0-10(e). The Commission notes that while national securities exchanges can operate an ATS, subject to certain conditions, such an ATS would have to be registered as a broker-dealer. See Regulation ATS Adopting Release, *supra* note 7, at 70891. Currently, no national securities exchange operates an ATS that trades NMS stocks.

⁸⁴⁸ 17 CFR 242.301(b)(1).

⁸⁴¹ 5 U.S.C. 603.

⁸⁴² 5 U.S.C. 603(a).

⁸⁴³ 5 U.S.C. 605(b).

⁸⁴⁴ 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

reported any transaction volume in any security, including NMS stock, to the Commission on Form ATS-R. Given that this particular ATS has never reported any transaction volume to the Commission over the six years since it first submitted its Form ATS to the Commission, the Commission preliminarily believes that this ATS would likely not submit a Form ATS-N if the proposed amendments to Regulation ATS are adopted. Consequently, the Commission certifies that the proposed amendments to Regulation ATS would not, if adopted, have a significant economic impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. The Commission solicits comment as to whether the proposed amendments could have impacts on small entities that have not been considered. The Commission requests that commenters describe the nature of any impacts on small entities and provide empirical data to support the extent of such effect. Such comments will be placed in the same public file as comments on the proposed amendments to Regulation ATS. Persons wishing to submit written comments should refer to the instructions for submitting comments in the front of this release.

XVI. Statutory Authority

Pursuant to Exchange Act, 15 U.S.C. 78a *et seq.*, and particularly Sections 3(b), 5, 6, 11A, 15, 17(a), 17(b), 19, 23(a), and 36 thereof (15 U.S.C. 78c, 78k-1, 78o, 78q(a), 78q(b), 78w(a), and 78mm)], the Commission proposes to adopt Form ATS-N under the Exchange Act, to amend Rule 3a1-1 and Regulation ATS under the Exchange Act, and to amend 17 CFR 200.30-33.

List of Subjects in 17 CFR Parts 240, 242 and 249

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

For the reasons stated in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1934

■ 1. The authority citation for part 240 continues to read 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, 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; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 2. Amend § 240.3a1-1 by removing “242.303” from paragraphs (a)(2) and (3) wherever it occurs and adding in its place “242.304”.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 3. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, and 80a-37.

■ 4. Amend § 242.300 by:

■ a. In paragraph (f) adding the phrase “the broker-dealer of” before the phrase “an alternative trading system” wherever it occurs; and

■ b. Adding paragraph (k) to read as follows:

§ 242.300 Definitions.

* * * * *

(k) NMS Stock ATS means an alternative trading system, as defined in § 242.300(a), that facilitates transactions in NMS stocks, as defined in § 242.300(g).

■ 5. Amend § 242.301 by:

■ a. In paragraph (b)(2)(i), removing the phrase “, or if the alternative trading system is operating as of April 21, 1999, no later than May 11, 1999”;

■ b. In paragraph (b)(2)(vii), removing the phrase “Market Regulation, Stop 10-2” and in its place adding “Trading and Markets” after the words “Division of”;

■ c. Adding paragraph (b)(2)(viii);

■ d. In paragraph (b)(9)(i), adding the word “Separately” before the word “File” and changing the first letter of the word “File” to lower case and adding the phrase “for transactions in NMS stocks, as defined in § 242.300(g), and transactions in securities other than NMS stocks” after the phrase “(§ 249.638 of this chapter)”;

■ e. In paragraph (b)(9)(ii), adding the word “Separately” before the word “File” and changing the first letter of the word “File” to lower case and adding the phrase “for transactions in NMS stocks and transactions in securities other than NMS stocks” after the phrase “required by Form ATS-R”;

■ f. In paragraph (b)(10), adding the word “Written” before the phrase “Procedures to ensure the confidential treatment of trading information” and

changing the first letter of the word “Procedures” to lower case;

■ g. In paragraph (b)(10)(i), adding the word “written” before the word “safeguards” in both instances and adding the word “written” before the word “procedures” in both instances; and

■ h. In paragraph (b)(10)(ii), adding the word “written” before the word “oversight” and adding the word “written” before the word “safeguards”.

The addition reads as follows:

§ 242.301 Requirements for alternative trading systems.

* * * * *

(b) * * *

(2) * * *

(viii) An alternative trading system that is an NMS Stock ATS shall file the reports and amendments required by § 242.304, and shall not be subject to the requirements of paragraph (b)(2) of this section. An alternative trading system that effects transactions in both NMS stocks and non-NMS stocks shall be subject to the requirements of § 242.304 of this chapter with respect to NMS stocks and paragraph (b)(2) of this section with respect to non-NMS stocks.

* * * * *

■ 6. Amend § 242.303 by:

■ a. In paragraph (a) introductory text, removing “(b)(9)” and add in its place “(b)(8)”;

■ b. Adding paragraph (a)(1)(v); and

■ c. In paragraph (a)(2)(ii), adding the phrase “or § 242.304” after the phrase “paragraph (b)(2) of § 242.301”.

The addition reads as follows:

§ 242.303 Record preservation requirements for alternative trading systems.

* * * * *

(a) * * *

(1) * * *

(v) At least one copy of the written safeguards and written procedures to protect subscribers’ confidential trading information and the written oversight procedures created in the course of complying with paragraph (b)(10) of § 242.301.

■ 7. Add § 242.304 to the undesignated center heading Regulation ATS—Alternative Trading Systems to read as follows:

§ 242.304 NMS Stock ATSs.

(a) *Conditions to the exemption.* Unless not required to comply with Regulation ATS pursuant to § 242.301(a), an NMS Stock ATS must comply with §§ 242.300 through 242.304 (except § 242.301(b)(2)) to be exempt from the definition of an exchange pursuant to § 240.3a1-1(a)(2).

(1) *Form ATS-N*—(i) *Filing*. No exemption from the definition of “exchange” is available to an NMS Stock ATS pursuant to § 240.3a1–1(a)(2) unless the NMS Stock ATS files with the Commission a Form ATS–N, in accordance with the instructions therein, and the Commission declares the Form ATS–N effective. If the NMS Stock ATS is operating pursuant to a previously filed initial operation report on Form ATS as of [effective date of the final rule], such NMS Stock ATS shall file with the Commission a Form ATS–N, in accordance with the instructions therein, no later than 120 calendar days after [effective date of the final rule]. An NMS Stock ATS operating as of [effective date of the final rule] may continue to operate pursuant to a previously filed initial operation report on Form ATS pending the Commission’s review of the filed Form ATS–N.

(ii) *Review period and extension of the 120-day review period*. (A) The Commission will declare a Form ATS–N filed by an NMS Stock ATS operating as of [effective date of the final rule] effective or ineffective no later than 120 calendar days from filing with the Commission. The Commission may extend the Form ATS–N review period for an NMS Stock ATS operating as of [effective date of the final rule] for:

(1) An additional 120 calendar days if the Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-day review period and will briefly describe the reason for the determination for which additional time for review is required; or

(2) Any extended review period to which a duly-authorized representative of the NMS Stock ATS agrees in writing.

(B) The Commission will declare a Form ATS–N filed by an NMS Stock ATS that was not operating as of [effective date of the final rule] effective or ineffective no later than 120 calendar days from filing with the Commission. The Commission may extend the Form ATS–N review period for:

(1) An additional 90 days, if the Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-day review period and will briefly describe the reason for the determination for which additional time for review is required; or

(2) Any extended review period to which a duly-authorized representative of the NMS Stock ATS agrees in writing.

(iii) *Effectiveness*. The Commission will declare effective a Form ATS–N if the NMS Stock ATS qualifies for the Rule 3a1–1(a)(2) exemption. The Commission will declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(iv) *Order regarding effectiveness*. The Commission will issue an order to declare a Form ATS–N effective or ineffective. Upon the effectiveness of the Form ATS–N, the NMS Stock ATS may operate pursuant to the conditions of this section. If the Commission declares a Form ATS–N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS. A Form ATS–N declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS–N.

(2) *Form ATS–N amendment*—(i) *Form ATS–N amendment filing requirements*. An NMS Stock ATS shall amend an effective Form ATS–N, in accordance with the instructions therein:

(A) At least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N;

(B) Within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS–N Amendment; or

(C) Promptly, to correct information in any previous disclosure on Form ATS–N, after discovery that any information filed under paragraphs (a)(1)(i) or (a)(2)(i)(A) or (B) of this section was inaccurate or incomplete when filed.

(ii) *Commission review*. The Commission will, by order, if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, declare ineffective any Form ATS–N Amendment filed pursuant to paragraphs (a)(2)(i)(A) through (C) of this section no later than 30 calendar days from filing with the Commission. If the Commission declares a Form ATS–N Amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to the ineffective Form ATS–N Amendment. A Form ATS–N Amendment declared ineffective would not prevent the NMS

Stock ATS from subsequently filing a new Form ATS–N Amendment.

(3) *Notice of cessation*. An NMS Stock ATS shall notice its cessation of operations on Form ATS–N at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS. The notice of cessation shall cause the Form ATS–N to become ineffective on the date designated by the NMS Stock ATS.

(4) *Suspension, limitation, and revocation of the exemption from the definition of exchange*. (i) The Commission will, by order, if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, suspend for a period not exceeding twelve months, limit, or revoke an NMS Stock ATS’s exemption from the definition of “exchange” pursuant to § 240.3a1–1(a)(2) of this chapter.

(ii) If an NMS Stock ATS’s exemption is suspended or revoked pursuant to paragraph (a)(4)(i) of this section, the NMS Stock ATS shall be prohibited from operating pursuant to the exemption from the definition an “exchange” pursuant to § 240.3a1–1(a)(2) of this chapter. If an NMS Stock ATS’s exemption is limited pursuant to paragraph (a)(4)(i) of this section, the NMS Stock ATS shall be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order.

(b) *Public disclosures*. (1) Every Form ATS–N filed pursuant to this section shall constitute a “report” within the meaning of sections 11A, 17(a), 18(a), and 32(a) (15 U.S.C. 78k–1, 78q(a), 78r(a), and 78ff(a)), and any other applicable provisions of the Act.

(2) The Commission would make public via posting on the Commission’s Web site, each:

(i) Order of effectiveness of a Form ATS–N;

(ii) Order of ineffectiveness of a Form ATS–N;

(iii) Effective Form ATS–N;

(iv) Filed Form ATS–N Amendment;

(v) Order of ineffectiveness of a Form ATS–N Amendment;

(vi) Notice of cessation; and

(vii) Order suspending, limiting, or revoking the exemption from the definition of an “exchange” pursuant to § 240.3a1–1(a)(2) of this chapter.

(3) Each NMS Stock ATS shall make public via posting on its Web site a direct URL hyperlink to the Commission’s Web site that contains the documents enumerated in paragraph (b)(2) of this section.

(c) *Form ATS-N filing requirements.*

(1) A filed Form ATS-N must respond to each item, as applicable, in detail and disclose information that is accurate, current, and complete.

(2) Any report required to be filed with the Commission under this section shall be filed electronically on Form ATS-N, and include all information as prescribed in Form ATS-N and the instructions thereto and contain an electronic signature. The signatory to an electronically filed Form ATS-N shall manually sign a signature page or document, in the manner prescribed by Form ATS-N, authenticating,

acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing. Such document shall be executed before or at the time Form ATS-N is electronically filed and shall be retained by the NMS Stock ATS in accordance with § 242.303.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 8. The general 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; and Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309, unless otherwise noted.

* * * * *

■ 9. Add § 249.640 to subpart G to read as follows:

§ 249.640 Form ATS-N, information required of NMS Stock ATSs pursuant to § 242.304(a) of this chapter.

This form shall be used by every NMS Stock ATS to file required reports under § 242.304(a) of this chapter.

Note: The text of Form ATS-N will not appear in the Code of Federal Regulations.

BILLING CODE 8011-01-P

**United States Securities and Exchange Commission
Washington, DC 20510
FORM ATS-N**

**INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE
CRIMINAL VIOLATIONS.
See 18 U.S.C.1001 and 15 U.S.C. 78ff(a)**

Page 1 of _____

File No: ATSN-[acronym]-YYYY-####

(Entity name) is making this filing pursuant to the Rule 304 under the Securities Exchange Act of 1934

- Initial Form Filing
- Withdrawal of Initial Form Filing

Submission Type (select one)

- Rule 304(a)(1)(i) Form ATS-N
- Rule 304(a)(2)(i)(A) Material Amendment to Form ATS-N
- Rule 304(a)(2)(i)(B) Periodic Amendment to Form ATS-N
- Rule 304(a)(2)(i)(C) Correcting Amendment to Form ATS-N
- Rule 304(a)(3) Notice of Cessation
- Date NMS Stock ATS will cease to operate: mm/dd/yyyy

Provide a brief narrative description of the Amendment:

Part I: Name

1. Full Name of Registered Broker-Dealer of the NMS Stock ATS (“broker-dealer operator”) as stated on Form BD: _____
2. Full Name of NMS Stock ATS under which business is conducted, if any: _____
3. Market Participant Identifier (MPID) of the NMS Stock ATS: _____
4. Is the NMS Stock ATS currently operating pursuant to a previously filed initial operation report on Form ATS? Yes No

Part II – Broker Dealer Operator Registration and Contact Information

1. Effective date of broker-dealer registration with the Commission: mm/dd/yyyy
2. SEC File No.: 8-_____
3. CRD No.: _____
4. Full Name of the national securities association and the effective date of broker-dealer membership with the national securities association:

Name _____ mm/dd/yyyy

5. Legal Status (select one)
 - Sole Proprietorship
 - Corporation
 - Partnership
 - Limited Liability Company
 - Other (Specify): _____

If other than a sole proprietor, please provide the following:

- a) Date of Formation: mm/dd/yyyy
- b) State/Country of Formation: {pick list}

6. Physical Street Address of the NMS Stock ATS matching system:

Street: _____
City _____ State __ Zip Code _____

If the broker-dealer operator is a sole proprietor and the physical street address is a private residence, check this box:

A private residential address of a sole proprietor will not be included in publicly available versions of this form.

7. Mailing Address: Same as physical address

Street: _____
City _____ State __ Zip Code _____

If the broker-dealer operator is a sole proprietor and the mailing address is a private residence, check this box:

A private residential address of a sole proprietor will not be included in publicly available versions of this form.

8. Website URL of the NMS Stock ATS _____

Exhibit 1	Provide a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N (e.g., FIX protocol procedures, rules of engagement/manuals, frequently asked questions, marketing materials).
Exhibit 2A	<p>Provide a copy of the most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information related to direct owners and executive officers.</p> <p><input type="checkbox"/> In lieu of filing {entity} certifies that the information requested under this exhibit is available at the Internet website below and is accurate as of the date of this filing.</p> <p>URL:</p>
Exhibit 2B	<p>Provide a copy of the most recently filed or amended Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners.</p> <p><input type="checkbox"/> In lieu of filing {entity} certifies that the information requested under this exhibit is available at the Internet website below and is accurate as of the date of this filing.</p> <p>URL:</p>

Part III. Activities of the Broker-Dealer Operator and Affiliates

- Respond to each question below. Attach responses to each Item of Part III as Exhibit 3 with the information required for each "yes" response. Label each Item appropriately and organize responses according to Item number. For any Item or subpart of an Item that is inapplicable, state as such.
- For Items requesting the identity of affiliates and business units of the broker-dealer operator, provide the name under which each affiliate or business unit conducts business (e.g., the formal name under which a proprietary trading desk of the broker-dealer operator conducts business) and the applicable CRD number and MPID(s) under which the affiliate or business unit conducts business.
- For filings made pursuant to Rule 304(a)(2)(i) (i.e., Form ATS-N Amendments), also attach as Exhibit 3A a redline document to indicate additions to or deletions from any amended Item. Items in which there is no change do not need to be included within the Exhibit 3A.

<p>Item 1: Non-ATS Trading Centers</p>	<p>Does the broker-dealer operator, or any of its affiliates, operate or control any non-ATS trading center(s) that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent (“non-ATS trading centers”)?</p> <p>If Yes:</p> <ul style="list-style-type: none"> a) Identify the non-ATS trading center(s); and b) Describe any interaction or coordination between the non-ATS trading center(s) identified in Item 1(a) and the NMS Stock ATS, including: <ul style="list-style-type: none"> i. Circumstances under which subscriber orders or other trading interest (such as quotes, indications of interest (“IOI”), conditional orders or messages (hereinafter collectively referred to as “trading interest”)) sent to the NMS Stock ATS are displayed or otherwise made known to the non-ATS trading center(s) identified in Item 1(a) before entering the NMS Stock ATS; ii. Circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates may execute, in whole or in part, in the non-ATS trading center(s) identified in Item 1(a) before entering the NMS Stock ATS; and iii. Circumstances under which subscriber orders or other trading interest are removed from the NMS Stock ATS and sent to the non-ATS trading center(s) identified in Item 1(a). 	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
<p>Item 2: Multiple NMS Stock ATS Operations</p>	<p>Does the broker-dealer operator, or any of its affiliates, operate one or more NMS Stock ATSS other than the NMS Stock ATS named on this Form ATS-N?</p> <p>If Yes:</p> <ul style="list-style-type: none"> a) Identify the NMS Stock ATS(s) and provide the MPID(s); and b) Describe any interaction or coordination between each NMS Stock ATS(s) identified in Item 2(a) and the NMS Stock ATS named on this Form ATS-N including: <ul style="list-style-type: none"> i. The circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates to be sent to the NMS Stock ATS named on this Form ATS-N may be sent to an NMS Stock ATS identified in Item 2(a); 	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>

	<p>ii. The circumstances under which subscriber orders or other trading interest to be sent to the NMS Stock ATS named on this Form ATS-N are displayed or otherwise made known in an NMS Stock ATS identified in Item 2(a); and</p> <p>iii. The circumstances under which subscriber orders or other trading interest received by the NMS Stock ATS named on this Form ATS-N may be removed and sent to the NMS Stock ATS(s) identified in Item 2(a).</p>	
<p>Item 3: Products or Services Offered to Subscribers</p>	<p>Does the broker-dealer operator, or any of its affiliates, offer subscribers any products or services used in connection with trading on the NMS Stock ATS (e.g., algorithmic trading products, market data feeds)?</p> <p>If Yes:</p> <p>a) Describe the products or services, and identify the types of subscribers (e.g., retail, institutional, professional) to which such services or products are offered; and</p> <p>b) If the terms and conditions of the services or products are not the same for all subscribers, describe any differences.</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
<p>Item 4: Arrangements with Unaffiliated Trading Centers</p>	<p>Does the broker-dealer operator, or any of its affiliates, have any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person(s), that operates a trading center regarding access to the NMS Stock ATS, including preferential routing arrangements?</p> <p>If Yes:</p> <p>a) Identify the person(s) and the trading center(s); and</p> <p>b) Describe the terms of the arrangement(s).</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>

<p>Item 5: Trading Activities on the NMS Stock ATS</p>	<p>Does the broker-dealer operator, or any of its affiliates, enter orders or other trading interest on the NMS Stock ATS?</p> <p>If Yes:</p> <ul style="list-style-type: none"> a) Identify each affiliate and business unit of the broker-dealer operator that may enter orders or other trading interest on the NMS Stock ATS; b) Describe the circumstances and capacity (e.g., proprietary or agency) in which each affiliate and business unit identified in Item 5(a) enters orders or other trading interest on the NMS Stock ATS; c) Describe the manner in which by which each affiliate or business unit identified in Item 5(a) enters orders or other trading interest on the NMS Stock ATS (e.g., directly through a Financial Information Exchange (“FIX”) connection to the NMS Stock ATS, or indirectly, by way of the broker-dealer operator’s SOR (or similar functionality), algorithm, intermediate application, or sales desk); and d) Describe any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates on the NMS Stock ATS. 	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
<p>Item 6: Smart Order Router (“SOR”) (or Similar Functionality) or Algorithms</p>	<p>Does the broker-dealer operator, or any of its affiliates, use a SOR(s) (or similar functionality), an algorithm(s), or both to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS?</p> <p>If Yes:</p> <ul style="list-style-type: none"> a) Identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR(s) (or similar functionality) and algorithm(s), if other than the broker-dealer operator; b) Describe the interaction or coordination between the SOR(s) (or similar functionality) or algorithm(s) identified in Item 6(a) and the NMS Stock ATS, including any information or messages about orders or other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person. 	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>

<p>Item 7: Shared Employees of the NMS Stock ATS</p>	<p>Does any employee of the broker-dealer operator that services the operations of the NMS Stock ATS also service any other business unit(s) or any affiliate(s) of the broker-dealer operator (“shared employee”)?</p> <p>If Yes:</p> <ul style="list-style-type: none"> a) Identify the business unit(s) and/or the affiliate(s) of the broker-dealer operator to which the shared employee(s) provides services and identify the position(s) or title(s) that the shared employee(s) holds in the business unit(s) and/or affiliate(s) of the broker-dealer operator; and b) Describe the roles and responsibilities of the shared employee(s) at the NMS Stock ATS and the business unit(s) and/or affiliate(s) of the broker-dealer operator. 	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
<p>Item 8: Service Providers to the NMS Stock ATS</p>	<p>Is any operation, service, or function of the NMS Stock ATS performed by any person(s) other than the broker-dealer operator of the NMS Stock ATS?</p> <p>If Yes:</p> <ul style="list-style-type: none"> a) Identify the person(s) (in the case of a natural person, identify only the person’s position or title) performing the operation, service, or function and note whether this service provider(s) is an affiliate of the broker-dealer, if applicable; b) Describe the operation, service, or function that the person(s) identified in Item 8(a) provides and describe the role and responsibilities of that person(s); and c) State whether or not the person(s) identified in Item 8(a), or any of its affiliates, may enter orders or other trading interest on the NMS Stock ATS, and, if so, describe the circumstances and means by which such orders or other trading interest are entered on the NMS Stock ATS. 	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>

<p>Item 9: Differences in Availability of Services, Functionalities or Procedures</p>	<p>Is there any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS?</p> <p>If Yes:</p> <ul style="list-style-type: none"> a) Identify the service, functionality, or procedure; and b) Describe the service, functionality, or procedure that is available to the broker-dealer operator or its affiliates but is not available or does not apply to a subscriber(s) to the NMS Stock ATS. 	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
<p>Item 10: Confidential Treatment of Trading Information</p>	<p>Describe the written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS.</p> <p>Including:</p> <ul style="list-style-type: none"> a) Describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates); b) Identify the positions or titles of any persons that have access to confidential trading information; describe the confidential trading information to which the persons have access; and describe the circumstances under which the persons can access confidential trading information; c) Describe the written standards controlling employees of the NMS Stock ATS that trade for employees' accounts; and d) Describe the written oversight procedures to ensure that the safeguards and procedures described above are implemented and followed. 	

Part IV. The NMS Stock ATS Manner of Operations

- Respond to the questions below. Attach responses to each Item to Part IV as Exhibit 4 with the information required for each disclosure. Label each Item appropriately and organize responses according to Item number. For any Item or subpart of an Item that is inapplicable, state as such.
- For filings made pursuant to Rule 304(a)(2)(i) (i.e., Form ATS-N Amendments), also attach as Exhibit 4A a redline document to indicate additions to or deletions from any Item which is being amended. Items in which there is no change do not need to be included within the Exhibit 4A

<p>Item 1: Subscribers</p>	<p>a) <i>Eligibility</i>: Describe any eligibility requirements to gain access to the services of the NMS Stock ATS. If the eligibility requirements are not the same for all subscribers and persons, describe any differences.</p> <p>b) <i>Terms and Conditions of Use</i>: Describe the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on the NMS Stock ATS. State whether these contractual agreements are written. If the terms or conditions of any contractual agreements are not the same for all subscribers and persons, describe any differences.</p> <p>c) <i>Types of Subscribers</i>: Describe the types of subscribers and other persons that use the services of the NMS Stock ATS (e.g., institutional investors, retail investors, broker-dealers, proprietary trading firms). State whether the NMS Stock ATS accepts non-broker-dealers as subscribers to the ATS. Describe any criteria for distinguishing among types of subscribers, classes of subscribers, or other persons.</p> <p>d) <i>Liquidity Providers</i>: Describe any formal or informal arrangement the NMS Stock ATS has with a subscriber(s) or person(s) to provide liquidity to the NMS Stock ATS (e.g., undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). Describe the terms and conditions of each arrangement and identify any liquidity providers that are affiliates of the broker-dealer operator.</p> <p>e) <i>Limitation and Denial of Services</i>: Describe the circumstances by which access to the NMS Stock ATS for a subscriber or other person may be limited or denied, and describe any procedures or standards that are used to determine such action. If the circumstances, procedures, or standards are not applicable to all subscribers and persons, describe any differences.</p>
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<p>Item 2: Hours of Operations</p>	<p>a) <i>Hours</i>: Provide the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered on the NMS Stock ATS and the time when pre-opening or after-hours trading occur.</p> <p>b) <i>Application</i>: If the times when orders or other trading interest are entered on the NMS Stock ATS are not the same for all subscribers and persons, describe any differences.</p>
<p>Item 3: Types of Orders</p>	<p>a) <i>Order Types and Modifiers</i>: Describe any types of orders that are entered on the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS, including:</p> <ul style="list-style-type: none"> i. priority for each order type, including the order type's priority upon order entry and any subsequent change to priority (if applicable); whether the order type can receive a new time stamp; the order type's priority vis-à-vis other orders on the book due to changes in the NBBO or other reference price; and any instance in which the order type could lose execution priority to a later arriving order at the same price; ii. conditions for each order type, including any price conditions, including how the order type is ranked and how price conditions affect the rank and price at which it can be executed; conditions on the display or non-display of an order; or conditions on executability and routability; iii. order types designed not to remove liquidity (e.g., post-only orders), including what occurs when such order is marketable against trading interest on the NMS Stock ATS when received; iv. order types that adjust their price as changes to the order book occur (e.g., price sliding orders or pegged orders) or have a discretionary range, including an order's rank and price upon order entry and whether such prices or rank may change based on the NBBO or other market conditions when using such order type; when the order type is executable and at what price the execution would occur; whether the price at which the order type can be executed ever changes; and if the order type can operate in different ways, the default operation of the order type; v. the time-in-force instructions that can be used or not used with each order type; vi. the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of an order type across those forms of connectivity; vii. whether an order type is eligible for routing to other trading centers, including, if the order type is routable, whether it can be used with any routing services offered; and viii. the circumstances under which order types may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS.

	<p>b) <i>Application</i>: If the availability of order types and their terms and conditions are not the same for all subscribers and persons, describe any differences.</p> <p>c) <i>Order Size Requirements and Odd-Lot Orders</i>: Describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. If the requirements and handling procedures for minimum order sizes or, odd lot orders, or mixed lot orders are not the same for all subscribers and persons, describe any differences.</p> <p>d) <i>Indications of Interest (“IOI”) and Conditional Orders</i>: Describe any messages sent to or received by the NMS Stock ATS indicating trading interest (e.g., IOIs, actionable IOIs, or conditional orders), including the information contained in the message, the means under which messages are transmitted, the circumstances in which messages are transmitted (e.g., automatically by the NMS Stock ATS, or upon the subscriber’s request), and the circumstances in which they may result in an execution on the NMS Stock ATS. If the terms and conditions regarding these messages, indications of interests, and conditional orders are not the same for all subscribers and persons, describe any differences.</p>
<p>Item 4: Connectivity, Order Entry, and Co-location</p>	<p>a) <i>Connectivity and Order Entry</i>: Describe the means by which subscribers or other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS (e.g., directly, through a Financial Information eXchange (“FIX”) connection to the ATS, or indirectly, through the broker-dealer operator’s SOR, or any intermediate functionality, algorithm, or sales desk). If the terms and conditions for connecting and entering orders or other trading interest on the NMS Stock ATS are not the same for all subscribers and persons, describe any differences.</p> <p>b) <i>Co-Location</i>: Describe any co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS. Describe the terms and conditions of co-location services. If the terms and conditions of the co-location services are not the same for all subscribers and persons, describe any differences.</p>
<p>Item 5: Segmentation of Order Flow and Notice About Segmentation</p>	<p>a) <i>Categories</i>: Describe any segmentation of orders or other trading interest on the NMS Stock ATS (e.g., classification by type of participant, source, nature of trading activity) and describe the segmentation categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. If the segmented categories, the criteria used to segment these categories, and any procedures for determining, evaluating or changing segmented categories are not the same for all subscribers and persons, describe any differences.</p>

	<p>b) <i>Notice about Segmentation</i>: State whether the NMS Stock ATS notifies subscribers or persons about the segmentation category that a subscriber or a person is assigned. Describe any notice provided to subscribers or persons about the segmentation category that they are assigned and the segmentation identified in 5(a), including the content of any notice and the means by which any notice is communicated. If the notice is not the same for all subscribers and persons, describe any differences.</p> <p>c) <i>Order Preferencing</i>: Describe any means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS (e.g., designating an order or trading interest to be executed against a specific subscriber) and how such designations affect order priority and interaction.</p>
<p>Item 6: Display of Order and Trading Interest</p>	<p>a) <i>Display</i>: Describe any means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed. If the display of orders or other trading interest is not the same for all subscribers and persons, describe any differences.</p> <p>b) <i>Recipients</i>: Identify the subscriber(s) or person(s) (in the case of a natural person, identify only the person's position or title) to whom the orders and trading interest are displayed or otherwise made known.</p>
<p>Item 7: Trading Services</p>	<p>a) <i>Matching Methodology</i>: Describe the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, including the structure of the market (e.g., crossing system, auction market, limit order matching book). If the use of these means or facilities are not the same for all subscribers and persons, describe any differences.</p> <p>b) <i>Order Interaction Rules</i>: Describe the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. If the rules and procedures are not the same for all subscribers and persons, describe any differences.</p> <p>c) <i>Other Trading Procedures</i>: Describe any trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality. If the trading procedures are not the same for all subscribers and persons, describe any differences.</p>

<p>Item 8: Suspension of Trading, System Disruption or Malfunction</p>	<p>a) <i>Suspension of Trading, System Disruption or Malfunction:</i> Describe any procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or system malfunction. If the procedures governing trading during a suspension or system disruption or malfunction are not the same for all subscribers and persons, describe any differences.</p>
<p>Item 9: Opening, Reopening, and Closing Processes, and After Hours Procedures</p>	<p>a) <i>Opening and Reopening Processes:</i> Describe any opening and reopening processes, including how orders or other trading interest are matched and executed prior to the start of regular trading hours or following a stoppage of trading in a security during regular trading hours and how unexecuted orders or other trading interest are handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours. Describe any differences between pre-opening executions, executions following a stoppage of trading in a security during regular trading hours, and executions during regular trading hours.</p> <p>b) <i>Closing Process:</i> Describe any closing process, including how unexecuted orders or other trading interest are handled at the close of regular trading. Describe any differences between the closing executions and executions during regular trading hours.</p> <p>c) <i>After-Hours Trading:</i> Describe any after-hours trading procedures, including how orders and trading interest are matched and executed during after-hours trading. Describe any differences between the after-hours executions and executions during regular trading hours.</p>
<p>Item 10: Outbound Routing</p>	<p>a) <i>Routing:</i> Describe the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, including whether outbound routing occurs at the affirmative instruction of the subscriber or at the discretion of the broker-dealer operator, and the means by which routing is performed (e.g., a third party or order management system or a SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates).</p> <p>b) <i>Application:</i> If the means by which orders or other trading interest are routed from the NMS Stock ATS are not the same for all subscribers and persons, describe any differences.</p>
<p>Item 11: Market Data</p>	<p>a) <i>Market Data:</i> Describe the market data used by the NMS Stock ATS and the source of that market data (e.g., market data feeds disseminated by the consolidated data processor (“SIP”) and market data feeds disseminated directly by an exchange or other trading center or third-party vendor of market data).</p>

	<p>b) <i>Usage</i>: Describe the specific purpose for which market data is used by the NMS Stock ATS, including how market data is used to determine the NBBO, protected quotes, pricing of orders and executions, and routing destinations.</p>
<p>Item 12: Fees</p>	<p>a) <i>Fees</i>: Describe any fees, rebates, or other charges of the NMS Stock ATS (e.g., connectivity fees, subscription fees, execution fees, volume discounts) and provide the range (e.g., high and low) of such fees, rebates, or other charges.</p> <p>b) <i>Application</i>: If the fees, rebates, or other charges of the NMS Stock ATS are not the same for all subscribers and persons, describe any differences.</p>
<p>Item 13: Trade Reporting, Clearance and Settlement</p>	<p>a) <i>Trade Reporting</i>: Describe any arrangements or procedures for reporting transactions on the NMS Stock ATS. If the trade reporting procedures are not the same for all subscribers and persons, describe any differences.</p> <p>b) <i>Clearance and Settlement</i>: Describe any arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS (e.g., whether the NMS Stock ATS becomes a counterparty, whether it submits trades to a registered clearing agency, or whether it requires subscribers to have arrangements with a clearing firm). If the clearance and settlement procedures are not the same for all subscribers and persons, describe any differences.</p>
<p>Item 14: Order Display and Execution Access</p>	<p>If the NMS Stock ATS displays orders in an NMS stock to any person other than employees of the NMS Stock ATS and executed 5% or more of the average daily trading volume in that NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months:</p> <p>a) Provide the ticker symbol for each NMS stock displayed for each of the last 6 calendar months;</p> <p>b) Describe the manner in which the NMS Stock ATS displays such orders on a national securities exchange or through a national securities association; and</p> <p>c) Describe how the NMS Stock ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that exchange or association.</p>
<p>Item 15: Fair Access</p>	<p>If the NMS Stock ATS executed 5% or more of the average daily trading volume in an NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months:</p> <p>a) Provide the ticker symbol for each NMS stock for each of the last 6 calendar months; and</p> <p>b) Describe the written standards for granting access to trading on the NMS Stock ATS.</p>

<p>Item 16: Market Quality Statistics Published or Provided to Subscribers</p>	<p>If the NMS Stock ATS publishes or otherwise provides to one or more subscribers aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures under 17 CFR § 242.605:</p> <ul style="list-style-type: none"> a) List and describe the categories or metrics of aggregate platform-wide order flow and execution statistics published or provided; b) Describe any criteria or methodology used to calculate aggregate platform-wide order flow and execution statistics; and c) Attach as Exhibit 5 the most recent disclosure of aggregate platform-wide order flow and execution statistics published or provided to one or more subscribers for each category or metric as of the end of the calendar quarter.
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Part V: Contact Information, Signature Block, and Consent to Service

Provide the following information of the person at {the name of the NMS Stock ATS} prepared to respond to questions for this submission:

First Name:

Last Name:

Title:

E-Mail:

Telephone:

The {name of the NMS Stock ATS} consents that service of any civil action brought by, or notice of any proceeding before, the SEC or a self-regulatory organizations in connection with the alternative trading system's activities may be given by registered or certified mail or email to the contact employee at the primary street address or email address, or mailing address if different, given in Part I above. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and {name of NMS Stock ATS} represents that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true, and complete.

Date {auto fill}

{Name of NMS Stock ATS}

By: _____

Title _____

(Digital sign)

FORM ATS-N INSTRUCTIONS**A. GENERAL INSTRUCTIONS:**

• Form ATS-N is a public reporting form that is designed to provide the public and the Commission with information about the operations of the NMS Stock ATS and the activities of its broker-dealer operator and its affiliates. Form ATS-N is to be used by an NMS Stock ATS to qualify for the exemption from the definition of an “exchange” pursuant to Exchange Act Rule 3a1-1(a)(2), for which no other form is authorized or prescribed.

• An NMS Stock ATS must respond to each item, as applicable, in detail and disclose information that is accurate, current, and complete. An NMS Stock ATS must provide all the information required by the form, including the exhibits, and must present the information in a clear and comprehensible manner. A filing that is incomplete or similarly deficient may be returned to the NMS Stock ATS. Any filing so returned shall for all purposes be deemed not to have been filed with the Commission. *See also* Rule 0-3 under the Exchange Act (17 CFR 240.0-3).

• A separate Form ATS-N is required for each NMS Stock ATS operated by the same broker-dealer operator.

B. WHEN TO FILE FORM ATS-N

• Form ATS-N: Prior to commencing operations, an NMS Stock ATS shall file a Form ATS-N and the Form ATS-N must be declared effective by the Commission. If the NMS Stock ATS is operating pursuant to a previously filed initial operation report on Form ATS as of the effective date of proposed Rule 304, such NMS Stock ATS shall file with the Commission a Form ATS-N no later than 120 calendar days after such effective date.

• Form ATS-N Amendment: An NMS Stock ATS shall amend an effective Form ATS-N: (1) at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N; (2) within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS-N Amendment; or (3) promptly, to correct information in any previous disclosure on Form ATS-N, after discovery that any information filed under paragraphs (a)(1)(i) or (a)(2)(i)(A) or (B) of proposed Rule 304 was inaccurate or incomplete when filed.

• Notice of Cessation: An NMS Stock ATS shall notice its cessation of operations on Form ATS-N at least 10 business days before the date the NMS Stock ATS will cease to operate as an NMS Stock ATS.

• Withdrawal: If an NMS Stock ATS determines to withdraw a Form ATS-N, it must select the appropriate check box and provide the correct file number to withdraw the submission.

C. HOW TO FILE A FORM ATS-N

• Any report required to be submitted pursuant to Rule 304 of Regulation ATS shall be filed in an electronic format through the electronic form filing system (“EFFS”), a secure Web site operated by the Securities and Exchange Commission (“Commission”). Documents filed through the EFFS system must be in a text-searchable format without the use of optical character recognition.

• A duly authorized individual of the NMS Stock ATS shall electronically sign the completed Form ATS-N. In addition, a duly authorized individual of the NMS Stock ATS shall manually sign one copy of the completed Form ATS-N, and the manually signed signature page shall be preserved pursuant to the requirements of proposed Rule 303 of Regulation ATS.

D. CONTACT INFORMATION

• The individual listed on the NMS Stock ATS’s response to Part V of Form ATS-N as the contact representative must be authorized to receive all incoming communications and be responsible for disseminating that information, as necessary, within the NMS Stock ATS.

E. RECORDKEEPING

• A copy of this Form ATS-N must be retained by the NMS Stock ATS and made available for inspection upon request of the SEC.

F. PAPERWORK REDUCTION ACT DISCLOSURE

• Form ATS-N requires an NMS Stock ATS to provide the Commission with certain information regarding: (1) the operation of the NMS Stock ATS and the activities of the broker-dealer operator and its affiliates; (2) material and other changes to the operation of the NMS Stock ATS; and (3) notice upon ceasing operation of the alternative trading system. Form ATS-N is intended to provide the public with information about the operations of the NMS Stock ATS and the activities of the broker-dealer operator and its affiliates so that they may make an informed decision as to whether to participate on

the NMS Stock ATS. In addition, the Form ATS-N is intended to provide the Commission with information to permit it to carry out its market oversight and investor protection functions.

• The information provided on Form ATS-N will help enable the Commission to determine whether an NMS Stock ATS is in compliance with the federal securities laws and the rules or regulations thereunder, including Regulation ATS. An NMS Stock ATS must: (1) file Form ATS-N prior to commencing operations; (2) file a Form ATS-N Amendment at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N; (3) file a Form ATS-N Amendment within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission on Form ATS-N; (4) file a Form ATS-N Amendment promptly to correct information in any previous disclosure on a Form ATS-N or a Form ATS-N Amendment after discovery that any information filed was inaccurate or incomplete when filed; and (5) notice its cessation of operations at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS.

• This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. 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 control number. The Commission estimates that that an NMS Stock ATS will spend approximately 141.3 hours completing the Form ATS-N, approximately 9.5 hours preparing each amendment to Form ATS-N, and approximately 2 hours preparing a notice of cessation on Form ATS-N. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

G. EXPLANATION OF TERMS

The following terms are defined for purposes of Form ATS-N.

• **AFFILIATE:** Shall mean, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person.

• **ALTERNATIVE TRADING SYSTEM:** Shall mean any organization,

association, person, group of persons, or system: (1) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act; and (2) that does not (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or (ii) discipline subscribers other than by exclusion from trading. 17 CFR 242.300(a).

• **BROKER-DEALER OPERATOR:** Shall mean the registered broker-dealer of the NMS Stock ATS pursuant to 17 CFR 242.301(b)(1).

• **CONTROL:** Shall mean the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through ownership of securities, by contract, or otherwise. A person is presumed to control the broker-dealer of an alternative trading system if that person: (1) is a director, general partner, or officer exercising executive responsibility (or having

similar status or performing similar functions); (2) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the broker-dealer of the alternative trading system.

• **NMS SECURITY:** Shall mean any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. 17 CFR 242.600(b)(46).

• **NMS STOCK:** Shall mean any NMS security other than an option. 17 CFR 242.600(b)(47).

• **NMS STOCK ATS:** Shall mean an alternative trading system, as defined in Rule 300(a) under the Exchange Act, that facilitates transactions in NMS stocks, as defined in Rule 300(g) under the Exchange Act. [Proposed] 17 CFR 242.300(k).

• **ORDER:** Shall mean any firm indication of a willingness to buy or sell a security as either principal or agent, including any bid or offer quotation, market order, limit order or other priced order. 17 CFR 242.300(e).

• **PERSON:** Shall mean a natural person or a company. 15 U.S.C. 80a-2(a)(28).

• **SUBSCRIBER:** Shall mean any person that has entered into a contractual agreement with an alternative trading system to access an alternative trading system for the purpose of effecting transactions in securities, or for submitting, disseminating or displaying orders on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or association. 17 CFR 242.300(b).

By the Commission.

Dated: November 18, 2015.

Brent J. Fields,

Secretary.

[FR Doc. 2015-29890 Filed 12-24-15; 8:45 am]

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