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DEPARTMENT OF LABOR

2 CFR Part 2900

RIN 1205–AB71

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards Technical Amendments

AGENCY: Department of Labor.

ACTION: Final rule; technical amendment.

SUMMARY: This final rule implements technical amendments to the Department of Labor's (Department or DOL) adoption of the Office of Management and Budget (OMB) Guidance in the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards to Non-Federal Entities.* The Department is making technical amendments in this final rule; all regulatory language included here is consistent with either the policies in the Uniform Guidance or the Department's existing policies and practices.

DATES: *Effective Date:* December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Adele Gagliardi, Administrator, Office of Policy Development and Research (OPDR), at 202–693–3700 (voice); or 202–693–2766 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

The Preamble to this rule is organized as follows:

I. Background

The Department implements, in this final rule, technical amendments to 2 CFR 2900 which supplemented the final guidance *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* published by the Office of Management and Budget (OMB) on December 26, 2013, (Uniform Guidance, available at 78 FR 78589). The Department published 2 CFR part 2900 as part of OMB's joint interim final rule at 2 CFR part 200 (Interim Final Rule, available at 79 FR 75867) which implemented in regulations the final guidance published earlier by OMB. 2 CFR part 2900 has Department specific policies and procedures for financial assistance administration which were approved by OMB and supplements the information in 2 CFR part 200.

The Uniform Guidance followed on a notice of proposed guidance issued February 1, 2013, (available at 78 FR 7282), and an advanced notice of proposed guidance issued February 28, 2012, (available at 77 FR 11778). The final guidance incorporated feedback received from the public in response to those earlier issuances. Additional supporting resources are available from the Council on Financial Assistance Reform at *www.cfo.gov/COFAR.*

The Uniform Guidance delivered on two presidential directives; Executive Order 13520 on Reducing Improper Payments (74 FR 62201; November 15, 2009), and February 28, 2011, Presidential Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments, (Daily Comp. Pres. Docs.; *http://www.gpo.gov/fdsys/pkg/DCPD-201100123/pdf/DCPD-201100123.pdf*). It reflected more than two years of work by the Council on Financial Assistance Reform to improve the efficiency and effectiveness of Federal financial assistance. For a detailed discussion of the reform and its impacts, please see the **Federal Register** notice for the issuance of the final guidance (78 FR 78589).

The Department provided additional language in 2 CFR part 2900 beyond that included in 2 CFR part 200, consistent with the Department's existing policy, to provide more detail with respect to how the Department intended to implement the policy, where appropriate. The Department is not making any new policy with the technical amendments in this final rule; all regulatory language included here is consistent with either the policies in the Uniform Guidance or the Department's existing policies and practices as explained in 2 CFR part 2900.

This final rule incorporates minor changes to 2 CFR part 2900 to add citations or correct citation errors in §§ 2900.1, 2900.5, 2900.7, and 2900.13. In addition, non-substantive deletions and additions of a word or phrase were made to §§ 2900.3, 2900.13, 2900.15, 2900.16, and 2900.21 to clarify the language in the section. Finally, typographical errors were corrected in §§ 2900.5 and 2900.20.

Accordingly, the regulations in 2 CFR part 2900 are amended to include updated information.

II. Administrative Information

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR 1320 Appendix A.1) (PRA), the Department reviewed this final rule and determined that there are no new collections of information contained within the rule.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency that is issuing a final rule to provide a final regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. This final rule implements technical amendments to 2 CFR 2 part 900 which supplemented OMB final guidance issued on December 26, 2013. Therefore, this final rule and will not have a significant economic impact beyond the impact of the December 2013 guidance.

Executive Order 12866 Determination

Pursuant to Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) designated the joint interim final rule at 2 CFR 200, which included Department specific policies and procedures for financial assistance administration at 2 CFR part 2900, published on December 19, 2014, (Interim Final Rule, available at 79 FR 75867) not to be significant. This final rule implements technical amendments to 2 CFR part 2900 and introduces no new policy issues, economic impacts, or new burdens; therefore, pursuant to Executive Order 12866, this action is not a significant regulatory action and was not submitted to OMB for review.

Administrative Procedure Act (5 U.S.C. 553) Waiver of Proposed Rulemaking and Waiver of Delayed Effective Date

(a) Waiver of Proposed Rulemaking—In General

Under the Administrative Procedure Act (APA), the Department generally is required to publish a notice of proposed rulemaking and provide the public with an opportunity to comment on proposed regulations prior to establishing a final rule. However, as noted earlier in the background preamble, OMB offered the public two opportunities to comment on the Uniform Guidance, first through an advanced notice of proposed guidance and, second, through a notice of proposed guidance. OMB considered over 300 comments submitted in response to each of these notices. OMB has directed agencies to adopt the uniform guidance in part 200 without change, except to the extent that an agency can demonstrate that any conflicting agency requirements are required by statute or regulations, or consistent with longstanding practice and approved by OMB. As explained above, the Department published agency specific supplemental information that was approved by OMB in 2 CFR part 2900. This final rule only makes technical amendments to 2 CFR part 2900. Finally, OMB made clear that the requirements in 2 CFR part 200 (including the audit requirements in subpart F) and 2 CFR part 2900, will apply, starting on December 26, 2014, giving recipients of all types of financial assistance advance notice of when the regulations would become effective. Therefore, under 5 U.S.C. 553(b)(B), there is good cause for waiving proposed rulemaking as unnecessary.

(b) Waiver of Delayed Effective Date—In General

Generally, the Department is subject to the APA requirement to delay the effective date of its final regulations by 30 days after publication, as required under 5 U.S.C. 553(d), unless an exception under subsection (d) applies.

Under 5 U.S.C. 553(d), the Department may waive the delayed effective date requirement if it finds good cause and explains the basis for the waiver in the final rulemaking document or if the regulations grant or recognize an exemption or relieve a restriction. In the present case, there is good cause to waive the delayed effective date for three reasons.

First, OMB informed the public on December 26, 2013, that agencies would be required to adopt the Uniform Guidance and make it effective by December 26, 2014. The public had significant time to prepare for the promulgation of those interim final regulations.

Second, while those interim final regulations were based on a new, more effective method for establishing government-wide requirements, the substance of the regulations are, in most cases, virtually identical to the requirements that exist in current agency regulations. Finally, this final rule makes technical changes to the Department's agency-specific supplemental information at 2 CFR part 2900 that was made effective along with 2 CFR part 200 on December 27, 2014. Delaying the implementation of these technical amendments would cause errors that were discovered in 2 CFR part 2900 to be in effect for an additional 30 days causing unnecessary confusion to recipients of Federal financial assistance. Based on these considerations, the Department has determined that there is good cause to waive the delayed effective date for these final regulations.

Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) (2 U.S.C. 1532) requires that covered agencies prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OMB has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, the Department has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 13132 Determination

The Department has determined that this final rule does not have any Federalism implications, as required by Executive Order 13132.

Plain Language

The Department drafted this rule in plain language.

List of Subjects in 2 CFR Part 2900

Accounting, Administrative practice and procedure, Appeal procedures, Auditing, Audit requirements, Cost principles, Grant programs, Grant programs—labor, Grants administration, Labor, Reporting and recordkeeping requirements.

Under the authority of the 5 U.S.C. 301, the Department of Labor amends 2 CFR part 2900 as follows:

PART 2900—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 2900 continues to read as follows:

Authority: 5 U.S.C. 301; 2 CFR 200.

■ 2. Revise § 2900.1 to read as follows:

§ 2900.1 Budget.

In the DOL, approval of the budget as awarded does not constitute prior approval of those items requiring prior approval, including those items the Federal Awarding agency specifies as requiring prior approval. See § 200.407 and § 2900.16 for more information about prior approval. (See 2 CFR 200.8)

■ 3. Amend § 2900.3 by revising the introductory text to read as follows:

§ 2900.3 Questioned cost.

In the DOL, in addition to the guidance contained in 2 CFR 200.84, a *Questioned cost* means a cost that is questioned by an auditor, Federal Project Officer, Grant Officer, or other authorized Awarding agency representative because of an audit or monitoring finding:

* * * * *

■ 4. Revise § 2900.5 to read as follows:

§ 2900.5 Federal awarding agency review of merit of proposals.

In the DOL, audits and monitoring reports containing findings, issues of non-compliance or questioned costs are in addition to reports and findings from audits performed under Subpart F—Audit Requirements of 2 CFR 200 or the reports and findings of any other available audits. (See 2 CFR 200.205(c)(4))

■ 5. Revise § 2900.7 to read as follows:

§ 2900.7 Payment.

In addition to the guidance set forth in 2 CFR 200.305(b), for Federal awards from the Department of Labor, the non-Federal entity should liquidate existing advances before it requests additional advances.

■ 6. Revise § 2900.13 to read as follows:

§ 2900.13 Intangible property.

In addition to the guidance set forth in 2 CFR 200.315(d), the Department of Labor requires intellectual property developed under a competitive Federal award process to be licensed under a Creative Commons Attribution license. This license allows subsequent users to copy, distribute, transmit and adapt the copyrighted work and requires such users to attribute the work in the manner specified by the recipient.

■ 7. Revise § 2900.15 to read as follows:

§ 2900.15 Closeout.

In addition to the guidance set forth in 2 CFR 200.343(b), for Federal awards from the Department of Labor, the non-Federal entity must liquidate all obligations and/or accrued expenditures incurred under the Federal award. For non-Federal entities reporting on an accrual basis and operating on an expenditure period, unless otherwise noted in the grant agreement, the only liquidation that can occur during closeout is the liquidation of accrued expenditures (NOT obligations) for goods and/or services received during the grant period.

■ 8. Revise § 2900.16 to read as follows:

§ 2900.16 Prior written approval (prior approval).

In addition to the guidance set forth in 2 CFR 200.407, for Federal awards from the Department of Labor, the non-Federal entity must request prior written approval which should include the timeframe or scope of the agreement and be submitted not less than 30 days before the requested action is to occur. Unless otherwise noted in the grant agreement, the Grant Officer is the only official with the authority to provide prior written approval (prior approval). Items included in the statement of work or budget as awarded does not constitute prior approval.

■ 9. Amend § 2900.20 by revising the introductory text to read as follows.

§ 2900.20 Federal Agency Audit Responsibilities.

In the DOL, in addition to 2 CFR 200.513, the department employs a collaborative resolution process with non-federal entities.

* * * * *

■ 10. Revise § 2900.21 to read as follows:

§ 2900.21 Management decision.

In the DOL, ordinarily, a management decision is issued within six months of receipt of an audit from the audit liaison of the Office of the Inspector General and is extended an additional six months when the audit contains a finding involving a subrecipient of the pass-through entity being audited. The pass-through entity responsible for issuing a management decision must do so within twelve months of acceptance of the audit report by the FAC. The auditee must initiate and proceed with corrective action as rapidly as possible and should begin corrective action no later than upon receipt of the audit report. (See 2 CFR 200.521(d))

Signed at Washington, DC, this 23rd day of December, 2015.

Thomas E. Perez,

Secretary, U.S. Department of Labor.

[FR Doc. 2015–32725 Filed 12–29–15; 8:45 am]

BILLING CODE 4510–FM–P

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[Docket No. EERE–2014–BT–TP–0055]

RIN 1904–AD41

Energy Conservation Program: Test Procedures for Commercial Prerinse Spray Valves

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

ACTION: Final rule.

SUMMARY: On June 23, 2015, the U.S. Department of Energy (DOE) issued a notice of proposed rulemaking (NOPR) to amend the test procedure for commercial prerinse spray valves. That proposed rulemaking serves as the basis for this final rule. Specifically, this final rule incorporates by reference relevant portions of the latest version of the industry testing standard from the American Society for Testing and Materials (ASTM) Standard F2324–13, ''Standard Test Method for Prerinse Spray Valves,'' including the procedure for measuring spray force. This final rule also adopts a revised definition of ''commercial prerinse spray valve,'' clarifies the test procedure for products with multiple spray settings, establishes rounding requirements for flow rate and spray force measurements, and removes irrelevant portions of statistical methods for certification, compliance, and enforcement.

DATES: The effective date of this rule is January 29, 2016. The final rule changes will be mandatory for representations starting June 27, 2016. The incorporation by reference of certain material listed in this rule is approved by the Director of the Federal Register as of January 29, 2016.

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

A link to the docket Web page can be found at DOE's rulemaking Web page at: *https://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx?ruleid=119.* This Web page will contain a link to the docket for this document on the *www.regulations.gov* site. The *www.regulations.gov* Web page will contain simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. James Raba, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–8654. Email: *commercial_pre-rinse_spray_valves@ee.doe.gov.*

Ms. Johanna Jochum, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–6307. Email: *Johanna.Jochum@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: This final rule incorporates by reference into part 431 the following industry standard: ASTM Standard F2324–13, (''ASTM F2324–13''), Standard Test Method for Prerinse Spray Valves, approved June 1, 2013.

Copies of ASTM Standard F2324–13 can be obtained from ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, or by going to *http://www.astm.org/Standard/standards-and-publications.html.*

See section IV.M. for additional information about this standard.

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I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975 (EPCA),[1] sets forth a variety of provisions designed to improve energy efficiency. Part B of title III[2] establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles,'' which includes commercial prerinse spray valves (CPSVs). EPCA provides definitions for commercial prerinse spray valves under 42 U.S.C. 6291(33), the test procedure under 42 U.S.C. 6293(b)(14), and energy conservation standards for flow rate under 42 U.S.C. 6295(dd).[3]

[1] All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015).

[2] For editorial reasons, Part B was codified as Part A in the U.S. Code (42 U.S.C. 6291–6309, as codified).

[3] Because Congress included commercial prerinse spray valves in Part B of Title III of EPCA, the consumer product provisions of Part B (not the industrial equipment provisions of Part C) apply to commercial prerinse spray valves. However, because commercial prerinse spray valves are more commonly considered to be commercial equipment, as a matter of administrative convenience and to minimize confusion among interested parties, DOE adopted CPSV provisions into subpart O of 10 CFR part 431. 71 FR 71340, 71374 (Dec. 8, 2006). Part 431 contains DOE regulations for commercial and industrial equipment. The location of provisions within the CFR does not affect either their substance or applicable procedure, and DOE refers to commercial prerinse spray valves as either ''products'' or ''equipment.''

Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of a test procedure that manufacturers of covered products must use as the basis for (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) making representations about the efficiency of those products. Similarly, DOE must use the test procedure to determine whether the products comply with any relevant standards promulgated under EPCA.

EPCA sets forth the current maximum flow rate of not more than 1.6 gallons per minute for commercial prerinse spray valves. (42 U.S.C. 6295(dd)) EPCA also requires DOE to use the ASTM Standard F2324 as the basis for the test procedure for measuring flow rate. (42 U.S.C. 6293(b)(14))

In the December 8, 2006 final rule, DOE incorporated by reference ASTM Standard F2324–03 into regulatory text under section 431.263 of Title 10 of the Code of Federal Regulations, Part 431 (10 CFR part 431), and prescribed it as the uniform test method to measure flow rate of commercial prerinse spray valves under 10 CFR 431.264. 71 FR 71340, 71374. Later, on October 23, 2013, DOE published a final rule (October 2013 final rule) that incorporated by reference ASTM Standard F2324–03 (2009) for testing commercial prerinse spray valves, which updated the 2003 version to the 2009 version of the same test standard. 78 FR 62970, 62980.

Since the October 2013 final rule, ASTM has published a revised version of the F2324 test standard, ASTM F2324–13. In addition, DOE has initiated a rulemaking to consider amended water conservation standards for commercial prerinse spray valves (Docket No. EERE–2014–BT–STD–0027). DOE published a notice of proposed rulemaking (NOPR) for the test procedure on June 23, 2015, presenting DOE's proposals to amend the CPSV test procedure (80 FR 35874–5886) (hereafter, the ''2015 CPSV TP NOPR''). DOE held a public meeting related to this NOPR on July 28, 2015 (hereafter, the ''NOPR public meeting'').

A. General Test Procedure Rulemaking Process

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

In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1))

In this final rule, DOE amends the commercial prerinse spray valve test procedure to be based on the current industry standard, ASTM Standard F2324–13, ''Standard Test Method for Prerinse Spray Valves,'' which continues to measure water use based on a maximum flow rate. By incorporating the newest version of ASTM Standard F2324–13, DOE is adding testing requirements for spray force. In addition, DOE is also specifying provisions governing representations of commercial prerinse spray valves with multiple spray settings. In addition, DOE concludes that amendments adopted in this final rule do not change the measured energy and water use of commercial prerinse spray valves compared to the current test procedure. As such, all test procedure amendments adopted in this final rule are effective 30 days after publication in the **Federal Register** and required for representations regarding the water consumption of covered equipment 180 days after publication of this final rule in the **Federal Register**.

This final rule fulfills DOE's obligation to periodically review its test procedures under 42 U.S.C. 6293(b)(1)(A). DOE anticipates that its next evaluation of this test procedure will occur in a manner consistent with the timeline set out in this provision.

II. Summary of the Final Rule

In this final rule, DOE amends 10 CFR 431.264, ''Uniform test method for the measurement of flow rate for commercial prerinse spray valves,'' as follows:

- Modifies the definition of ''commercial prerinse spray valve,'' and adds a definition for ''spray force;''

• Incorporates by reference certain provisions (sections 6.1–6.9, 9.1–9.5.3.2, 10.1–10.2.5, 10.3.1–10.3.8, and 11.3.1) of the current revision to the applicable industry standard—ASTM Standard F2324–13, ''Standard Test Method for Prerinse Spray Valves''—pertaining to flow rate and spray force measurement;

• Adds clarification addressing minor inconsistencies between the proposed test procedure and ASTM Standard F2324–13, and sources of ambiguity within ASTM Standard F2324–13;

• Modifies the current test method for measuring flow rate to reference sections 10.1–10.2.5 and 11.3.1 of ASTM Standard F2324–13;

• Adds a test method for measuring spray force that references sections 10.3.1–10.3.8 of ASTM Standard F2324–13;

• Adds a requirement for measuring the flow rate and spray force of each spray setting for commercial prerinse spray valves with multiple spray settings;

• Modifies the rounding requirement for flow rate measurement and specifies the rounding requirement for spray force measurement; and

• Modifies the existing CPSV sampling requirements to remove the provisions related to determining represented values where consumers would favor higher values.

III. Discussion

The following sections describe DOE's amendments to the test procedure, including definitions, industry standards incorporated by reference, modifications to the test procedure, additional test measurements, rounding requirements, and certification and compliance requirements.

A. Definitions

In this final rule, DOE amends the definition of ''commercial prerinse spray valve'' and adds a definition for the term ''spray force.'' A detailed discussion of these terms follows.

1. Commercial Prerinse Spray Valve

EPCA currently defines a ''commercial prerinse spray valve'' as a handheld device designed and marketed for use with commercial dishwashing and ware washing equipment that sprays water on dishes, flatware, and other food service items for the purpose of removing food residue before cleaning the items. (42 U.S.C. 6291(33)(A), 10 CFR 431.262) EPCA allows DOE to modify the CPSV definition to include products (1) that are used extensively in conjunction with commercial dishwashing and ware washing equipment, (2) to which the application of standards would result in significant energy savings, and (3) to which the application of standards would not be likely to result in the unavailability of any covered product type currently available on the market. (42 U.S.C. 6291(33)(B)(i)) EPCA also allows DOE to modify the CPSV definition to exclude products (1) that are used for special food service applications, (2) that are unlikely to be widely used in conjunction with commercial dishwashing and ware washing equipment, and (3) to which the application of standards would not result in significant energy savings. (42 U.S.C. 6291(33)(B)(ii))

As described in the 2015 CPSV TP NOPR, DOE has observed the existence of products distributed in the U.S. with brochures describing them as ''prerinse spray'' or ''prerinse spray valve;'' these are often marketed (usually by third parties) to rinse dishes before washing, to pre-rinse items in a dish room in preparation for running them through a commercial dishwasher, or to be used with pre-rinse assemblies and/or as ware washing equipment. 80 FR 35874, 35876–77 (June 23, 2015). DOE has also observed products marketed as ''pull-down kitchen faucets'' or ''commercial style prerinse,'' which, generally speaking, are handheld devices that can be used for commercial dishwashing or ware washing regardless of installation location. Further, DOE has observed instances where products designed by the manufacturer for other specific applications are marketed on retailer's Web sites for commercial dishwashing and ware washing. In DOE's view, this illustrates that such products are also ''suitable for use'' as commercial prerinse spray valves and are marketed and used in commercial dishwashing and ware washing applications.

To ensure a level and fair playing field for all products serving commercial prerinse spray valve applications, all products that are used in such an application should be held to the same standard. As a result, in the 2015 CPSV TP NOPR, DOE proposed to modify the CPSV definition such that these categories of products would meet the definition of commercial prerinse spray valve and would be subject to the associated regulations. *Id.* Specifically, DOE stated that installation location is not a factor in determining whether a given model meets the definition of commercial prerinse spray valve. *Id.* Therefore, DOE proposed defining ''commercial prerinse spray valve'' as ''a handheld device . . . *suitable for use with* commercial dishwashing and ware washing equipment for the purpose of removing food residue before cleaning items.'' *Id.* at 35877.

Although DOE understands that manufacturers may market different categories of spray valves for various uses, such as cleaning floors or walls or filling glasses, DOE believes any such device that is suitable for use in conjunction with commercial dishwashing and ware washing equipment to spray water for the purpose of removing food residue should fall within the CPSV definition. Similarly, DOE believes products that are appropriate for removing food residue in dishwashing and ware washing applications should be subject to DOE standards and certification requirements, even if they are marketed without the term ''commercial dishwashing and ware washing equipment.'' Therefore, after reviewing the current CPSV definition and products currently being distributed in the market as appropriate for dishwashing and ware washing applications, DOE proposed to replace the phrase ''designed and marketed for use'' with the phrase ''suitable for use'' in the CPSV definition. 80 FR 35874, 35876–77 (June 23, 2015).

During the NOPR public meeting, T&S Brass stated that manufacturers can only control what they design, intend, or market their product for. Specifically, T&S Brass stated that manufacturers generally use the words ''designed'' or ''intended for'' when they qualify commercial prerinse spray valves. (T&S Brass, Public Meeting Transcript, No. 3 at p. 13) [4] T&S Brass provided the examples of a garden hose spray nozzle or pet grooming spray valves, which are identical in look and feel to commercial prerinse spray valves, but require much higher flow rates due to different factors, such as the sensitivity of the pet's skin when used in pet grooming. T&S Brass expressed concern that these other products could be interpreted as being suitable for washing dishes, despite the manufacturer's intent for product use. (T&S Brass, Public Meeting Transcript, No. 3 at pp. 14–16)

DOE also received written comments related to the term ''suitable'' in the proposed definition. Plumbing Manufacturers International (PMI) and Fisher Manufacturing Co. (Fisher) stated that the DOE proposed term ''suitable''

[4] A notation in the form ''T&S Brass, Public Meeting Transcript, No. 3 at pp. 14–16'' identifies a comment that DOE has received and has included in the docket of this rulemaking. This particular notation refers to a comment: (1) Submitted by T&S Brass; (2) as recorded in the public meeting transcript, which is document number 3 of the docket; and (3) on pages 14 through 16 of that document.

should be replaced with the phrase ''designed and marketed,'' as a manufacturer designs, develops, and markets a product with a specific end use in mind. (PMI, No. 4 at p. 1; Fisher, No. 5 at p. 1) PMI commented that the term ''suitable'' is ambiguous and could imply that a device be considered a commercial prerinse spray valve even though it may have not been designed or developed for that intended purpose. (PMI, No. 4 at p. 1) T&S Brass added that the term ''suitable'' subjects the definition to misrepresentation and that a product that is defined for use with commercial dishwashing and ware washing equipment is ''designed and marketed'' specifically for that application. (T&S Brass, No. 7 at p. 1)

During the NOPR public meeting, DOE clarified its proposal and requested additional information regarding the specific design changes that manufacturers implement to distinguish products that are ''intended'' for commercial dishwashing and ware washing applications from products that are never ''intended'' for those applications. DOE explained it has experienced instances where the term ''designed and marketed'' in a definition creates ambiguity and inequitable equipment coverage, since such coverage is subject to marketing materials rather than objective design criteria. (DOE, Public Meeting Transcript, No. 3 at pp. 14–16) DOE has seen instances in the market where a manufacturer's self-declaration of intent varies greatly from how products are sold by retailers. DOE urged manufacturers to provide distinct design information or product characteristics that could be used to clearly distinguish products that are manufactured for dishwashing and ware washing installations. Thus, because the suggestion from T&S Brass of using ''designed and/or intended for'' does not differ functionally from the current definition of ''designed and marketed for,'' it would still perpetuate a fundamental problem DOE seeks to remedy. In fact, by removing the term ''marketed,'' T&S Brass's suggestion would increase ambiguity by requiring DOE or other parties to divine intent, without any express tie to objective criteria. *Id.* DOE requested that interested parties provide additional comments on how to clarify the definition to alleviate any unintended consequences. *Id.* Specifically, DOE requested comments on how to distinguish between products that are intended to be commercial prerinse spray valves versus those that are not, but may have similar design features and characteristics. *Id.* DOE did not receive any additional comments about using an alternative phrase to replace ''designed and marketed.''

In response to T&S Brass's observation that certain products exist that are identical to commercial prerinse spray valves, but are advertised and/or intended to perform in different applications, such as pet grooming, DOE reviewed the comments from interested parties and different models of spray valves available on the market. DOE could not identify any differentiating characteristics among commercial prerinse spray valves and spray valves intended for other applications that would indicate that such products were not regularly used as commercial prerinse spray valves or that such products serve a unique utility in those applications. In addition, DOE has found spray valves that manufacturers market for specific applications listed on retailer's Web sites as appropriate for commercial dishwashing and ware washing.

Conversely, in a joint comment, Pacific Gas and Electric (PG&E), Southern California Gas Company (SCGC), Southern California Edison (SCE) and San Diego Gas and Electric (SDG&E) company (referred to as the California Investor Owned Utilities, or CA IOUs), pointed out that there are products currently marketed as pot fillers, which have very high flow rates (greater than 3 gallons per minute (gpm)), that can be used in a similar function to CPSVs. According to the CA IOUs, because these products are listed as ''pot fillers,'' they would not be subject to standards. The CA IOUs stated that the definition of commercial prerinse spray valve should ensure that any product that may be used as a commercial prerinse spray valve is appropriately covered by the standard. The CA IOUs cautioned that there is a loophole that allows manufacturers to sell commercial prerinse spray valves that do not meet the flow rate standard and encouraged DOE to define the products carefully to eliminate the loophole. (EERE–2014–BT–STD–0027, CA IOUs, No. 34 at p. 2)

DOE is aware that ''pot fillers'' that have many of the same physical characteristics as commercial prerinse spray valves. However, DOE does not agree that most of these products can be used extensively in commercial dishwashing. Under the definition proposed in the CPSV TP NOPR, a pot filler would not be considered a commercial prerinse spray valve because it is not suitable to be used for rinsing dishware before washing in a commercial dishwasher. A pot filler is used to fill a container with water, while a commercial prerinse spray valve is used to remove food residue from dishware. DOE believes that a reasonable consumer would not install a pot filler to be used as a commercial prerinse spray valve. In addition, most pot fillers are usually rigidly mounted to a wall with a swing arm, and are thus not handheld devices. Therefore, DOE believes that the proposed definition is adequate in distinguishing pot fillers from commercial prerinse spray valves.

When evaluating whether a spray valve model is suitable for removing food residue from food service items before cleaning them in commercial dishwashing or ware washing equipment, DOE would consider various factors including channels of marketing and sales, product design and descriptions, and actual sales to determine whether the spray valve is used extensively in conjunction with commercial dishwashing and ware washing equipment. For example, a product marketed or sold through outlets that market or sell to food service entities such as restaurants or commercial or institutional kitchens is more likely to be used as a commercial prerinse spray valve than one marketed or sold through outlets catering to pet care. Similarly, a product marketed outside of the United States as a commercial prerinse spray valve, or for similar use in a kitchen-type setting, would be considered suitable for use as a commercial prerinse spray valve. In evaluating whether a spray valve is suitable for use as a commercial prerinse spray valve, DOE would consider how a product is marketed and sold to end-users, including how the product is identified and described in product catalogs, brochures, specification sheets, and communications with prospective purchasers. DOE would also consider actual sales, including whether the end-users are restaurants or commercial or institutional kitchens, even if those sales are indirectly through an entity such as a distributor.

For the reasons stated previously, DOE is modifying the CPSV definition in part by replacing the term ''designed and marketed for use'' with the phrase ''suitable for use.'' By relying on suitability, DOE effectively differentiates products that are used in commercial dishwashing applications (and therefore fall under the DOE regulations) from products that are unlikely to be used to wash dishes. DOE believes that such a definition also removes the loophole noted by the CA IOUs in its comment by avoiding the ambiguity associated with determining

product coverage based on manufacturer intent or marketing materials. DOE recognizes that this definition change will alter the range of products subject to standards. Therefore, DOE maintains in this final rule that any equipment meeting the previous definition of commercial prerinse spray valve is subject to DOE's applicable standards and test procedure for such equipment. For clarity, DOE has moved the relevant portion of the previous CPSV definition to the current standard in 10 CFR 431.266 to ensure manufacturers understand the range of equipment subject to the current Federal energy conservation standards. Any representations with regard to water use for equipment meeting the revised definition must be based on the DOE test procedure as of 180 days following publications of this final rule. As of the compliance date for any amended standards, any equipment meeting the revised definition of commercial prerinse spray valve will be subject to DOE's applicable standards.

DOE also reviewed the prerinse spray valve definition in ASTM Standard F2324–13, which defines the term ''prerinse spray valve'' as ''a handheld device containing a release to close mechanism that is used to spray water on dishes, flatware, etc.'' The ''release-to-close'' mechanism included in the ASTM definition means a manually actuated, normally closed valve, which is a typical feature of commercial prerinse spray valves. In the 2015 CPSV TP NOPR, DOE proposed a different definition that would include the term normally closed; that is DOE proposed to define commercial prerinse spray valve as ''a handheld device containing a normally closed valve that is suitable for use with commercial dishwashing and ware washing equipment for the purpose of removing food residue before cleaning items.'' 80 FR 35874, 35877 (June 23, 2015).

DOE received one written comment regarding including the term ''normally closed'' in its proposed definition. The Alliance for Water Efficiency (AWE) does not support the inclusion of the phrase ''normally closed valve'' in the CPSV definition. AWE commented that many non-dishwashing products, similar to prerinse spray valves, include ''normally closed valves,'' and that the proposed phrase would not distinguish commercial prerinse spray valves from other similar devices. Additionally, AWE stated that products sold and used to prerinse dishware could be deemed not subject to the proposed rule because the valve is not a ''normally closed'' valve. (AWE, No. 6, p. 2)

DOE is not currently aware of any commercial prerinse spray valves that lack a release to close valve, but agrees with AWE that including the term ''normally closed valve'' in the definition could result in a CPSV model not being considered a covered product if its design does not include such a valve. Therefore, DOE is not including the term ''normally closed valve'' in the definition and is instead replacing it with the term ''release-to-close,'' consistent with the definition in ASTM F2324 − 13.

In summary, in this final rule, DOE adopts a modified version of the definition of ''commercial prerinse spray valve'' than what was proposed in the 2015 CPSV TP NOPR. 80 FR 35874, 35877 (June 23, 2015). Specifically, DOE defines ''commercial prerinse spray valve'' as ''a handheld device that has a release-to-close valve and is suitable for removing food residue from food service items before cleaning them in commercial dishwashing or ware washing equipment.'' DOE has concluded that this definition satisfies the requirements at 42 U.S.C. 6291(33)(B) because (1) the products covered by this definition are used extensively in conjunction with commercial dishwashing and ware washing equipment, (2) the application of standards to such products would result in significant energy savings, and (3) the application of standards to such products would not be likely to result in the unavailability of any covered product type currently available on the market.[5]

2. Spray Force

In the 2015 CPSV TP NOPR, DOE proposed adding a definition for the term ''spray force,'' as ''the amount of force exerted onto the spray disc, measured in ounce-force (ozf).'' 80 FR 35874, 35878–79, 35886 (June 23, 2015). DOE understands spray force to be an important differentiating feature in commercial prerinse spray valves.

DOE received several written comments about adding a definition for spray force. DOE will finalize its decision regarding the use of spray force as it relates to the proposed amended energy conservation standards, and will address any comments related to spray force and product classes, in the ongoing CPSV standards rulemaking (Docket No. EERE–2014–BT–STD–0027).

During the NOPR public meeting, Pacific Gas and Electric (PG&E) supported adding spray force requirements because doing so could aid in saving water and energy. (PG&E, Public Meeting Transcript, No. 3 at p. 17) The Natural Resources Defense Council (NRDC) asked if DOE would be adding a definition for the term ounce-force. (NRDC, Public Meeting Transcript, No. 3 at p. 17) In this final rule, DOE does not include a definition for the unit ounce-force. Ounce-force is used by ASTM Standard F2324–13 and is a commonly understood unit of measurement.

As such, in this final rule, DOE adopts the term ''spray force,'' defined as ''the amount of force exerted onto the spray disc, measured in ounce-force (ozf).'' Adopting this new term in the CPSV test procedure does not affect any amended CPSV energy conservation standards and does not guarantee or require its use in such standards.

B. Industry Standards Incorporated by Reference

EPCA prescribes that the test procedure for measuring flow rate for commercial prerinse spray valves be based on ASTM Standard F2324, ''Standard Test Method for Pre-Rinse Spray Valves.'' (42 U.S.C. 6293(14)) Pursuant to this statutory requirement, DOE incorporated by reference ASTM Standard F2324–03 in a final rule published on December 8, 2006. 71 FR 71340, 71374. DOE last updated its CPSV test procedure to reference the updated ASTM Standard F2324–03 (2009) in a final rule published on October 23, 2013. 78 FR 62970, 62980. The 2009 version was a reaffirmation of the 2003 standard and contained no changes to the test method. The current version of the ASTM industry standard for CPSVs is the version published in 2013, ASTM Standard F2324–13.

In the 2015 CPSV TP NOPR, DOE noted that the most significant difference between ASTM Standard F2324–13 and the ASTM standard currently referenced by the DOE test procedure (ASTM Standard F2324–03 (2009)) is that ASTM Standard F2324–13 replaces the cleanability test with a spray force test and moves the cleanability test to a normative (*i.e.,* non-mandatory) appendix. 80 FR 35874, 35878 (June 23, 2015). During the NOPR public meeting, T&S Brass requested DOE's assistance in updating California's Title 20 requirements related to commercial prerinse spray valves because California Title 20 currently includes a cleanability

[5] The analyses of the energy savings potential of standards and the impact of standards on the availability of any covered product type currently on the market are being conducted as part of DOE's concurrent energy conservation standards rulemaking for commercial prerinse spray valves. Docket No. EERE–2014–BT–STD–0027.

requirement (Title 20, Section 1605.3(h)(3)(A)), which has now been moved to the appendix of ASTM Standard F2324–13. T&S Brass stated that, under the 2015 CPSV TP NOPR, manufacturers who sell products in California must test for both cleanability and spray force. (T&S Brass, Public Meeting Transcript, No. 3 at p. 18) DOE appreciates T&S Brass's comments; however, DOE's adoption of any amendments to the Federal CPSV test procedure does not preclude California from adopting amendments to a rule California had in place prior to January 1, 2005, if that amendment is developed to align California regulations with changes in ASTM F2324. See 42 U.S.C. 6297(c)(7). Nonetheless, DOE welcomes any discussion with manufacturers and the State of California regarding any potential amendments to California's CPSV test procedure or requirements.

DOE also identified minor differences between ASTM Standard F2324–03 (2009) and ASTM Standard F2324–13, which include (1) tolerance on water pressure required for testing, (2) minimum flow rate of flex tubing, (3) water temperature for testing, and (4) length of water pipe required to be insulated.

Table III.1 summarizes changes between ASTM Standard F2324–03 (2009) and F2324–13 as they apply to DOE's test procedure.

TABLE III.1—CHANGES TO ASTM STANDARD F2324

	Current DOE test procedure (ASTM Standard F2324–03 (2009))	Amended DOE test procedure (ASTM Standard F2324–13)
Water pressure	60 ± 1 psi and 60 ± 2 psi	60 ± 2 psi.
Minimum flow rate of flex tubing	7 gpm	3.5 gpm.
Water temperature for testing	120 ± 4 °F	60 ± 10 °F.
Minimum insulation requirement of water pipe.	Requires any insulation to have a thermal resistance (R) of 4 °F x ft^2 x h/Btu for the entire length of the water pipe, from the mixing valve to the inlet of the flex tubing.	No requirement.

DOE discussed the rationale for the changes between the ASTM Standards and the effects on testing results in the 2015 CPSV TP NOPR. 80 FR 35874, 35878–79 (June 23, 2015). In the 2015 CPSV TP NOPR, DOE concluded that the updates do not affect the measurement of flow rate for commercial prerinse spray valves. However, in this final rule, DOE is clarifying that the water temperature measurement for both spray force and flow rate tests is an instantaneous temperature measurement of the water at the start of the test, not the average temperature of the water over the duration of the test. Additionally, DOE clarifies that the water temperature will have no impact on the measured value of flow rate and spray force.

DOE received a written comment concerning the incorporation by reference of ASTM Standard F2324–13. AWE supports, in part, the use of this ASTM standard as a method to test commercial prerinse spray valves. However, AWE opposes this test method as the sole means to determine compliance with a maximum flow rate of 1.28 gallons per minute (gpm). AWE stated that the ASTM Standard F2324–13 was developed and modified for flow rates not exceeding 1.6 gpm. AWE expressed concern whether the same test criteria would be adequate for testing commercial prerinse spray valves operating at flows significantly less than 1.28 gpm, because as water flow is reduced, the margin of error for performance narrows. (AWE, No. 6, p. 3)

Currently, section 10 from ASTM Standard F2324–13 is the generally accepted test procedure for the CPSV industry, and is used to certify commercial prerinse spray valves at all flow rates, including flow rates at less than 1.28 gpm. The ASTM flow rate test method specifies an allowable range of supply water temperature and pressure, which are the two physical parameters that would have the biggest effect on the accuracy and repeatability of the water flow rate measurement of a commercial prerinse spray valve. DOE has no evidence that the accuracy or repeatability of flow rate measurements lower than 1.28 gpm would be significantly different than flow rate measurements greater than 1.28 gpm. Additionally, DOE tested a range of commercial prerinse spray valves as part of the ongoing CPSV energy conservation standards rulemaking, and found the test method to be sufficiently accurate for spray valves with low flow rates. In a comment submitted by the Alliance to Save Energy (ASE), ASAP, and NRDC in response to the energy conservation standard NOPR, the commenters stated that they support incorporating provisions of ASTM Standard F2324–13 pertaining to flow rate and spray force into the DOE test procedure, including test methods and definitions. (EERE–2014–BT–STD–0027, ASE, ASAP, NRDC, No. 32 at p. 2) Finally, EPCA requires DOE to use the ASTM Standard F2324 as a basis for the test procedure for measuring flow rate. (42 U.S.C. 6293(b)(14)) Therefore, DOE incorporates by reference the specified sections of ASTM Standard F2324–13 in this final rule.

DOE also received comments regarding its proposal to incorporate by reference elements of the water supply pressure specified in sections 9.3, 10.2.2 and 10.3.2 of ASTM Standard F2324–13. In the 2015 CPSV TP NOPR, DOE proposed to test commercial prerinse spray valves at a water pressure of 60 ± 2 psi when water is flowing through the commercial prerinse spray valve, as required by ASTM Standard F2324–13. As part of that proposal, DOE included a discussion on reports on water pressure across the country and the different aspects of testing at multiple water pressures. 80 FR 35873, 35878 (June 23, 2015). DOE also acknowledged that supply pressure will affect the flow rate of a commercial prerinse spray valve once installed. Typically, lower pressures result in lower flow rates and higher pressures result in higher flow rates. Nevertheless, DOE noted that testing at a single specific supply pressure to demonstrate compliance with the maximum allowable flow rate would create a consistent and standardized reference that would be comparable across all products. *Id.* Testing at multiple supply pressures would also increase test burden. DOE also reviewed the American Society of Mechanical Engineers (ASME) Standard A112.18.1–2012, ''Plumbing Supply Fittings,'' which contains testing parameters for other plumbing products, such as faucets and showerheads, and found that it requires testing at lower supply pressures only when determining a minimum flow rate. 80 FR 35873, 35878 (June 23, 2015).

In comments provided for the related CPSV energy conservation standards rulemaking, AWE supported the use of the ASTM Standard F2324–13 test procedure and testing at a supply pressure of 60 psi. (Docket No. EERE–2014–BT–STD–0027, AWE, No. 8 at p. 2) During the NOPR public meeting, the Appliance Standards Awareness Project (ASAP) and NRDC both requested that DOE test at multiple water pressure values. (ASAP, Public Meeting Transcript, No. 3 at p. 27; NRDC, Public Meeting Transcript, No. 3 at pp. 19–20) In response to the 2015 CPSV TP NOPR, AWE commented that water pressure can vary from one water utility service area to another, impacting the performance of commercial prerinse spray valves. (AWE, No. 6 at p. 2) AWE also suggested that DOE suspend its rulemaking efforts until a comprehensive study is conducted to determine the effects of water pressure on performance of commercial prerinse spray valves. (AWE, No. 6 at p.4)

In response to AWE's comment regarding the effect of varied water pressures on performance, DOE acknowledged in the 2015 CPSV TP NOPR that supply pressures have an impact on flow rate. Consistent with what was described in Chapter 5 of the Technical Support Document (TSD) for the CPSV energy conservation standards NOPR (Docket EERE–2014–BT–STD–0027), DOE observed that flow rate increases with the square root of pressure. DOE compiled data from various field studies that demonstrated the performance of prerinse spray valves rated between 0.51 gpm and 1.88 gpm installed in commercial kitchen locations. While the water pressure measured in these locations ranged between 38 psi and 83 psi, the average water pressure observed in the commercial kitchens included in the studies was 55 psi, which is very close to the 60 psi supply pressure specified in ASTM Standard F2324–13. DOE provides the full results of its data analysis in a separate report accompanying this final rule, titled ''Analysis of Water Pressure for Testing Commercial Prerinse Spray Valves Final Report.'' [6] From the analysis, DOE found that although the flow rate of CPSVs can vary by almost 40 percent when the water pressure changes from the analyzed range of 40 psi to 80 psi, the weighted average flow rate for CPSVs installed with varying supply pressures results in a 5-percent decrease in flow rate as compared to the flow rate of a CPSV installed with a water pressure of 60 psi. Based on this information, DOE determined that 60 psi is representative of the water pressures observed across the nation. Therefore, this final rule incorporates the single water pressure supply requirement of ASTM Standard F2324–13, 60 ± 2 psi.

Specifically, DOE is incorporating by reference the following sections of ASTM Standard F2324–13: 6.1–6.9, 9.1–9.5.3.2, 10.1–10.2.5, 10.3.1–10.3.8, 11.3.1 (replacing the plural ''nozzles'' with ''nozzle''), and excluding references to ''Annex A1.''

In the 2015 CPSV TP NOPR, DOE proposed replacing the plural ''nozzles'' with ''nozzle'' because ''nozzles'' refers to Section 8.1 of the ASTM Standard F2324–13, which requires three representative production units to be selected for all performance testing. DOE did not receive any comments regarding this proposal, therefore DOE is incorporating this change in this final rule. DOE also clarifies in this final rule that the term ''nozzle'' means a CPSV unit. Also, DOE is retaining the existing CPSV sampling plan at 10 CFR 429.51(a), and therefore is not incorporating by reference Section 8.1 of ASTM Standard F2324–13. Section III.E of this document provides more details on the selection of units to test.

DOE is also excluding any references to ''Annex A1'' from incorporation by reference because the annex provides a procedure for determining the uncertainty in reported test results. DOE's required statistical methods for determination of the representative value of flow rate for each basic model is in 10 CFR 429.51(a)(2). Therefore, DOE is not incorporating by reference Annex A1 in this test procedure, and any references to the annex in the incorporated ASTM Standard F2324–13 sections are invalid. The referenced sections describe the testing apparatus, test method, and calculations pertaining to flow-rate measurement.

1. Clarifications

In analyzing ASTM Standard F2324–13 and DOE's proposed test provisions when responding to comments submitted by interested parties and formulating the final test procedure adopted in this document, DOE noticed several minor inconsistencies and sources of ambiguity in the proposed test procedure and industry standard. As such, in this final rule, DOE is also clarifying several minor issues regarding terminology and conducting the amended DOE test procedure, so as to improve the repeatability and consistency of the test procedure.

Throughout ASTM F2324–13, various terms are used to refer to flow rate: water consumption flow rate, water consumption, water flow rate, flow rate, and nozzle flow rate. Additionally, regulatory text in 10 CFR 429.51, 10 CFR 431.264, and 10 CFR 431.266 refers to flow rate using both the terms water consumption flow rate and flow rate. For this final rule, DOE is clarifying that all of the aforementioned terms are equivalent to the term flow rate.

Section 9.1 of ASTM Standard F2324–13, instructs the test lab to attach the prerinse spray valve to a 36-inch, spring-style (flex tubing) prerinse spray valve in accordance with the manufacturer's instructions. DOE is clarifying that the second instance of ''prerinse spray valve'' refers to the spring-style deck-mounted prerinse unit that is previously defined in section 6.8 of ASTM F2324–13. DOE is also clarifying that it does not believe that using the manufacturer's instructions or packaging are necessary to connect the nozzle for testing as the manufacturer's instructions typically describe how to install the entire prerinse spray valve, not just the nozzle.

Section 10.1.1 of ASTM Standard F2324–13 directs the test lab to record the water temperature (°F), dynamic water pressure (psi), time (min) and the flow rate (gpm) for each run of every test. For this final rule, DOE is clarifying that water temperature and dynamic water pressure values must be recorded one time at the start of each run when testing for both flow rate and spray force. The time is measured throughout the flow rate test and recorded after the test to indicate the duration of testing. DOE clarifies that the flow rate is calculated afterwards using the normalized weight of the carboy, as discussed in the next paragraph, and the measured time of testing.

In section 10.2.4 of ASTM F2324–13, the flow rate test requires that the water flow be stopped at the end of one minute. However, section 6.9 of ASTM F2324–13 requires time measurement instruments accurate ± 0.1 second and it will likely be difficult for an operator to stop the stopwatch and CPSV at precisely 1:00.0 min every test. Therefore, DOE is clarifying that the recorded weight of the water will be normalized to 60.0 seconds for every test, to ensure that each flow rate is calculated using the same time period. Normalize the weight using Equation 1, where W_{water} is the weight normalized to a 1 minute time period, W_1 is the weight of the water in the carboy at the conclusion of the flow rate test, and t_1 is the total recorded time of the flow rate test.

[6] The water pressure sensitivity analysis is available at regulations.gov under docket number EERE–2014–BT–TP–0055.

$$W_{water} = W_1 \, x \, \frac{60 \, s}{t_1} \qquad (1)$$

C. Additional Test Methods

1. Adding Test Method To Measure Spray Force

In the 2015 CPSV TP NOPR, DOE proposed a test procedure for measuring the spray force of a commercial prerinse spray valve. DOE discussed how the test is conducted, the apparatus used, a review of the procedure, the applicable sections of ASTM F2324–13 to incorporate by reference. DOE also explained that it proposed the test to support the forthcoming proposed revisions to the CPSV product class structure in the ongoing energy conservation standard for commercial prerinse spray valves (Docket No. EERE–2014–BT–STD–0027). 80 FR 35874, 35879 (June 23, 2015).

As discussed previously in this final rule, DOE received several written comments about using spray force to define product classes. Specifically, in a joint comment submitted by ASE, ASAP, and NRDC and in the CA IOUs joint comment, the parties stated that they support incorporating provisions of ASTM Standard F2324–13 pertaining to spray force into the DOE test procedure, including test methods and definitions. The commenters additionally supported a requirement to measure and report spray force. (EERE–2014–BT–STD–0027, ASE, ASAP, NRDC, No. 32 at p. 2; EERE–2014–BT–STD–0027, CA IOUs, No. 34 at p. 3)

In this final rule, DOE clarifies how to record average spray force. Section 10.3.6 of ASTM F2324–13 requires the average spray force to be recorded over a 15-second time period after the prerinse spray valve has flowed for at least 5 seconds. DOE interprets ''average'' spray force to require at least two spray force readings during the test. Therefore, in this final rule, DOE clarifies that this requires recording at least two spray force readings to calculate the average spray force over the 15-second time period.

2. Multiple Spray Settings: Adding a Requirement To Measure Flow Rate and Spray Force of Each Spray Setting

In the 2015 CPSV TP NOPR, DOE proposed adding a requirement at 10 CFR 431.264(b)(3) to measure and record each available spray pattern if a sample unit has multiple spray patterns or spray settings. DOE identified several commercial prerinse spray valves on the market with multiple spray patterns that can be selected by the end user. Additionally, section 10.3.7 of ASTM Standard F2324–13, which DOE proposed in the 2015 CPSV TP NOPR to incorporate by reference, specifies that force shall be tested for each mode (*i.e.,* spray setting). 80 FR 35873, 35880 (June 23, 2015).

In this final rule, DOE intended the term ''spray pattern'' mean a user-selectable setting on a commercial prerinse spray valve; however, DOE realizes that some people might interpret the term ''spray pattern'' to mean the shape of the water spray as it exits the unit, such as shower, knife, solid stream, etc. For this final rule, DOE clarifies that the term ''spray pattern'' refers to a user-selectable setting on a commercial prerinse spray valve and uses the term ''spray setting'' instead of ''spray pattern.'' Although DOE used the term ''spray pattern'' in the 2015 CPSV TP NOPR, for clarity, DOE is using the term ''spray setting'' throughout this discussion of comments received in response to the 2015 CPSV TP NOPR and in the regulatory text.

During the NOPR public meeting, Chicago Faucet sought clarification related to testing of multiple settings. Specifically, Chicago Faucet asked whether each setting on a model with multiple settings would need to be tested and meet a minimum spray force value. (Chicago Faucet, Public Meeting Transcript, No. 3, pp. 25–26) DOE clarified during the public meeting that DOE was not proposing mandatory minimum spray force requirements, but rather was proposing to use the spray force measurement to define product classes. DOE further confirmed that a unit with multiple settings would need to be tested at each spray setting, and each spray setting would need to meet the applicable flow rate requirements.

In its written comments, AWE agreed that all of the emitters of a valve must comply with maximum allowable flow requirements. AWE added that it is only necessary for at least one of the emitters to meet a minimum spray force requirement. AWE stated that requiring all emitters to meet a certain minimum spray force will likely result in excessive water use when used in applications that do not require high force. (AWE, No. 6, p. 3) As previously mentioned, DOE is not establishing a mandatory minimum spray force requirement but, rather, has proposed using the spray force measurement to define product classes. Further discussion on how DOE proposed to use spray force to define product classes is presented in the forthcoming CPSV standards rulemaking final rule (Docket No. EERE–2014–BT–STD–0027).

T&S Brass stated that if the ''suitable for use'' language in DOE's proposed definition (based on suitability) were finalized, only one of the spray patterns would need to be tested and meet the requirements of a commercial prerinse spray valve. According to T&S Brass, one setting on the spray valve could meet the proposed definition even though the rest of the spray pattern selections may be non-compliant. T&S Brass also recommended that all spray modes of the commercial prerinse spray valve be tested for compliance. (T&S Brass, No. 7 at p. 2)

As stated in the 2015 CPSV TP NOPR, DOE is aware that some commercial prerinse spray valves may have multiple flow rate settings (which may or may not have the same water spray shape) or multiple, exchangeable faces to alter the spray force and flow rate of the product. 80 FR 35873, 35880 (June 23, 2015). In this final rule, DOE adopts its proposal in the 2015 CPSV TP NOPR to require testing of spray force and flow rate for each of the spray settings in CPSVs with multiple settings. Similarly, in this final rule, DOE is also adopting a definition of basic model to clarify how spray settings can be grouped for the purposes of making representations and certifying compliance to the Department. The basic model definition allows manufacturers to group spray settings within a given product class as long as the individual spray settings have similar physical and functional (or hydraulic) characteristics that affect water consumption or water efficiency for the purposes of testing and certifying compliance with the applicable standard. DOE also notes that consistent with DOE's basic model grouping provisions discussed in the certification, compliance, and enforcement final rule, manufacturers may elect to certify multiple spray settings under the same basic model, provided that (1) all individual spray settings identified as the same basic model have the same certified flow rate, (2) all representations are based on the tested performance of the least efficient individual model in that basic model, and (3) all spray settings are in the same product class. 76 FR 12422, 12429 (March 7, 2011). Specifically, for commercial prerinse spray valves, manufacturers may certify a CPSV unit with multiple spray settings as a single basic model if all the spray settings fall into the same product class and all

representations regarding the performance of that basic model are based on the most consumptive spray setting. In such a case, manufacturers may not make differing representations regarding the performance of different spray settings for those individual models within the basic model. However, to the extent manufacturers wish to make representations regarding the spray force or flow rate at spray settings other than the most consumptive flow rate, manufacturers may instead elect to certify individual spray settings as unique basic models.

In addition, if the spray settings on a CPSV unit fall into multiple product classes, manufacturers must certify separate basic models for each product class and may only group individual spray settings into basic models within each product class. In the ongoing energy conservation standard rulemaking (Docket No. EERE–2014–BT–STD–0027), DOE proposed to adopt amended standards for commercial prerinse spray values and establish different product classes and standards for commercial prerinse spray valves as a function of spray force. 80 FR 39486 (July 9, 2015). As such, a commercial prerinse spray value that contains multiple spray settings, or is sold with multiple spray faces, may fall into different product classes. In such a case, the commercial prerinse spray valve would meet both product class definitions and, as such, would be required to meet an appropriate energy conservation standard for both product classes. For example, if product classes were differentiated at 5-ozf and 8-ozf, the maximum flow rate setting with a spray force below 5-ozf would have to meet the standard associated with a spray force below 5-ozf, and the maximum flow rate setting between 5- and 8-ozf would have to meet the standard associated with a spray force between 5- and 8-ozf. This is consistent with DOE's treatment of other products and equipment that fall into multiple product classes or equipment categories. For example, dual-temperature commercial refrigeration equipment that can operate as both a commercial refrigerator and a commercial freezer must be tested as, and meet the energy conservation standard for, both equipment categories. 77 FR 10292 (February 21, 2012). Similarly, if a spray valve has at least one setting that meets the definition of a commercial prerinse spray valve, then the entire unit is a commercial prerinse spray valve and all settings must meet the flow rate standard.

D. Rounding Requirements

1. Flow Rate

In the 2015 CPSV TP NOPR, DOE proposed to change the rounding requirements for recording flow rate measurements from one decimal place to two decimal places. 80 FR 35873, 35880 (June 23, 2015). During the NOPR public meeting, T&S Brass agreed with this proposal and stated that the WaterSense program also requires flow rate to be rounded to two decimal places. (T&S Brass, Public Meeting Transcript, No. 3 at p. 23) DOE did not receive any comments objecting to this proposal. Therefore, DOE amends the flow rate measurement rounding requirements to two decimal places in 10 CFR 431.264(b)(1).

2. Spray Force

In the 2015 CPSV TP NOPR, DOE proposed to adopt Section 11.4.2 of the ASTM Standard F2324–13 that specifies that the spray force be rounded to one decimal place. 80 FR 35873, 35880 (June 23, 2015). DOE received no comments related to this proposal. Therefore, DOE adopts spray force rounding requirements of one decimal place in 10 CFR 431.264(b)(2).

E. Sampling Plan for Representative Values

In the 2015 CPSV TP NOPR, DOE proposed retaining the existing CPSV sampling plan at 10 CFR 429.51(a). 80 FR 35874, 35880 (June 23, 2015). Although Section 8.1 of ASTM Standard F2324–13 requires three representative production units to be selected for all performance testing, in the 2015 CPSV TP NOPR, DOE proposed not to adopt this requirement. DOE only proposed to adopt the testing methodology (*i.e.,* applicable to testing of a unit)—not the rating methodology (*i.e.,* applicable to a basic model)—found in ASTM Standard F2324–13. However, DOE notes that the DOE test procedure for commercial prerinse spray valves adopted in this final rule incorporates by reference ASTM F2324–13, which requires performing three test runs on each unit and the measured flow rate or spray force to be calculated as the average of the flow rate or spray force value determined during each of the three runs. DOE is retaining this requirement as is it improves the accuracy and precision of the test. The representative value of flow rate and spray force for each CPSV model is then calculated as the values determined from each test, subject to the sampling plan and rounding requirements presented in at 10 CFR 431.51(a) and 10 CFR 431.264(b)(2).

CPSV testing is subject to DOE's general certification regulations at 10 CFR 429.11. These require a manufacturer to randomly select and test a sample of sufficient size to ensure that the represented value of water consumption adequately represents performance of all of the units within the basic model, but no fewer than two units. (10 CFR 429.11(b)) The purpose of these requirements is to achieve a realistic representation of the water consumption of the basic model, and to mitigate the risk of noncompliance, without imposing undue test burden. DOE did not receive any comments related to this proposal.

In the 2015 CPSV TP NOPR, DOE proposed to revise the statistical methods for determination of the representative value of flow rate for each basic model of commercial prerinse spray valve in 10 CFR 429.51(a)(2). 80 FR 35874, 35880 (June 23, 2015). Specifically, DOE proposed to remove the lower confidence limit (LCL) formula from the sampling plan for the selection of units for testing and retain only the provision for an upper confidence limit (UCL) under 10 CFR 429.51(a)(2)(i). The original statistical methods allowed for two options that were exclusive; however, because the energy conservation standard for commercial prerinse spray valves specifies a maximum water flow rate, only the UCL provision is used for certification and compliance purposes. DOE received no comments related to this proposal. Therefore, DOE removes the LCL formula from the sampling plan in this final rule and retains the remainder of the sampling plan at 10 CFR 429.51(a).

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

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

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis

(IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. As required by Executive Order 13272. ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003 to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://energy.gov/gc/office-general-counsel.*

DOE reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has concluded that the rule would not have a significant impact on a substantial number of small entities. The factual basis for this certification is as follows.

The Small Business Administration (SBA) considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. These size standards and codes are established by the North American Industry Classification System (NAICS). The threshold number for NAICS classification code 332919, which applies to ''other metal valve and pipe fitting manufacturing'' and includes CPSV manufacturers, is 500 employees.[7]

Based on a search of DOE's Compliance and Certification Database, individual company Web sites, and various marketing research tools (*e.g.,* Dun and Bradstreet reports, Manta, and Hoovers), DOE identified 13 manufacturers of commercial prerinse spray valves, of which 9 are domestic small businesses. Table IV.1 lists the eight small businesses that DOE identified, according to the number of employees.

TABLE IV.1—SMALL BUSINESS SIZE BY NUMBER OF EMPLOYEES

Number of employees	Number of small businesses	Percentage of small businesses *
1–50	3	33
51–100	3	33
101–150	1	11
151–250	1	11
251–500	1	11

* **Note:** Because of rounding, the values in this column do not sum to 100%.

DOE estimated the labor burden associated with testing, in view of the 2012 (most recent) median annual pay for (1) environmental engineering technicians ($45,350), (2) mechanical engineering technicians ($51,980), and (3) plumbers, pipefitters, and steamfitters ($49,140) for an average annual salary of $48,823.[8] [9] DOE divided the average by 1,920 hours per year (40 hours per week for 48 weeks per year) to develop an hourly rate of $25.43. DOE adjusted the hourly rate by 31-percent to account for benefits, resulting in an estimated total hourly rate of $33.31.[10] [11] DOE used this hourly rate to assess the labor costs for testing units according to the amendments to the test procedures.

Currently, 10 CFR 431.264 prescribes measurements for flow rate and requires commercial prerinse spray valves with multiple spray settings to comply with the applicable Federal energy conservation standard. DOE is clarifying in this final rule that CPSV models with multiple spray patterns must demonstrate compliance through certifying each discrete spray pattern or through the application of the basic model concept (see section III.C.2).

The amendments to the test procedures adopted in today's final rule do not modify the time or burden associated with conducting the CPSV test procedure, except for including an additional test for spray force. During the NOPR public meeting, T&S Brass commented that only the manufacturers participating in the WaterSense program typically perform this test. (T&S Brass, Public Meeting Transcript, No. 3 at pp. 24–25) Out of 13 total CPSV manufacturers that DOE identified, only 2 currently participate in the WaterSense program. DOE concludes, therefore, that most manufacturers do not currently test for spray force. DOE estimates that an additional hour of labor time per basic model is required to conduct the spray force test.

In addition to the labor time, DOE assumed that manufacturers would have to either construct or purchase an apparatus to measure spray force. DOE researched the materials necessary for the spray force test and estimates the cost of these materials to be $575.

Another amendment to the test procedure includes clarifying that all spray settings must be tested on units that offer multiple spray settings. While CPSV models with multiple spray settings are currently required to demonstrate compliance, which requires testing of all spray settings, DOE understands that testing multiple spray settings requires more testing time than testing units with only one spray setting and that some manufacturers may not have been testing each spray setting. Therefore, DOE is also estimating the cost associated with testing units with multiple spray settings. DOE's review of commercial prerinse spray valves with multiple spray settings indicates that these units

[7] U.S. Small Business Administration Table of Small Business Size Standards Matched to North American Industry Classification System Codes. See *www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf* (last accessed September 10, 2015).

[8] U.S. Department of Labor Bureau of Labor Statistics. *Occupational Outlook Handbook, Architecture and Engineering. www.bls.gov/ooh/Architecture-and-Engineering/home.htm* (last accessed September 10, 2015).

[9] U.S. Department of Labor Bureau of Labor Statistics. *Occupational Outlook Handbook, Construction and Extraction Occupations. www.bls.gov/ooh/construction-and-extraction/home.htm* (last accessed September 10, 2015).

[10] Bureau of Labor Statistics. *News Release: Employer Cost For Employee Compensation. www.bls.gov/news.release/ecec.nr0.htm.* (last accessed September 10, 2015).

[11] Additional benefits include paid leave, supplemental pay, insurance, retirement and savings, Social Security, Medicare, unemployment insurance, and workers compensation.

have an average of three settings. DOE estimated that the time to measure both flow rate and spray force for all three spray settings is greater than 2 hours but typically less than 3 hours.

Based on this analysis, DOE estimated that up to 3 hours of total testing time is required for each basic model. Therefore, up to 6 hours of total testing time might be required to test two production units per basic model in the final test procedure, which results in a total labor cost of $199.88. As previously stated, DOE estimated that the cost of complying with the current test procedure is $66.63. Therefore, the amended test procedure reflects an increase in cost of $133.25 per basic model, and an additional one-time equipment setup cost of $575, compared to the current test procedure.

AWE commented that the additional manufacturer cost burden for requiring multiple spray force tests would negatively affect product innovation and consumer choice. (AWE, No. 6, p. 3). As described earlier, DOE has accounted for the multiple spray force tests costs by determining the added cost for increased testing time, labor, and purchase of equipment for the spray force test.

DOE's analysis determined that 69-percent of all CPSV manufacturers could be classified as small entities according to SBA classification guidelines. DOE believes that small manufacturers would not be differentially affected by the proposed amendments to the test procedure. In fact, DOE does not believe the amendments adopted in today's final rule as they relate to testing will result in any significant differential impact as compared to the testing currently required by DOE's regulations. Therefore, DOE concludes that the cost effects accruing from the final rule would not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of an FRFA is not warranted. DOE has submitted a certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of commercial prerinse spray valves must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including commercial prerinse spray valves. *See generally* 10 CFR part 429. The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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

D. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE amends its test procedure for commercial prerinse spray valves. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without affecting the amount, quality or distribution of energy usage, and, therefore, will not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

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

F. Review Under Executive Order 12988

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

meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

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

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

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

I. Review Under Executive Order 12630

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

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

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

K. Review Under Executive Order 13211

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

This regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

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

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

The modifications to the test procedure addressed by this action incorporate testing methods contained in the following commercial standards: ASTM F2324–13, Standard Test Method for Prerinse Spray Valves, sections 6.1–6.9, 9.1–9.5.3.2, 10.1–10.2.5, 10.3.1–10.3.8, 11.3.1 (replacing ''nozzles'' with ''nozzle''), and disregarding references to Annex A1. DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA (*i.e.,* that they were developed in a manner that fully provides for public participation, comment, and review). DOE has consulted with the Attorney General and the Chairman of the FTC concerning the impact of these test procedures on competition and has received no comments objecting to their use.

M. Description of Materials Incorporated by Reference

In this final rule, DOE incorporates by reference the test standard published by ASTM, titled, ''Standard Test Method for Prerinse Spray Valves,'' ASTM Standard F2324–13. ASTM Standard F2324–13 is an industry-accepted test procedure that measures water flow rate and spray force for prerinse spray valves, and is applicable to products sold in North America. ASTM Standard F2324–13 specifies testing conducted in accordance with other industry accepted test procedures (already incorporated by reference). The test procedure in this final rule references various sections of ASTM Standard F2324–13 that address test setup, instrumentation, test conduct, and calculations. ASTM Standard F2324–13 is readily available at ASTM's Web site at *www.astm.org/Standard/standards-and-publications.html.*

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation

of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

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

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation test procedures, Incorporation by reference, and Reporting and recordkeeping requirements.

Issued in Washington, DC, on December 18, 2015.

Kathleen B. Hogan,

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

For the reasons stated in the preamble, DOE amends parts 429 and 431 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. In § 429.51, paragraph (a) is revised to read as follows:

§ 429.51 Commercial pre-rinse spray valves.

(a) *Sampling plan for selection of units for testing.* (1) The requirements of § 429.11 apply to commercial prerinse spray valves; and

(2) For each basic model of commercial prerinse spray valve, a sample of sufficient size must be randomly selected and tested to ensure that any represented value of flow rate must be greater than or equal to the higher of:

(i) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and, $\bar{x}$ is the sample mean;
n is the number of samples; and
x_i is the i^{th} sample; Or,

(ii) The upper 95-percent confidence limit (UCL) of the true mean divided by 1.10, where:

$$UCL = \bar{x} + t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

and, $\bar{x}$ is the sample mean;
s is the sample standard deviation;
n is the number of samples; and
$t_{0.95}$ is the t statistic for a 95-percent two-tailed confidence interval with n-1 degrees of freedom (from Appendix A of this subpart).

* * * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 3. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 4. Section 431.262 is revised to read as follows:

§ 431.262 Definitions.

As used in this subpart:

Basic model means all spray settings of a given class manufactured by one manufacturer, which have essentially identical physical and functional (or hydraulic) characteristics that affect water consumption or water efficiency.

Commercial prerinse spray valve means a handheld device that has a release-to-close valve and is suitable for removing food residue from food service items before cleaning them in commercial dishwashing or ware washing equipment.

Spray force means the amount of force exerted onto the spray disc, measured in ounce-force (ozf).

■ 5. Section 431.263 is amended by revising paragraph (b)(1) to read as follows:

§ 431.263 Materials incorporated by reference.

* * * * *

(b) * * *

(1) ASTM Standard F2324–13, (''ASTM F2324–13''), Standard Test Method for Prerinse Spray Valves, approved June 1, 2013; IBR approved for § 431.264.

* * * * *

■ 6. Section 431.264 is revised to read as follows:

§ 431.264 Uniform test method to measure flow rate and spray force of commercial prerinse spray valves.

(a) *Scope.* This section provides the test procedure to measure the flow rate and spray force of a commercial prerinse spray valve.

(b) *Testing and calculations for a unit with a single spray setting*—(1) *Flow rate.* (i) Test each unit in accordance with the requirements of sections 6.1 through 6.9 (Apparatus) (except 6.4 and 6.7), 9.1 through 9.4 (Preparation of Apparatus), and 10.1 through 10.2.5 (Procedure) of ASTM F2324–13, (incorporated by reference, see § 431.263). Precatory language in the ASTM F2324–13 is to be treated as mandatory for the purpose of testing. In section 9.1 of ASTM F2324–13, the second instance of ''prerinse spray valve'' refers to the spring-style deck-mounted prerinse unit defined in section 6.8. In lieu of using manufacturer installation instructions or packaging, always connect the commercial prerinse spray valve to the flex tubing for testing. Normalize the weight of the water to calculate flow rate using Equation 1, where W_{water} is the weight normalized to a 1 minute time period, W_1 is the weight of the water in the carboy at the conclusion of the flow rate test, and t_1 is the total recorded time of the flow rate test.

$$W_{water} = W_1 \, x \, \frac{60\,s}{t_1} \qquad \text{(Eq. 1)}$$

(ii) Perform calculations in accordance with section 11.3.1 (Calculation and Report). Record the water temperature (°F) and dynamic water pressure (psi) once at the start for each run of the test. Record the time (min), the normalized weight of water in the carboy (lb) and the resulting flow rate (gpm) once at the end of each run of the test. Record flow rate measurements of time (min) and weight (lb) at the resolutions of the test instrumentation. Perform three runs on each unit, as specified in section 10.2.5 of ASTM F2324–13, but disregard any references to Annex A1. Then, for each unit, calculate the mean of the three flow rate values determined from each

run. Round the final value for flow rate to two decimal places and record that value.

(2) *Spray force.* Test each unit in accordance with the test requirements specified in sections 6.2 and 6.4 through 6.9 (Apparatus), 9.1 through 9.5.3.2 (Preparation of Apparatus), and 10.3.1 through 10.3.8 (Procedure) of ASTM F2324–13. In section 9.1 of ASTM F2324–13, the second instance of ''prerinse spray valve'' refers to the spring-style deck-mounted prerinse unit defined in section 6.8. In lieu of using manufacturer installation instructions or packaging, always connect the commercial prerinse spray valve to the flex tubing for testing. Record the water temperature (°F) and dynamic water pressure (psi) once at the start for each run of the test. In order to calculate the mean spray force value for the unit under test, there are two measurements per run and there are three runs per test. For each run of the test, record a minimum of two spray force measurements and calculate the mean of the measurements over the 15-second time period of stabilized flow during spray force testing. Record the time (min) once at the end of each run of the test. Record spray force measurements at the resolution of the test instrumentation. Conduct three runs on each unit, as specified in section 10.3.8 of ASTM F2324–13, but disregard any references to Annex A1. Ensure the unit has been stabilized separately during each run. Then for each unit, calculate and record the mean of the spray force values determined from each run. Round the final value for spray force to one decimal place.

(c) *Testing and calculations for a unit with multiple spray settings.* If a unit has multiple user-selectable spray settings, or includes multiple spray faces that can be installed, for each possible spray setting or spray face:

(1) Measure both the flow rate and spray force according to paragraphs (b)(1) and (2) of this section (including calculating the mean flow rate and mean spray force) for each spray setting; and

(2) Record the mean flow rate for each spray setting, rounded to two decimal places. Record the mean spray force for each spray setting, rounded to one decimal place.

■ 7. Section 431.266 is revised to read as follows:

§ 431.266 Energy conservation standards and their effective dates.

Commercial prerinse spray valves manufactured on or after January 1, 2006, shall have a flow rate of not more than 1.6 gallons per minute. For the purposes of this standard, a *commercial prerinse spray valve* is a handheld device designed and marketed for use with commercial dishwashing and ware washing equipment that sprays water on dishes, flatware, and other food service items for the purpose of removing food residue before cleaning the items.

[FR Doc. 2015–32805 Filed 12–29–15; 8:45 am]

BILLING CODE 6450–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–73639A; File No. S7–01–13]

RIN 3235–AL43

Regulation Systems Compliance and Integrity; Correction

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; correction.

SUMMARY: The Securities and Exchange Commission (''Commission'') is making a technical correction to its rules concerning Regulation Systems Compliance and Integrity (''Regulation SCI'') under the Securities Exchange Act of 1934 (''Exchange Act'') and conforming amendments to Regulation ATS under the Exchange Act, which applies to certain self-regulatory organizations (including registered clearing agencies), alternative trading systems (''ATSs''), plan processors, and exempt clearing agencies (collectively, ''SCI entities'').

DATES: Effective December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Sara Hawkins, Special Counsel, Office of Market Supervision, at (202) 551–5523 and Alexander Zozos, Attorney-Adviser, Office of Market Supervision, at (202) 551–6932, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is making a technical correction to final rules that were published in the **Federal Register** on December 5, 2014 (79 FR 72251) as part of Regulation SCI under the Exchange Act and conforming amendments to Regulation ATS under the Exchange Act.

List of Subjects in 17 CFR 242

Brokers; Confidential business information; Reporting and recordkeeping requirements; and Securities.

Accordingly, 17 CFR Part 242 is corrected by making the following correcting amendment:

PART 242—REGULATIONS M, SHO, ATS, AC, NMS AND SCI AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES—[CORRECTED]

■ 1. 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.

§ 242.1000 [Amended]

■ 2. Amend § 242.1000 in paragraph (3) of the definition of *SCI alternative trading system* or *SCI ATS,* by revising the phrase ''until six months after satisfying any of paragraphs (a) or (b) of this section'' to read ''until six months after satisfying any of paragraphs (1) or (2) of this definition''.

Dated: December 22, 2015.

Brent J. Fields,

Secretary.

[FR Doc. 2015–32646 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

30 CFR Part 519

RIN 1010–AD65

Office of Natural Resources Revenue

30 CFR Part 1219

[Docket ID: ONRR–2011–0024; DS63610000 DR2PS0000.CH7000 156D0102R2]

RIN 1012–AA11

Allocation and Disbursement of Royalties, Rentals, and Bonuses—Oil and Gas, Offshore

AGENCY: Bureau of Ocean Energy Management and Office of Natural Resources Revenue, Interior.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of the Interior moves the Gulf of Mexico Energy Security Act of 2006's Phase I regulations from the Bureau of Ocean Energy Management's (BOEM) title 30 of the *Code of Federal Regulations* (CFR) chapter V to the Office of Natural Resources Revenue's (ONRR) title 30 CFR chapter XII and clarifies and adds minor definition changes to these current revenue-

sharing regulations. Additionally, ONRR amends these regulations concerning the distribution and disbursement of qualified revenues from certain leases on the Gulf of Mexico's Outer Continental Shelf, under the provisions of the Gulf of Mexico Energy Security Act of 2006. These regulations set forth formulas and methodologies for calculating and allocating revenues to the States of Alabama, Louisiana, Mississippi, and Texas; their eligible coastal political subdivisions; the Land and Water Conservation Fund; and the United States Treasury.

DATES: *Effective:* January 29, 2016.

FOR FURTHER INFORMATION CONTACT: For questions, contact Karen Osborne, Supervisory Management & Program Analyst, Office of the Deputy Director, ONRR, at *karen.osborne@onrr.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

President George W. Bush signed the Gulf of Mexico Energy Security Act of 2006 (GOMESA or Act) into law on December 20, 2006 (Pub. L. 109–432, 120 Stat. 2922; 43 U.S.C. 1331 note), as part of H.R. 6111, The Tax Relief and Health Care Act of 2006. With regard to the Gulf of Mexico (GOM) Outer Continental Shelf (OCS) provisions (Division C, Title 1, 120 Stat. 3000), GOMESA:

- Provided for sharing of leasing revenues with Gulf producing States, coastal political subdivisions (CPSs) within those States, and the Land and Water Conservation Fund (LWCF), for coastal protection, conservation, and restoration projects.
- Lifted the congressional moratorium on oil and gas leasing and development in a portion of the Eastern and Central GOM.
- Mandated lease sales for 8.3 million acres in the Eastern and Central GOM, including 5.8 million acres in the Central GOM previously under Congressional moratoria.
- Barred, until June 30, 2022, oil and gas leasing within 125 miles of the Florida coastline in the Eastern Planning Area, and 100 miles of the Florida coastline in the Central Planning Area, as well as in all areas in the GOM east of the Military Mission Line (86°41′ W. longitude).
- Established a process for lessees to exchange with the Federal Government certain existing leases in moratorium areas for bonus or royalty credits to use on other GOM leases.

This final rule sets forth the Department of the Interior's (DOI, hereafter ''We'') plan to implement the second phase of GOMESA revenue sharing in fiscal year 2017 and beyond. In addition, we add several clarifications and conforming modifications to the GOMESA Phase I revenue-sharing regulations, currently available in BOEM's regulations at part 519, subpart D, of 30 CFR chapter V. We add these changes to differentiate between the two GOMESA revenue-sharing phases. We also move the Phase I regulations from 30 CFR chapter V, part 519, subpart D, to ONRR's regulations at 30 CFR chapter XII.

We published a final rule (73 FR 78622, December 23, 2008) in the **Federal Register** on the allocation and disbursement of qualified revenues from two designated areas in the Gulf of Mexico, known as the 181 Area in the Eastern Planning Area and the 181 South Area. That final rule addressed such allocation and disbursement for each of fiscal years 2007 through 2016, to which we refer as ''GOMESA Phase I'' revenue sharing. You can find depictions of the 181 Area and the 181 South Area on the map available at *www.boem.gov/Map-Gallery*. The majority of this new final rule covers revenue sharing from the 181 Area, the 181 South Area, and the 2002–2007 Planning Area subject to GOMESA—for fiscal year 2017 and thereafter—to which we refer as ''GOMESA Phase II'' revenue sharing. To avoid confusion between the two GOMESA revenue-sharing phases, we are adding a new subpart E in the regulations for GOMESA Phase II. The differences between GOMESA Phase I and Phase II include the calculation methodology, revenue-sharing areas, and the imposition of a cap on shared revenues in Phase II. Moving the GOMESA Phase I regulations to 30 CFR chapter XII and modifying the definitions does not change the existing revenue-sharing methodology applicable to GOMESA Phase I.

We have drawn on the experience that we gained during the first few years of GOMESA Phase I revenue sharing, along with comments and questions that we received, to refine the definitions. We have worked to eliminate any uncertainty, consistent with the Secretary's authority under GOMESA.

For each of the fiscal years 2017 and thereafter, GOMESA directs the Secretary of the Interior to deposit 50 percent of qualified OCS revenues (Phase II) that we receive on or after October 1, 2016, from certain OCS oil and gas leases in the 181 Area, the 181 South Area, and the 2002–2007 Planning Area, into a special account in the U.S. Treasury. From that account, we distribute 25 percent of the qualified revenues to the LWCF and distribute the remaining 75 percent to the States of Alabama, Louisiana, Mississippi, and Texas (which we collectively identify as the ''Gulf producing States'') and their eligible CPSs. Under GOMESA Phase II, we share the revenues from leases that the Department issued on or after December 20, 2006, in the 181 Area, the 181 South Area, and the 2002–2007 Planning Area. You can find the definition of these Phase II revenue-sharing areas in Section 102 of GOMESA, and you can also locate them on the map available at *www.boem.gov/Map-Gallery.*

We allocate the GOMESA Phase II qualified OCS revenues among the Gulf producing States based upon proportional inverse distance calculations from applicable leased tracts (Phase II) in the 181 Area and the 181 South Area, as well as historical lease sites in the 2002–2007 Planning Area, in accordance with GOMESA. The result of this inverse distance calculation is that States closest to the most applicable leased tracts (Phase II)—as well as historical lease sites—will receive the greatest share of revenues. In determining each individual Gulf producing State's share of the GOMESA Phase II qualified OCS revenues, GOMESA provides that no State receives less than 10 percent of the revenues that we disburse to the Gulf producing States, regardless of the amount that the application of the proportional inverse distance formula establishes. Additionally, the shared revenues from certain GOMESA Phase II areas are subject to a cap of $500 million for each of fiscal years 2016 through 2055.

The CPSs located in the States' coastal zone and within 200 nautical miles of the geographic center of any OCS leased tract receive 20 percent of the qualified OCS revenues (Phase II) that GOMESA allocates to the State. We allocate revenues to the CPSs based upon their in-State relative population, coastline length, and proportional inverse distance from applicable leased tracts (Phase II) in the 181 Area and historical lease sites in the 2002–2007 Planning Area.

There are a few substantive differences between GOMESA Phase I and Phase II revenue sharing. First, the GOM acreage and resulting qualified revenues will be greater in GOMESA Phase II because Phase II acreage consists of the entire 181 Area, the 181 South Area, and the 2002–2007 Planning Area, whereas Phase I acreage consists of only the 181 Area in the Eastern Planning Area and the 181 South Area. Second, GOMESA Phase II requires that the proportional inverse

distance calculations be from both applicable leased tracts in the 181 Area and the 181 South Area and historical lease sites in the 2002–2007 Planning Area, rather than only from applicable leased tracts. Additionally, under GOMESA Phase II, we must update the group of historical lease sites in the 2002–2007 Planning Area once every five years. The result of the five-year periods between updates is that each Gulf producing State's subset of inverse distances to historical lease sites remains static for five years following each update. Third, GOMESA Phase I ends with the disbursement of fiscal year 2016 qualified OCS revenues. GOMESA Phase II begins with the disbursement of fiscal year 2017 qualified OCS revenues. Fourth, for Phase II, GOMESA directs a $500 million annual cap on the majority of shared revenues, which equates to a $375 million annual cap among the four Gulf producing States and their eligible CPSs, and a $125 million annual cap to the LWCF for each of fiscal years 2016 through 2055.

Revenues Shared Under GOMESA Phase II

Qualified OCS revenues under GOMESA Phase II are revenues from leases that the Department issued after the passage of GOMESA (December 20, 2006) in the 181 Area, the 181 South Area, and the 2002–2007 Planning Area, as GOMESA delineates.

Excluded Acreage

Selected acreage in the De Soto Canyon Protraction Area does not fall within the 181 Area, the 181 South Area, or the 2002–2007 Planning Area, as defined by GOMESA. You can locate the 21 blocks in the De Soto Canyon Protraction area bordering the Eastern Planning Area and not covered under GOMESA on the ''Call for Information and Nominations Map, Central Planning Area Lease Sale 213,'' available at *www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Regional-Leasing/Gulf-of-Mexico-Region/Lease-Sales/213/index.aspx.*

II. Comments on the Proposed Amendments

ONRR and BOEM published the proposed rule on March 31, 2014 (79 FR 17948), with a 60-day comment period. We received two comment letters on the proposed rule: One from a Gulf producing State, and one from a coastal political subdivision. We have analyzed the comments contained in the letters and discuss them below:

Specific Comments on 30 CFR Part 1219—Subpart E—Offshore Oil and Gas, GOMESA Phase II Revenue Sharing

(1) Definition of ''Qualified Outer Continental Shelf Revenues'' (Section 1219.511)

(a) Public Comment: Jefferson Parish, Louisiana, commented that the exclusion in the proposed regulation of (1) user fees and (2) lease revenues explicitly excluded from GOMESA revenue sharing by statute or appropriations law is contrary to GOMESA's requirements.

ONRR Response: As we discussed in the preamble of the proposed rule, the definition of ''qualified Outer Continental Shelf revenues (Phase II)'' is consistent with the regulations that we published for GOMESA Phase I revenue sharing (RIN 1010–AD46). In addition, this definition is consistent with other laws that appropriate OCS leasing revenues and fees by excluding any leasing revenues and fees that Congress may authorize DOI to retain in appropriations legislation or that are otherwise precluded from GOMESA revenue sharing.

Beginning in Fiscal Year 2009, the Appropriations Acts for the Department of the Interior have contained language that excludes certain rental receipts from GOMESA qualified OCS revenues, which Congress has appropriated to fund certain Departmental operations. Appropriations legislation for Fiscal Year 2012 made that exclusion permanent.

Additionally, we collect fees for cost recovery of special services, such as the transfer of a record title, based on the cost of providing those services. We collect these fees under the authority of the Independent Offices Appropriations Act (31 U.S.C. 9701) and the Office of Management and Budget's Circular A–25. We do not derive these fees from the lease. For these reasons, Congress designates such fees as part of the Department's appropriation, and they do not qualify as qualified OCS revenues under GOMESA. See Pub. L. 111–88, October 30, 2009.

(b) Public Comment: The State of Louisiana commented that we should revise the definition of qualified OCS revenues to include all funds due and payable to the United States, rather than only funds that ONRR receives. Louisiana expressed concern that including only funds received as qualified OCS revenues suggests that the United States (and therefore the Gulf-producing States and their CPSs) may not receive monies owed, and that ONRR may be perceived as having no obligation to collect monies owed.

ONRR Response: ONRR's mission is ''to collect, disburse and verify Federal and Indian energy and other natural resource revenues on behalf of all Americans.'' The Secretary entrusts ONRR with a fiduciary role, and we ensure timely receipt of all revenues that payors owe. All qualified rentals, royalties, bonus bids, and other sums that ONRR receives within a fiscal year and subsequently transfers to the appropriate receipt account establish the amount of revenues due and payable for that fiscal year. We believe that this definition is consistent with the intent of the GOMESA provisions and other applicable laws.

(2) GOMESA $500,000,000 Cap and ONRR Disbursement of Qualified OCS Revenues (Phase II) (Section 1219.512)

Public Comments: Jefferson Parish, Louisiana, commented that it is concerned with what it believes is an arbitrary annual cap of five hundred million dollars ($500,000,000.00) per year.

The State of Louisiana requested that States and their CPSs be allowed to direct all or a specified portion of their payments directly to a trustee.

ONRR Response: GOMESA is explicit about the annual cap. GOMESA states that, for each of fiscal years 2016 through 2055, the total amount that the Department shares with the States, CPSs, and the LWCF cannot exceed $500,000,000 annually. ONRR does not have the authority to alter the application of the cap.

GOMESA specifically enumerates the four States, CPSs, and the LWCF as the recipients of GOMESA revenue-sharing funds. ONRR's standard practice is to disburse revenue-sharing funds to the Government entity with which the Department shares the revenues. In order to maintain consistency between this standard practice and the revenue sharing under GOMESA, ONRR will disburse revenues to the States, CPSs, and the LWCF, and not directly to trustees.

(3) ONRR Allocates the Qualified OCS Revenues (Phase II) to Coastal Political Subdivisions Within the Gulf Producing States (Section 1219.514)

Public Comment: Jefferson Parish, Louisiana, commented that the portion of the allocation formula based upon proportionate coastline lengths for CPSs in Louisiana results in an inequity for Jefferson Parish, since parishes without a coastline in Louisiana receive greater allocations than Jefferson Parish, which has a coastline.

ONRR Response: GOMESA specifically states in Section

105(b)(3)(B) that allocations to coastal political subdivisions will be made in accordance with paragraphs (B), (C), and (E) of section 31(b)(4) of the OCSLA. Paragraph (B) specifies that 25 percent of the allocation be based on the number of miles of coastline a CPS has in proportion to the total number of miles of coastline of all CPSs within each State. For the State of Louisiana, paragraph (C) specifies a proxy coastline length for CPSs without a coastline. GOMESA does not provide an option to adjust the coastline length of any CPSs in Louisiana that have a coastline shorter than the proxy coastline length. Although Jefferson Parish does receive a smaller portion of revenues relative to CPSs without a coastline, GOMESA does not provide the Department with the authority to address this issue without a legislative change.

(4) ONRR Disbursement of Funds to Gulf Producing States and Eligible Coastal Political Subdivisions (Section 1219.516)

Public Comment: The State of Louisiana commented that we should make the disbursement of allocated funds as quickly as practicable, but not later than March 31st of the year following the fiscal year of qualified OCS revenues.

ONRR Response: ONRR intends to disburse funds as quickly as practicable, but we cannot guarantee that we will do so before March 31st of the following fiscal year. GOMESA requires that ONRR disburse funds within the following fiscal year—or by September 30th. ONRR's intent is to make the disbursements as soon as possible, but the disbursements may depend on factors outside of ONRR's authority. ONRR has modified the final rule to include language that states that we will disburse as soon as authorized and practicable each year.

This final rule also makes non-substantive technical or clarifying changes to the proposed rule. In the interim, between development of the proposed rule and the final rule, we made a technical update in § 1219.102 due to the United States Department of the Treasury disbursing monies only by Electronic Funds Transfer (EFT).

III. Procedural Matters

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) will review all significant rulemakings. OIRA determined that this rule is not significant.

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

Regulatory Flexibility Act

DOI certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule specifies the formulas and methodologies for distributing DOI-collected shared revenues to the qualified Gulf producing States, their CPSs, and the LWCF. This rule has no effect on the amount of royalties, rents, or bonuses that lessees, operators, or payors owe, regardless of size and, consequently, does not have a significant economic effect on offshore lessees or operators, including those classified as small businesses. Small entities may be the beneficiaries of contracts that GOMESA revenues fund and that Gulf producing States or CPSs manage for coastal protection, conservation, or restoration services, but that is solely at the local government entity's discretion rather than the Federal Government's discretion. It is not possible to estimate GOMESA's ultimate effect on small entities since, under the statute, States and CPSs will be the entities disbursing the shared revenues for one or more of the five GOMESA-authorized uses.

Small Business Regulatory Enforcement Fairness Act

This rulemaking is not a major rule under 5 U.S.C. 801 *et seq.* of the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more. This rule's provisions specify how we will allocate qualified OCS revenues to States and CPSs during the second phase of GOMESA revenue sharing. This rule has no effect on the amount of royalties, rents, or bonuses that lessees, operators, or payors owe, regardless of size and, consequently, does not have a significant adverse economic effect on offshore lessees or operators, including those classified as small businesses. The Gulf producing States and CPS recipients of the revenues will likely fund contracts that will benefit the local economies, small entities, and the environment. We believe that these annual effects will be less than $100 million.

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

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. We project that the effects, if any, of distributing revenues to the States and CPSs, will be beneficial.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. This rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. We are not required to provide a statement containing the information that the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) requires because this rule is not a mandate. This rule merely provides the formulas and methods to implement an allocation of revenue to certain States and eligible CPSs, as Congress directed.

Takings (E.O. 12630)

Under the criteria in section 2 of E.O. 12630, this rule does not have significant takings implications. This rule will not be a governmental action capable of interference with constitutionally protected property rights. This rule does not require a Takings Implication Assessment.

Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This rule does not substantially and directly affect the relationship between the Federal and State governments. To the extent that State and local governments have a role in OCS activities, this rule does not affect that role.

Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

a. Meets the criteria of section 3(a), which requires that all regulations undergo review to eliminate errors and ambiguity and are written to minimize litigation.

b. Meets the criteria of section 3(b)(2), which requires that we write regulations in clear language using clear legal standards.

Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. Under the Department's consultation policy and the criteria in E.O. 13175, we have evaluated this rule and determined that it has no substantial direct effects on Federally recognized Indian Tribes.

Paperwork Reduction Act

This rule:

(1) Does not contain any information collection requirements.

(2) Does not require a submission under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. We are not required to provide a detailed statement under the National Environmental Policy Act of 1969 (NEPA) because this rule qualifies for categorical exclusion under 43 CFR 46.210(c) and (i) and the DOI Departmental Manual, part 516, section 15.4.D: ''*(c) Routine financial transactions including such things as . . . audits, fees, bonds, and royalties . . . (i) Policies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature.*'' We have also determined that this rule is not involved in any of the extraordinary circumstances listed in 43 CFR 46.215 that require further analysis under NEPA. This rule does not alter, in any material way, natural resources exploration, production, or transportation.

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

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

List of Subjects

30 CFR Part 519

Government contracts, Mineral royalties, Oil and gas exploration, Public lands—mineral resources.

30 CFR Part 1219

Government contracts, Mineral royalties, Oil and gas exploration, Public lands—mineral resources.

Janice M. Schneider,

Assistant Secretary—Land and Minerals Management.

Kristen J. Sarri,

Principal Deputy Assistant Secretary—Policy, Management and Budget.

Authority and Issuance

For the reasons stated in the preamble, under the authority provided by the Reorganization Plan No. 3 of 1950 (64 Stat. 1262) and Secretarial Order Nos. 3299, 3302, and 3306, the Department of the Interior amends part 519 of title 30 CFR chapter V and part 1219 of 30 CFR chapter XII as follows:

Chapter V—Bureau of Ocean Energy Management, Department of the Interior

Subchapter A—Minerals Revenue Management

PART 519 [REMOVED AND RESERVED]

■ 1. Remove and reserve part 519

Chapter XII—Office of Natural Resources Revenue, Department of the Interior

Subchapter A—Natural Resources Revenue

■ 2. Revise part 1219 to read as follows:

PART 1219—DISTRIBUTION AND DISBURSEMENT OF ROYALTIES, RENTALS, AND BONUSES

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—Oil and Gas, Onshore

Sec.

Subpart D—Oil and Gas, Offshore, GOMESA Phase I Revenue Sharing

Subpart E—Oil and Gas, Offshore, GOMESA Phase II Revenue Sharing

Authority: Section 104, Pub. L. 97–451, 96 Stat. 2451 (30 U.S.C. 1714), Pub. L. 109–432, Div. C, Title I, 120 Stat. 3000.

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—Oil and Gas, Onshore

§ 1219.100 What is ONRR's timing of payment to the States?

ONRR will pay a State's share of mineral leasing revenues to the State not later than the last business day of the month in which the U.S. Treasury issues a warrant authorizing the disbursement, except for any portion of such revenues which is under challenge and placed in a suspense account pending resolution of a dispute.

§ 1219.101 What receipts are subject to an interest charge?

(a) Subject to the availability of appropriations, the Office of Natural Resources Revenue (ONRR) will pay the

State its proportionate share of any interest charge for royalty and related monies that are placed in a suspense account pending resolution of any matters that may disallow distribution and disbursement. Such monies not disbursed by the last business day of the month following receipt by ONRR will accrue interest until paid.

(b) Upon resolution of any matters that may disallow distribution and disbursement, ONRR will disburse the suspended monies found due in paragraph (a) of this section, plus interest, to the State, under the provisions of § 1219.100.

(c) ONRR will apply paragraph (a) of this section to revenues that ONRR cannot disburse to the State because the payor/lessee provided to ONRR incorrect, inadequate, or incomplete information, which prevented ONRR from identifying the proper recipient of the payment.

§ 1219.102 What is ONRR's method of payment to the States?

ONRR will disburse monies to a State by Electronic Funds Transfer (EFT).

§ 1219.103 How will ONRR manage payments to Indian accounts?

ONRR will transfer mineral revenues received from Indian leases to the appropriate Indian accounts that the Bureau of Indian Affairs (BIA) manages for allotted and Tribal revenues. These accounts are specifically designated Treasury accounts. ONRR will transfer these revenues to the Indian accounts at the earliest practicable date after such funds are received, but in no case later than the last business day of the month in which ONRR receives these revenues.

§ 1219.104 What are Explanation of Payments to the States and Indian Tribes?

(a) ONRR will describe the payments to States and BIA, on behalf of Indian Tribes or Indian allottees, discussed in this part, in ONRR-prepared Explanation of Payment reports. ONRR will prepare these reports at the lease level and will include a description of the type of payment made, the period covered by the payment, the source of the payment, sales amounts upon which the payment is based, the royalty rate, and the unit value. If any State or Indian Tribe needs additional information pertaining to mineral revenue payments, the State or Tribe may request this information from ONRR.

(b) ONRR will provide these reports to:

(1) States, not later than the 10th day of the month following the month in which ONRR disburses the State's share of royalties and related monies.

(2) BIA, on behalf of Tribes and Indian allottees, not later than the 10th day of the month following the month in which ONRR disburses the funds.

(c) ONRR will not include in these reports revenues that we cannot distribute to States, Tribes, or Indian allottees because the payor/lessee provided incorrect, inadequate, or incomplete information about the proper recipient of the payment, until the payor/lessee has submitted to ONRR the missing information.

§ 1219.105 What definitions apply to this subpart?

Terms that ONRR uses in this subpart will have the same meaning as in 30 U.S.C. 1702.

Subpart D—Oil and Gas, Offshore, GOMESA Phase I Revenue Sharing

§ 1219.410 What does this subpart contain?

(a) The Gulf of Mexico Energy Security Act of 2006 (GOMESA) directs the Secretary of the Interior to disburse a portion of the rentals, royalties, bonus bids, and other sums derived from certain Outer Continental Shelf (OCS) leases in the Gulf of Mexico (GOM) to the States of Alabama, Louisiana, Mississippi, and Texas (collectively identified as the Gulf producing States); to eligible coastal political subdivisions (CPSs) within those States; and to the Land and Water Conservation Fund (LWCF). Shared GOMESA revenues are reserved for the following purposes:

(1) Projects and activities for the purpose of coastal protection, including conservation, coastal restoration, hurricane protection, and infrastructure directly affected by coastal wetland losses;

(2) Mitigation of damage to fish, wildlife, or natural resources;

(3) Implementation of a federally-approved marine, coastal, or comprehensive conservation management plan;

(4) Mitigation of the impact of OCS activities through the funding of onshore infrastructure projects; and

(5) Planning assistance and administrative costs not-to-exceed 3 percent of the amounts received.

(b) This subpart sets forth the formula and methodology ONRR uses to determine the amount of revenues allocated and disbursed to each Gulf producing State and each eligible CPS for each of fiscal years 2007 through 2016. Leasing revenues disbursed under this subpart originate from leases issued on or after December 20, 2006, in the 181 Area in the Eastern Planning Area and the 181 South Area, subject to restrictions identified in GOMESA. We collectively refer to the revenue sharing from these areas for these fiscal years as GOMESA Phase I revenue sharing. For questions related to the revenue-sharing provisions in this subpart, please contact: Program Manager, Financial Management, Office of Natural Resources Revenue, P.O. Box 25165, Denver Federal Center, Building 85, Denver, CO 80225–0165.

§ 1219.411 What definitions apply to this subpart?

For purposes of this subpart:

181 Area means the area identified in map 15, page 58, of the ''Proposed Final Outer Continental Shelf Oil and Gas Leasing Program for 1997–2002,'' dated August 1996, excluding the area offered in OCS Lease Sale 181, held on December 5, 2001.

181 Area in the Eastern Planning Area is comprised of the area of overlap of the two geographic areas defined as the ''181 Area'' and the ''Eastern Planning Area.''

181 South Area means any area—

(1) Located:

(i) South of the 181 Area;

(ii) West of the Military Mission Line; and

(iii) In the Central Planning Area;

(2) Excluded from the ''Proposed Final Outer Continental Shelf Oil and Gas Leasing Program for 1997–2002,'' dated August 1996, of the Bureau of Ocean Energy Management; and

(3) Included in the areas considered for oil and gas leasing, as identified in map 8, page 84, of the document entitled, ''Revised Outer Continental Shelf Oil and Gas Leasing Program 2007–2012,'' approved December 2010.

Applicable leased tract (Phase I) means a tract that is subject to a lease under section 8 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1337, for the purpose of drilling for, developing, and producing oil or natural gas resources, issued on or after December 20, 2006, and located fully or partially in either the 181 Area in the Eastern Planning Area or in the 181 South Area.

Central Planning Area means the Central Gulf of Mexico Planning Area of the Outer Continental Shelf, as designated in the document entitled, ''Revised Outer Continental Shelf Oil and Gas Leasing Program 2007–2012,'' approved December 2010.

Coastal political subdivision means a political subdivision of a Gulf producing State, any part of which is:

(1) Within the coastal zone (as defined in section 304 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453)) of the Gulf producing State as of December 20, 2006; and

(2) Not more than 200 nautical miles from the geographic center of any leased tract.

Coastline means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. This is the same definition used in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

Distance means the minimum great circle distance.

Eastern Planning Area means the Eastern Gulf of Mexico Planning Area of the Outer Continental Shelf, as designated in the document entitled, ''Revised Outer Continental Shelf Oil and Gas Leasing Program 2007–2012,'' approved December 2010.

Gulf producing State means each of the States of Alabama, Louisiana, Mississippi, and Texas.

Leased tract means any tract that is subject to a lease under section 6 or 8 of the Outer Continental Shelf Lands Act for the purpose of drilling for, developing, and producing oil or natural gas resources.

Military Mission Line means the north-south line at 86°41′ W. longitude.

Qualified OCS revenues (Phase I) means—

(1) In the case of each of the fiscal years 2007 through 2016, all rentals, royalties, bonus bids, and other sums received by the United States from leases issued on or after December 20, 2006, located:

(i) In the 181 Area in the Eastern Planning Area.

(ii) In the 181 South Area.

(2) For applicable leased tracts intersected by the planning area administrative boundary line (*e.g.,* separating the GOM Central Planning Area from the Eastern Planning Area), only the percent of revenues equivalent to the percent of surface acreage in the 181 Area in the Eastern Planning Area will be considered qualified OCS revenues *(Phase I).*

(3) Exclusions from the term qualified OCS revenues *(Phase I)* are:

(i) Revenues from the forfeiture of a bond or other surety securing obligations other than royalties;

(ii) Civil penalties;

(iii) Royalties ''taken by the Secretary in-kind and not sold.'' (Pub. L. 109–432, Dec. 20, 2006);

(iv) Revenues generated from leases subject to section 8(g) of the Outer Continental Shelf Lands Act (43 U.S.C. 1337(g));

(v) User fees; and

(vi) Lease revenues explicitly excluded from GOMESA revenue sharing by statute or appropriations law.

§ 1219.412 How will ONRR divide the qualified OCS revenues (Phase I)?

For each of the fiscal years 2007 through 2016, the Secretary of the Treasury will deposit 50 percent of the qualified OCS revenues (Phase I) into a special U.S. Treasury account, from which ONRR will disburse 75 percent to the Gulf producing States and 25 percent to the Land and Water Conservation Fund (LWCF). Of the revenues disbursed to a Gulf producing State, we will disburse 20 percent directly to the CPSs within that State. Each Gulf producing State will receive at least 10 percent of the qualified OCS revenues (Phase I) available for allocation to the Gulf producing States each fiscal year. The following table summarizes the resulting revenue shares (adding to 100 percent):

REVENUE DISTRIBUTION OF QUALIFIED OCS REVENUES UNDER GOMESA PHASE I

Recipient of qualified OCS revenues	Percentage of qualified OCS revenues
U.S. Treasury (General Fund)	50
Land and Water Conservation Fund	12.5
Gulf Producing States	30
Gulf Producing State Coastal Political Subdivisions	7.5

§ 1219.413 How will ONRR determine each Gulf producing State's share of the qualified OCS revenues (Phase I) from leases in the 181 Area in the Eastern Planning Area and the 181 South Area?

(a) ONRR will determine the great circle distance between:

(1) The geographic center of each applicable leased tract (Phase I); and

(2) The point on the coastline of each Gulf producing State that is closest to the geographic center of each applicable leased tract (Phase I).

(b) Based on these distances, we will calculate the qualified OCS revenues (Phase I) to disburse to each Gulf producing State as follows:

(1) For each Gulf producing State, we will calculate and total, over all applicable leased tracts (Phase I), the mathematical inverses of the distances between the points on the State's coastline that are closest to the geographic centers of the applicable leased tracts (Phase I), and the geographic centers of the applicable leased tracts (Phase I). For applicable leased tracts intersected by the planning area administrative boundary line, we will use the geographic center of the entire lease for the inverse distance determination.

(2) For each Gulf producing State, we will divide the sum of each State's inverse distances from all applicable leased tracts (Phase I) calculated under paragraph (1), by the sum of the inverse distances from all applicable leased tracts (Phase I) across all four Gulf producing States. In the formulas below, I_{AL}, I_{LA}, I_{MS}, and I_{TX} represent the sum of the inverses of the shortest distances between Alabama, Louisiana, Mississippi, and Texas and all applicable leased tracts (Phase I), respectively. We will multiply the result by the amount of shareable, qualified OCS revenues (Phase I).

Alabama Share = $(I_{AL} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase I)

Louisiana Share = $(I_{LA} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase I)

Mississippi Share = $(I_{MS} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase I)

Texas Share = $(I_{TX} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase I)

(3) If, in any fiscal year, this calculation results in less than a 10-percent allocation of the qualified OCS revenues (Phase I) to any Gulf producing State, we will recalculate the distribution. We will allocate 10 percent of the qualified OCS revenues (Phase I) to the affected State and recalculate the other States' shares of the remaining qualified OCS revenues (Phase I), omitting from the calculation the State receiving the 10-percent minimum share.

§ 1219.414 How will ONRR allocate the qualified OCS revenues (Phase I) to coastal political subdivisions within the Gulf producing States?

(a) Of the qualified OCS revenues (Phase I) allocated to a Gulf producing State's CPSs, ONRR will allocate 25 percent based on the proportion that each CPS's population bears to the population of all CPSs in the State.

(b) Of the qualified OCS revenues (Phase I) allocated to a Gulf producing State's CPSs, we will allocate 25 percent based on the proportion that each CPS's miles of coastline bears to the total miles of coastline across all CPSs in the State. However, for the State of Louisiana, we will deem CPSs without a coastline to each have a coastline one-third the average length of the coastline of all CPSs within Louisiana that have a coastline.

(c)(1) Of the qualified OCS revenues (Phase I) allocated to a Gulf producing State's CPSs, we will allocate 50 percent in amounts that are inversely

proportional to the respective distances between:

(i) The point in each CPS that is closest to the geographic center of each applicable leased tract (Phase I); and

(ii) The geographic center of each applicable leased tract (Phase I).

(2) However, we will exclude distances to an applicable leased tract (Phase I) from this calculation if any portion of the tract is located in a geographic area that was subject to a leasing moratorium on January 1, 2005, unless the leased tract was in production on that date.

§ 1219.415 How will ONRR allocate qualified OCS revenues (Phase I) to the coastal political subdivisions if, during any fiscal year, there are no applicable leased tracts in the 181 Area in the Eastern Gulf of Mexico Planning Area?

If, during any fiscal year, there are no applicable leased tracts in the 181 Area in the Eastern Gulf of Mexico Planning Area, ONRR will allocate revenues to the CPSs in accordance with the following criteria:

(a) Of the qualified OCS revenues (Phase I) allocated to a Gulf producing State's CPSs, we will allocate 50 percent based on the proportion that each CPS's population bears to the population of all CPSs in the State.

(b) Of the qualified OCS revenues (Phase I) allocated to a Gulf producing State's CPSs, we will allocate 50 percent based on the proportion that each CPS's miles of coastline bears to the total miles of coastline across all CPSs within the State. However, for the State of Louisiana, we will deem CPSs without a coastline to each have a coastline one-third the average length of the coastline of all CPSs within Louisiana that have a coastline.

§ 1219.416 When will ONRR disburse funds to Gulf producing States and coastal political subdivisions?

ONRR will disburse GOMESA revenues as soon as authorized and practicable within the fiscal year following the year that we collect qualified OCS revenues (Phase I).

Subpart E—Oil and Gas, Offshore, GOMESA Phase II Revenue Sharing

§ 1219.510 What does this subpart contain?

(a) GOMESA directs the Secretary of the Interior to disburse a portion of the rentals, royalties, bonus bids, and other sums derived from certain OCS leases in the GOM to the States of Alabama, Louisiana, Mississippi, and Texas (collectively identified as the Gulf producing States); to eligible CPSs within those States; and to the LWCF. GOMESA directs the Gulf producing States and CPSs to use the shared revenues for the following purposes:

(1) Projects and activities for the purpose of coastal protection, including conservation, coastal restoration, hurricane protection, and infrastructure directly affected by coastal wetland losses;

(2) Mitigation of damage to fish, wildlife, or natural resources;

(3) Implementation of a federally-approved marine, coastal, or comprehensive conservation management plan;

(4) Mitigation of the impact of OCS activities through the funding of onshore infrastructure projects; and

(5) Planning assistance and administrative costs not-to-exceed 3 percent of the amounts received.

(b) This subpart sets forth the formula and methodology ONRR will use to determine the amount of revenues allocated and disbursed to each Gulf producing State and each eligible CPS for fiscal year 2017 and each fiscal year thereafter. Leasing revenues disbursed under this subpart (also referred to as GOMESA Phase II) originate from leases issued on or after December 20, 2006, in the 181 Area, the 181 South Area, and the GOM 2002–2007 Planning Area, subject to restrictions and caps identified in GOMESA. For questions related to the revenue-sharing provisions in this subpart, please contact: Program Manager, Financial Management, Office of Natural Resources Revenue, P.O. Box 25165, Denver Federal Center, Building 85, Denver, CO 80225–0165, or at (303) 231–3217.

§ 1219.511 What definitions apply to this subpart?

For purposes of this subpart:

181 Area is defined at § 1219.411.

181 South Area is defined at § 1219.411.

''181 Area in the Central Planning Area'' is comprised of the area of overlap of the two geographic areas defined at § 1219.411 as the ''181 Area'' and the ''Central Planning Area.''

2002–2007 Planning Area means any area—

(1) Located in—

(i) The Eastern Planning Area, as designated in the ''Proposed Final Outer Continental Shelf Leasing Program 2002–2007,'' dated April 2002;

(ii) The Central Planning Area, as designated in the ''Proposed Final Outer Continental Shelf Leasing Program 2002–2007,'' dated April 2002; or

(iii) The Western Planning Area, as designated in the ''Proposed Final Outer Continental Shelf Leasing Program 2002–2007,'' dated April 2002; and

(2) Not located in—

(i) An area in which no funds may be expended to conduct offshore preleasing, leasing, and related activities under sections 104 through 106 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006 (Pub. L. 109–54; 119 Stat. 521) (as in effect on August 2, 2005);

(ii) An area withdrawn from leasing under the ''Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition,'' from 34 Weekly Comp. Pres. Doc. 1111, dated June 12, 1998; or

(iii) The 181 Area or 181 South Area.

Applicable leased tract (Phase II) means a tract that is subject to a lease under section 8 of the OCSLA, for the purpose of drilling for, developing, and producing oil or natural gas resources, issued on or after December 20, 2006, and located fully or partially in either the 181 Area or the 181 South Area.

Central Planning Area is defined at § 1219.411.

Coastal political subdivision is defined at § 1219.411.

Coastline is defined at § 1219.411.

Distance is defined at § 1219.411.

Eastern Planning Area is defined at § 1219.411.

Gulf producing State is defined at § 1219.411.

Historical lease site means any tract in the 2002–2007 Planning Area leased on or after October 1, 1982, under section 8 of the OCSLA, for the purpose of drilling for, developing, and producing oil or natural gas resources.

Leased tract is defined at § 1219.411.

Military Mission Line is defined at § 1219.411.

Qualified OCS revenues (Phase II) means—

(1) In the case of fiscal year 2017 and each fiscal year thereafter, all rentals, royalties, bonus bids, and other sums received by the United States from leases that lessees enter(ed) into on or after December 20, 2006, located:

(i) In the 181 Area;

(ii) In the 181 South Area;

(iii) In the 2002–2007 Planning Area.

(2) Exclusions from the term *''Qualified OCS revenues (Phase II)''* are:

(i) Revenues from the forfeiture of a bond or other surety instrument securing obligations other than royalties;

(ii) Civil penalties;

(iii) Royalties ''taken by the Secretary in-kind and not sold'' (Pub. L. 109–432, Dec 20, 2006);

(iv) Revenues generated from leases subject to section 8(g) of the Outer Continental Shelf Lands Act (43 U.S.C. 1337(g));

(v) User fees; and

(vi) Lease revenues explicitly excluded from GOMESA revenue sharing by statute or appropriations law.

(3) The term *''Qualified OCS revenues (Phase II)''* consists wholly of the two subsets defined as *''Qualified OCS revenues (Phase II—capped)''* and *''Qualified OCS revenues (Phase II—uncapped).''*

(i) *Qualified OCS revenues (Phase II—capped)* means, in the case of fiscal year 2017 and each fiscal year thereafter, the subset of qualified OCS revenues (Phase II) received by the United States from leases that lessees enter(ed) into on or after December 20, 2006, located:

(A) In the 181 Area in the Central Planning Area; or

(B) In the 2002–2007 Planning Area.

(ii) *Qualified OCS revenues (Phase II—uncapped)* means, in the case of fiscal year 2017 and each fiscal year thereafter, the subset of qualified OCS revenues (Phase II) received by the United States from leases that lessees enter(ed) into on or after December 20, 2006, located:

(A) In the 181 Area in the Eastern Planning Area, or

(B) In the 181 South Area.

§ 1219.512 How will ONRR divide the qualified OCS revenues (Phase II)?

(a) For fiscal year 2017 and each fiscal year thereafter, the Secretary of the Treasury will deposit 50 percent of the qualified OCS revenues (Phase II—uncapped) into a special U.S. Treasury account, from which ONRR will disburse 75 percent to the Gulf producing States and 25 percent to the LWCF. Of the revenues disbursed to a Gulf producing State, we will disburse 20 percent directly to the CPSs within that State. Each Gulf producing State will receive at least 10 percent of the qualified OCS revenues (Phase II—uncapped) available for allocation to the Gulf producing States each fiscal year. The following table summarizes the resulting revenue shares (adding to 100 percent):

REVENUE DISTRIBUTION OF QUALIFIED OCS REVENUES (PHASE II—UNCAPPED) UNDER GOMESA PHASE II

Recipient of qualified OCS revenues	Percentage of qualified OCS revenues
U.S. Treasury (General Fund)	50
Land and Water Conservation Fund	12.5
Gulf Producing States	30
Gulf Producing State Coastal Political Subdivisions	7.5

(b) For fiscal year 2017 and each fiscal year thereafter, the Secretary of the Treasury will deposit 50 percent of the qualified OCS revenues (Phase II—capped) into a special U.S. Treasury account. The total amount of qualified OCS revenues (Phase II—capped) deposited in the special U.S. Treasury account and available for allocation to the Gulf producing States, the CPSs and the LWCF, under this subpart, cannot exceed $500,000,000 for each of the fiscal years 2017 through 2055. After applying the cap, if applicable, ONRR will disburse 75 percent to the Gulf producing States and 25 percent to the LWCF. Of the revenues disbursed to a Gulf producing State, we will disburse 20 percent directly to the CPSs within that State. Each Gulf producing State will receive at least 10 percent of the qualified OCS revenues (Phase II—capped) available for allocation to the Gulf producing States each fiscal year.

§ 1219.513 How will ONRR determine each Gulf producing State's share of the qualified OCS revenues (Phase II) from leases in the 181 Area, the 181 South Area and the 2002–2007 Planning Area?

(a) ONRR will determine the great circle distance between:

(1) The geographic center of each applicable leased tract (Phase II) or historical lease site; and

(2) The point on the coastline of each Gulf producing State that is closest to the geographic center of each applicable leased tract (Phase II) or historical lease site.

(b) Based on a specific subset of these distances, we will calculate the qualified OCS revenues (Phase II—uncapped) to disburse to each Gulf producing State as follows:

(1) For each Gulf producing State, we will calculate and total, over all applicable leased tracts (Phase II) located in the 181 Area in the Eastern Planning Area or the 181 South Area, the mathematical inverses of the distances between the points on the State's coastline that are closest to the geographic centers of the applicable leased tracts (Phase II) located in the 181 Area in the Eastern Planning Area or the 181 South Area, and the geographic centers of the applicable leased tracts (Phase II) located in the 181 Area in the Eastern Planning Area or the 181 South Area.

(2) For each Gulf producing State, we will divide the sum of each State's inverse distances from all applicable leased tracts (Phase II) located in the 181 Area in the Eastern Planning Area or the 181 South Area calculated under paragraph (1), by the sum of the inverse distances from all applicable leased tracts (Phase II) located in the 181 Area in the Eastern Planning Area or the 181 South Area across all four Gulf producing States. In the formulas below, I_{AL}, I_{LA}, I_{MS}, and I_{TX} represent the sum of the inverses of the shortest distances between Alabama, Louisiana, Mississippi, and Texas and all applicable leased tracts (Phase II), respectively. We will multiply the result by the amount of shareable, qualified OCS revenues (Phase II—uncapped).

Alabama Share = $(I_{AL} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—uncapped)

Louisiana Share = $(I_{LA} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—uncapped)

Mississippi Share = $(I_{MS} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—uncapped)

Texas Share = $(I_{TX} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—uncapped)

(3) If, in any fiscal year, this calculation results in less than a 10-percent allocation of the qualified OCS revenues (Phase II—uncapped) to any Gulf producing State, we will recalculate the distribution. We will allocate 10 percent of the qualified OCS revenues (Phase II—uncapped) to the affected State and recalculate the other States' shares of the remaining qualified OCS revenues (Phase II—uncapped), omitting from the calculation the State receiving the 10-percent minimum share.

(c) Based on a specific subset of these distances, we will calculate the qualified OCS revenues (Phase II—capped) to disburse to each Gulf producing State as follows:

(1) For each Gulf producing State, we will calculate and total, over all applicable leased tracts (Phase II) located in the 181 Area in the Central Planning Area and historical lease sites, the mathematical inverses of the distances between the points on the State's coastline that are closest to the geographic centers of the applicable leased tracts (Phase II) located in the 181 Area in the Central Planning Area and historical lease sites, and the geographic centers of the applicable leased tracts (Phase II) located in the 181 Area in the Central Planning Area and historical lease sites.

(2) For each Gulf producing State, we will divide the sum of each State's inverse distances from all applicable leased tracts (Phase II) located in the 181 Area in the Central Planning Area and historical lease sites calculated under paragraph (1), by the sum of the inverse distances from all applicable leased tracts (Phase II) located in the

181 Area in the Central Planning Area and historical lease sites across all four Gulf producing States. In the formulas below, I_{AL}, I_{LA}, I_{MS}, and I_{TX} represent the sum of the inverses of the shortest distances between Alabama, Louisiana, Mississippi, and Texas and all applicable leased tracts (Phase II) and historical lease sites, respectively. We will multiply the result by the amount of shareable, qualified OCS revenues (Phase II—capped).

Alabama Share = $(I_{AL} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—capped)

Louisiana Share = $(I_{LA} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—capped)

Mississippi Share = $(I_{MS} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—capped)

Texas Share = $(I_{TX} \div (I_{AL} + I_{LA} + I_{MS} + I_{TX})) \times$ qualified OCS revenues (Phase II—capped)

(3) If, in any fiscal year, this calculation results in less than a 10-percent allocation of the qualified OCS revenues (Phase II—capped) to any Gulf producing State, we will recalculate the distribution. We will allocate 10 percent of the qualified OCS revenues (Phase II—capped) to the affected State and recalculate the other States' shares of the remaining qualified OCS revenues (Phase II—capped), omitting from the calculation the State receiving the 10-percent minimum share.

§ 1219.514 How will ONRR allocate the qualified OCS revenues (Phase II) to coastal political subdivisions within the Gulf producing States?

(a) Of the qualified OCS revenues (Phase II) allocated to a Gulf producing State's CPSs, ONRR will allocate 25 percent based on the proportion that each CPS's population bears to the population of all CPSs in the State.

(b) Of the qualified OCS revenues (Phase II) allocated to a Gulf producing State's CPSs, we will allocate 25 percent based on the proportion that each CPS's miles of coastline bears to the total miles of coastline across all CPSs in the State. However, for the State of Louisiana, we will deem CPSs without a coastline to each have a coastline one-third the average length of the coastline of all CPSs within Louisiana that have a coastline.

(c)(1) Of the qualified OCS revenues (Phase II) allocated to a Gulf producing State's CPSs, we will allocate 50 percent in amounts that are inversely proportional to the respective distances between:

(i) The point in each CPS that is closest to the geographic center of the applicable leased tract (Phase II) or historical lease site; and

(ii) The geographic center of each applicable leased tract (Phase II) or historical lease site.

(2) However, we will exclude distances to an applicable leased tract (Phase II) from this calculation if any portion of the tract is located in a geographic area that was subject to a leasing moratorium on January 1, 2005, unless the leased tract was in production on that date.

§ 1219.515 How will ONRR update the group of ''historical lease sites'' and ''applicable leased tracts (Phase II)'' used for determining the allocation of shared revenues?

(a) As GOMESA directs, ONRR will update the group of historical lease sites in the 2002–2007 Planning Area as follows:

(1) On December 31, 2015, we will freeze the group of historical lease sites, subject to the adjustment under paragraph (a)(2) of this section.

(2) Beginning January 1, 2022, and every fifth year thereafter, we will extend the ending date for determining the group of historical lease sites for an additional five calendar years by adding any new historical lease sites to the existing group.

(b) Each year we will update the group of applicable leased tracts (Phase II) to include only leases that were in effect at any time during the previous fiscal year.

§ 1219.516 When will ONRR disburse funds to Gulf producing States and coastal political subdivisions?

ONRR will disburse GOMESA revenues as soon as authorized and practicable within the fiscal year following the year that we collect qualified OCS revenues (Phase II).

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DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 285

RIN 1510–AA10

Offset of Tax Refund Payments To Collect Past-Due Support

AGENCY: Bureau of the Fiscal Service, Fiscal Service, Treasury.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of the Treasury (Treasury), Bureau of the Fiscal Service (Fiscal Service), is amending its regulation governing the offset of tax refund payments to collect past-due support obligations. This rule will limit the time period during which Treasury may recover certain tax refund offset collections from States, when the States have already forwarded such funds to custodial parents as required or as authorized by applicable laws. This change will limit the time period during which Treasury may require States to return the offset funds to six months from the date of such collection, if Treasury has determined that the underlying refund was not due to the taxpayer.

DATES: *Effective Date.* This interim final rule is effective January 1, 2016.

Comment date. Comments must be received by February 29, 2016.

ADDRESSES: You can download this interim rule at the following Web site: *http://www.fms.treas.gov/debt.* You may also inspect and copy this interim rule at: Treasury Department Library, Freedom of Information Act (FOIA) Collection, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue NW., Washington, DC 20220. Before visiting, you must call (202) 622–0990 for an appointment.

In accordance with the U.S. government's eRulemaking Initiative, Fiscal Service publishes rulemaking information on *www.regulations.gov.* Regulations.gov offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

Instructions for Comment Submission

Comments on this rule, identified by docket FISCAL–2014–0005, should only be submitted using the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions on the Web site for submitting comments. Fiscal Service recommends using this method to submit comments since mail can be subject to delays caused by security screening.
- *Mail:* Thomas Kobielus, Manager, Treasury Offset Program Division, Debt Management Services, Bureau of the Fiscal Service, 401 14th Street SW., Room 220B, Washington, DC 20227. Please note that mail may be delayed due to security screening.

The fax and email methods of submitting comments on rules to Fiscal Service have been discontinued.

All submissions received must include the agency name (''Bureau of the Fiscal Service'') and docket number FISCAL–2014–0005 for this rulemaking.

In general, comments received will be published on Regulations.gov without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not disclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Thomas Kobielus, Manager, at (202) 874–6810, or Tricia Long, Senior Counsel, at (202) 874–6680.

SUPPLEMENTARY INFORMATION:

I. Background

When a tax refund payment is issued and offset through the Treasury Offset Program (TOP) to collect a delinquent child support debt owed by the taxpayer, the taxpayer receives the benefit of the payment in the form of a credit on the amount of debt owed. If the Internal Revenue Service (IRS) subsequently determines that the taxpayer was not entitled to that tax refund, the taxpayer is accordingly not entitled to the credit on the debt owed. Currently, IRS has unlimited time during which to require Fiscal Service to recover such erroneous offset funds from the Federal or State agency which collected the funds. Fiscal Service requires return of monies representing the offset from State agencies notwithstanding the fact that the State agency may have already forwarded such funds to the custodial parent.

States submit past-due support obligations to TOP both for collection of support debts which have been assigned to the State pursuant to 42 U.S.C. 608(a)(3) and on behalf of custodial parents, pursuant to 42 U.S.C. 654(4). Collections for support debts collected on behalf of custodial parents pursuant to 42 U.S.C. 654(4) are required by 42 U.S.C. 657 to be forwarded by the States to the custodial parent. By regulation, any of those collections resulting from tax refund offsets must be forwarded within 30 calendar days of initial receipt (unless the refund offset is based upon a joint return, in which case, the State has six months). *See* 45 CFR 302.32(b)(3)(ii). States also collect money as reimbursement for public assistance paid to the family. States have the option, as authorized by 42 U.S.C. 657, to forward such collections to custodial parents. Therefore, in many cases, the States no longer have the funds in their possession to return to Treasury. Under current procedures, States are required to pay Treasury from their own funds, or Treasury may retain such amounts from subsequent offset collections made on behalf of the States. This rule will impose a six-month limit upon Treasury for seeking recoupment from States for erroneous offset funds which have been forwarded to custodial parents pursuant to 42 U.S.C. 657.

Following implementation of this rule, IRS and Fiscal Service will continue to work with the Federal Office of Child Support Enforcement (OCSE) and State child support agencies to assess the impact of this interim final rule and to identify potential improvements in the tax offset process, including the practice of recouping from States erroneous offset funds that have been forwarded to custodial parents. Once sufficient data respecting implementation of this new rule is available, but in no case later than 2 years, Treasury will work with OCSE to consider further reduction in the time limit placed upon it for seeking recoupment from States.

The six-month limitation in this rule applies only to the offset of tax refund payments to collect past-due support obligations when States have forwarded the collected funds to the custodial parent. This rule does not apply when States have retained the funds. This rule does not apply to any other type of debt being collected by tax refund offset under 31 CFR part 285. This rule does not affect Treasury's rights to seek recovery of the erroneous offset funds from any person through any other means permitted by law.

Fiscal Service developed this interim final rule in consultation with the IRS and the Department of Health and Human Services (HHS) and appreciates their assistance. As required by 42 U.S.C. 664(b)(1), HHS has approved this interim final rule.

II. Procedural Analyses

Request for Comment on Plain Language

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comment on how to make this interim rule clearer. For example, you may wish to discuss: (1) Whether we have organized the material to suit your needs; (2) whether the requirements of the rule are clear; or (3) whether there is something else we could do to make this rule easier to understand.

Regulatory Planning and Review

The interim rule does not meet the criteria for a ''significant regulatory action'' as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act Analysis

It is hereby certified that the interim rule will not have a significant economic impact on a substantial number of small entities. This rule merely provides a time frame for Treasury to require States to return collections. Moreover, the provisions contained in this interim rule impose no additional costs to small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that this interim rule will not result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

Federalism

This rule has been reviewed under Executive Order (EO) 13132, Federalism. This rule relieves the States of an obligation to return funds to the Federal Government after a certain time period when the States have already forwarded the funds to custodial parents, as required or authorized by applicable laws, and they no longer have such funds. Treasury, with assistance from the Office of Child Support Enforcement at the Department of Health and Human Services, consulted with the States when developing this interim rule. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Administrative Procedure Act

This rule is being issued without prior public notice and comment because under 5 U.S.C. 553(b) good cause exists to determine that prior notice and comment rulemaking is unnecessary and contrary to the public interest. The policy being implemented through this rule imposes a time limitation on Treasury for recovering erroneous offset funds from States that have forwarded such funds onto families. It relieves the States of the burden of having to pay such amounts to Treasury from their own funds and does not adversely affect the rights of the public.

List of Subjects in 31 CFR Part 285

Administrative practice and procedure, Child support, Child welfare, Claims, Credits, Debts, Disability benefits, Federal employees, Garnishment of wages, Hearing and appeal procedures, Loan programs, Privacy, Railroad retirement, Railroad unemployment insurance, Salaries, Social Security benefits, Supplemental Security Income (SSI), Taxes, Veterans' benefits, Wages.

For the reasons set forth in the preamble, 31 CFR part 285 is amended as follows:

PART 285—DEBT COLLECTION AUTHORITIES UNDER THE DEBT COLLECTION IMPROVEMENT ACT OF 1996

■ 1. The authority citation for part 285 continues to read as follows:

Authority: 5 U.S.C. 5514; 26 U.S.C. 6402; 31 U.S.C. 321, 3701, 3711, 3716, 3719, 3720A, 3720B, 3720D; 3720E; 42 U.S.C. 664; E.O. 13019, 61 FR 51763, 3 CFR, 1996 Comp., p. 216.

■ 2. Amend § 285.3 as follows:
■ a. Revise paragraph (g).
■ b. Redesignate paragraphs (h) through (k) as paragraphs (i) through (l), respectively.
■ c. Add a new paragraph (h).

The revision and addition read as follows:

§ 285.3 Offset of tax refund payments to collect past-due support.

* * * * *

(g) *Disposition of amounts collected.* Fiscal Service will transmit amounts collected for debts, less fees charged under paragraph (i) of this section, to HHS or to the appropriate State. If IRS notifies Fiscal Service that a tax refund payment that was offset was erroneous or otherwise not due to the taxpayer, Fiscal Service will notify HHS or the appropriate State that the tax refund payment was not eligible for offset. Subject to paragraph (h) of this section, Fiscal Service may deduct the amount of the erroneous offset funds from amounts payable to HHS or the State, as the case may be; or, upon Fiscal Service's request, the State shall return promptly to the affected taxpayer or Fiscal Service an amount equal to the amount of the erroneous funds (unless the State previously has forwarded such amounts, or any portion of such amounts, to the affected taxpayer). HHS and States shall notify Fiscal Service any time HHS or a State returns an erroneous offset payment to an affected taxpayer. Fiscal Service and HHS, or the appropriate State, will adjust their debtor records accordingly.

(h) *Time limitation.* If IRS notifies Fiscal Service on or after January 1, 2016, that a tax refund payment that was offset was erroneous or otherwise not due to the taxpayer, Fiscal Service shall not deduct the amount of the erroneous offset funds from amounts due to HHS or the State, or otherwise demand return of the offset funds from the State pursuant to paragraph (g) of this section, if the date of IRS's notification to Fiscal Service in paragraph (g) is more than six months after the date the tax refund was offset (*i.e.,* the tax refund payment date); and the State has already forwarded the funds as required or authorized by 42 U.S.C. 657. This paragraph does not apply to paragraph (f) of this section.

David A. Lebryk,

Fiscal Assistant Secretary.

[FR Doc. 2015–32732 Filed 12–29–15; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2015–0974]

Drawbridge Operation Regulation; Des Allemands Bayou, Des Allemands, LA

AGENCY: Coast Guard, DHS.

ACTION: Delay of effective date without notice for temporary deviation from regulations.

SUMMARY: The Coast Guard is modifying the effective dates of a published temporary deviation from the operating schedule that governs the Burlington Northern Santa Fe Railroad swing span drawbridge across Des Allemands Bayou, mile 14.0, at Des Allemands, St. Charles and Lafourche Parishes, Louisiana. This modification of the dates is necessary due to weather delaying the scheduled rehabilitations. This deviation allows the bridge to remain in its closed-to-navigation position for three eight-hour periods during three consecutive days on two separate occasions.

DATES: The deviation published December 11, 2015 (80 FR 76860) is effective from 7 a.m. on January 20, 2016 through 3 p.m. on January 29, 2016.

ADDRESSES: The docket mentioned in the preamble as being available in the docket are part of the docket USCG–2015–0974 and are available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH''. Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Donna Gagliano, Bridge Specialist, Coast Guard; telephone 504–671–2128, email *Donna.Gagliano@uscg.mil.*

SUPPLEMENTARY INFORMATION: On December 11, 2015, the Coast Guard published a notice of temporary deviation from regulations entitled, ''Drawbridge Operation Regulation; Des Allemands Bayou, Des Allemands, LA'' in the **Federal Register** (80 FR 76860). The Burlington Northern Santa Fe Railroad requested this temporary deviation from the operating schedule of the swing span drawbridge across Des Allemands Bayou, mile 14.0, at Des Allemands, St. Charles and Lafourche Parishes, Louisiana, for January 13 through 22, 2016, to perform the rehabilitation. Due to the weather issues, preparations for the rehabilitation were delayed so Burlington Northern Santa Fe Railroad requested a modification to the effective dates from January 20 through 29, 2016.

The bridge has a vertical clearance of three feet above mean high water in the closed-to-navigation position and unlimited in the open-to-navigation position.

The draw currently operates under 33 CFR 117.440(b). For purposes of this deviation, the bridge will not be required to open from 7 a.m. to 3 p.m. daily for two three-day periods, January 20 through 22 and January 27 through 29, 2016. At all other times, the bridge will operate in accordance with 33 CFR 117.440(b).

The Burlington Northern Santa Fe Railroad requested a modification to the effective dates of the temporary deviation for the operation of the drawbridge to delay the previously approved deviation to accommodate rehabilitation work involving rest pivot

piers and the future swing span change out, an extensive but necessary maintenance operation. The reason for the request is that poor weather has delayed the preparatory work necessary to accomplish the modification to the rest piers. Navigation on the waterway consists of tugs with tows, fishing vessels and recreational crafts.

The Coast Guard has coordinated the closure with waterway users, industry, and other Coast Guard units and determined that this closure will not have a significant effect on vessel traffic.

During this deviation for bridge rehabilitation, vessels will not be allowed to pass through the bridge during the eight-hour closures each day as stated above. Many of the vessels that currently require an opening of the draw will be able to pass using the opposite channel from 3 p.m. to 7 a.m. when the deviations are not in effect. The bridge will not be able to open for emergencies and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: December 24, 2015.

David M. Frank,

Bridge Administrator, Eighth Coast Guard District.

[FR Doc. 2015–32871 Filed 12–29–15; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2015–0117; FRL–9940–63–Region 6]

Determination of Attainment; Texas; Houston-Galveston-Brazoria 1997 Ozone Nonattainment Area; Determination of Attainment of the 1997 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) has determined that the Houston-Galveston-Brazoria (HGB) 8-hour ozone nonattainment area is currently attaining the 1997 ozone National Ambient Air Quality Standard (NAAQS). This determination is based upon certified ambient air monitoring data that show the area has monitored attainment of the 1997 ozone NAAQS for the 2012–2014 monitoring period and continues to monitor attainment of the NAAQS based on preliminary 2015 data. Thus, the requirements for this area to submit an attainment demonstration, a reasonable further progress (RFP) plan, contingency measures, and other State Implementation Plan (SIP) documents related to attainment of the 1997 ozone NAAQS shall be suspended for so long as the area continues to attain the 1997 ozone NAAQS.

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

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–R06–OAR–2015–0117. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Wendy Jacques, (214) 665–7395, *jacques.wendy@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' means the EPA.

I. Background

The background for today's action is discussed in detail in our Proposal (80 FR 49187, August 17, 2015). In that document, we proposed to determine that the HGB ozone nonattainment area is currently in attainment of the 1997 ozone standard based on the most recent 3 years of quality-assured air quality data. Certified ambient air monitoring data show that the area has monitored attainment of the 1997 ozone NAAQS for the 2012–2014 monitoring period and continues to monitor attainment of the NAAQS based on preliminary 2015 data.

Our Proposal provides our rationale for this rulemaking. Please see the docket for this and other documents regarding our Proposal. The public comment period for our Proposal closed on September 16, 2015.

II. Response to Comments

We received no adverse comments. We received one letter dated September 2, 2015, from the Texas Commission on Environmental Quality (TCEQ or the Commenter) supporting our Proposal. A summary of the comment and our response follows.

Comment: The Commenter agrees with our Proposal to determine that the HGB ozone nonattainment area is currently in attainment of the 1997 ozone standard based upon certified ambient air monitoring data for the 2012–2014 monitoring period and preliminary 2015 monitoring data.

Response: We concur with the Commenter.

III. What is the effect of this action?

In accordance with our Clean Data Policy as codified in 40 CFR 51.1118, a determination of attainment suspends the requirements for the TCEQ to submit the attainment demonstration and associated reasonably available control measures, RFP plans, contingency measures for failure to attain or make reasonable progress and other planning SIPs related to attaining the 1997 ozone NAAQS in the HGB area for so long as the area continues to attain the standard. However, should the area violate the 1997 ozone standard after this Clean Data Determination is finalized, the EPA would rescind the CDD.

IV. Final Action

Based on the Proposal [1] and the certified ambient air monitoring data contained therein, EPA finds that the HGB ozone nonattainment area has attained the 1997 ozone standard and meets the requirements in 40 CFR 51.1118. This Clean Data Determination provides that Texas is no longer required to submit the attainment demonstration and other planning SIPs related to attainment of the 1997 ozone NAAQS, for so long as the area is attaining the standard.

V. Statutory and Executive Order Reviews

This action makes a determination of attainment based on air quality, and would, if finalized, result in the suspension of certain Federal requirements, and it would not impose additional requirements beyond those imposed by state law. For that reason, this action:

[1] 80 FR 49187 August 17, 2015.

• 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, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it merely makes a determination based on air quality data.

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. EPA will submit a report containing this action 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**. 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).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 29, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposed of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 15, 2015.

Ron Curry,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart SS—Texas

■ 2. Section 52.2275 is amended by adding paragraph (k) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(k) *Determination of Attainment.* Effective January 29, 2016 the EPA has determined that the Houston-Galveston-Brazoria 8-hour ozone nonattainment area has attained the 1997 ozone standard. Under the provisions of the EPA's Clean Data Policy, this determination suspends the requirements for this area to submit an attainment demonstration and other State Implementation Plans related to attainment of the 1997 ozone NAAQS for so long as the area continues to attain the 1997 ozone NAAQS.

[FR Doc. 2015–32752 Filed 12–29–15; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 229, and 252

[Docket DARS–2014–0046]

RIN 0750–AI26

Defense Federal Acquisition Regulation Supplement: Taxes—Foreign Contracts in Afghanistan (DFARS Case 2014–D003)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to notify contractors of requirements relating to Afghanistan taxes for contracts performed in Afghanistan.

DATES: Effective December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Ms. Julie Hammond, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 79 FR 35715 on June 24, 2014, to revise the DFARS to add two new clauses that notify contractors of requirements relating to Afghanistan taxes when contracts are being performed in Afghanistan. Three respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided below:

A. Summary of Significant Changes From the Proposed Rule

The final rule amends DFARS clause 252.229–7014, Taxes—Foreign Contracts in Afghanistan, to reference the bilateral security agreement entitled ''The Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America'' signed on September 30, 2014. The reference to the bilateral security agreement replaces the reference to the prior Agreement entered into between the United States and Afghanistan on May 28, 2003, regarding the ''Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in

Afghanistan,'' which was concluded by an exchange of diplomatic notes (U.S. Embassy Kabul note No. 202, dated September 26, 2002; Afghanistan Ministry of Foreign Affairs notes 791 and 93, dated December 12, 2002, and May 28, 2003, respectively). The clause is also amended to change ''Government of the United States of America'' to the ''Department of Defense'' to more accurately represent the new agreement.

The final rule also amends DFARS clause 252.229–7015, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), to reference the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) signed on September 30, 2014, instead of the Military Technical Agreement (MTA) entered into between the NATO International Security Assistance Force (ISAF) and Interim Administration of Afghanistan in April 2002. As a result of the new SOFA, the reference to the 2011 NATO ISAF Letter of Interpretation that modified the MTA's tax exemption is also removed, including the language allowing contractors to include taxes on profits earned by local contractors in the contract price.

The final rule also clarifies at DFARS 212.301 that the clauses apply to solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

B. Analysis of Public Comments

1. Taxes in Afghanistan

Comment: A respondent commented that the Afghan Ministry of Forces interprets Diplomatic Note (DN) 202 to apply only to prime contractors, while industry practice is to treat subcontractors in Afghanistan as subject to taxation. The respondent asked how DoD will enforce paragraph (b) of DFARS clause 252.225–7014, which exempts subcontractors from any taxes assessed in Afghanistan in accordance with DN 202.

Response: The final rule has been updated to reference the new bilateral security agreement between the United States and Afghanistan signed on September 30, 2014. Article 17.3 of the new agreement states that United States subcontractors shall not be liable to pay any tax assessed by the government of Afghanistan within the territory of Afghanistan on their activities under a contract or subcontract with, or in support of, United States Forces.

Comment: A respondent recommended Afghan contractors not be allowed to include Afghan tax on profits earned from NATO ISAF contracts in accordance with DFARS clause 252.225–7015(d). Another respondent asked about DoD's expectations regarding documentation of the price markup for Afghan income taxes as part of the contract price and whether United States Government contractors will be required to refund the United States Government if the Afghan contractors do not owe income taxes due to losses.

Response: The language that allowed contractors to include Afghan taxes on profits earned by local contractors in the contract price is removed from the final rule.

2. Bilateral Security Agreement

Comment: A respondent commented that clarifying language is needed in the pending bilateral security agreement between the United States and Afghanistan to affirm that all non-Afghan national employees working on DoD contracts are tax exempt and will not be treated as Afghan residents.

Response: This comment concerns the content of the bilateral security agreement, which is outside the scope of this rule.

Comment: Two respondents requested that implementation of the proposed rule be delayed until resolution is reached between the United States and the Afghanistan government in a bilateral security agreement. If implementation of the rule is not delayed, one respondent requested that the proposed rule be revised to allow contracting officers to relieve defense contractors and subcontractors of the risks and responsibilities when denied a tax exemption by the Afghan Ministry of Finance.

Response: A resolution has been reached between the United States and the Afghanistan government in a bilateral security agreement. The final rule has been updated to reference the new bilateral security agreement.

3. General

Comment: A respondent stated that the new tax law may limit the amount of contractors willing to work for the United States Government and may hurt future business relations between Afghanistan and the United States.

Response: This comment concerns Afghanistan tax law and is outside the scope of this rule.

Comment: A respondent recommended that the United States Government reduce costs by minimizing the use of military personnel and employing more Afghans.

Response: The comment is outside the scope of this rule.

Comment: One respondent suggested that clauses, similar to those included in the proposed rule, be added to specifically address and make the rule equally applicable to local Afghan contractors, vendors, and landlords.

Response: The final rule has been updated to reference the new bilateral security agreement. Article 17.3 of the new agreement states that United States contractors that are Afghan entities shall not be exempt from corporate profits tax that may be assessed by the Afghanistan government within the territory of Afghanistan on income received due to their status as United States contractors.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule creates two new clauses: (1) DFARS 252.229–7014, Taxes—Foreign Contracts in Afghanistan, and (2) DFARS 252.229–7015, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement). The objective of the rule is to exempt DoD contracts performed in Afghanistan from payment liability for Afghan taxes pursuant to the bilateral security agreement entitled ''The Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America'' signed on September 30, 2014, and the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) signed on September 30, 2014.

DoD is applying these two clauses to solicitations and contracts below the SAT and to the acquisition of commercial items, including COTS items, as defined at FAR 2.101. This rule clarifies the application of requirements relating to treatment of taxes for contracts performed in Afghanistan. Not applying this guidance to contracts below the SAT and for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule. Consequently, DoD is applying the rule to contracts below the SAT and for the acquisition of commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add two new clauses in order to notify DoD contractors of requirements relating to Afghanistan taxes when DoD contracts are being performed in Afghanistan. The clause at DFARS 252.229–7014, Taxes-Foreign Contracts in Afghanistan, will be required to be included in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan, unless the clause at 252.229–7015 is used. The clause at DFARS 252.229–7015, Taxes-Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), will be required to be included in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan awarded on behalf of NATO, which are governed by the NATO Status of Forces Agreement, if approval from the Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense for Acquisitions, Technology, and Logistics, is obtained prior to each use.

No comments were received from the public relative to the initial regulatory flexibility analysis.

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because this rule merely provides notice of the tax exemption for DoD contracts where performance is in Afghanistan. According to data in the Federal Procurement Data System, a total of thirty-five small business vendors received contract awards where performance was in Afghanistan during fiscal year 2015.

There are no new projected reporting, recordkeeping, or other compliance requirements projected for this rule.

There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 229, and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 229, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212, 229, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by—

■ a. Redesignating paragraphs (f)(xiii) through (xix) as (f)(xiv) through (xx); and

■ b. Adding a new paragraph (f)(xiii).

The addition reads as follows:

212.301 Solicitation provisions and contract clauses for acquisition of commercial items.

* * * * *

(f) * * *

(xiii) *Part 229—Taxes.*

(A) Use the clause at 252.229–7014, Taxes—Foreign Contracts in Afghanistan, as prescribed at 229.402–70(k).

(B) Use the clause at 252.229–7015, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), as prescribed at 229.402–70(l).

* * * * *

PART 229—TAXES

■ 3. In section 229.402–70, revise the section heading and add new paragraphs (k) and (l) to read as follows:

229.402–70 Additional provisions and clauses.

* * * * *

(k) Use the clause at 252.229–7014, Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan, unless the clause at 252.229–7015 is used.

(l) Use the clause at 252.229–7015, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), instead of the clause at 252.229–7014, Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan awarded on behalf of the North Atlantic Treaty Organization (NATO), which are governed by the NATO Status of Forces Agreement (SOFA), if approval from the Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, has been obtained prior to each use.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Add sections 252.229–7014 and 252.229–7015 to read as follows:

252.229–7014 Taxes—Foreign Contracts in Afghanistan.

As prescribed in 229.402–70(k), use the following clause:

Taxes—Foreign Contracts in Afghanistan (DEC 2015)

(a) This acquisition is covered by the Security and Defense Cooperation Agreement (the Agreement) between the Islamic Republic of Afghanistan and the United States of America signed on September 30, 2014, and entered into force on January 1, 2015.

(b) The Agreement exempts the Department of Defense (DoD), and its contractors and subcontractors (other than those that are Afghan legal entities or residents), from paying any tax or similar charge assessed on activities associated with this contract within Afghanistan. The Agreement also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan, by or on behalf of DoD, from any taxes, customs, duties, fees, or similar charges in Afghanistan.

(c) The Contractor shall exclude any Afghan taxes, customs, duties, fees, or similar charges from the contract price, other than those charged to Afghan legal entities or residents.

(d) The Agreement does not exempt Afghan employees of DoD contractors and subcontractors from Afghan tax laws. To the extent required by Afghan law, the Contractor shall withhold tax from the wages

of these employees and remit those payments to the appropriate Afghanistan taxing authority. These withholdings are an individual's liability, not a tax against the Contractor.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts, including subcontracts for commercial items.

(End of clause)

252.229–7015 Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement).

As prescribed in 229.402–70(l), use the following clause:

Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement) (DEC 2015)

(a) This acquisition is covered by the Status of Forces Agreement (SOFA) entered into between the North Atlantic Treaty Organization (NATO) and the Islamic Republic of Afghanistan issued on September 30, 2014, and entered into force on January 1, 2015.

(b) The SOFA exempts NATO Forces and its contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed within Afghanistan. The SOFA also exempts the acquisition, importation, exportation, reexportation, transportation and use of supplies and services in Afghanistan from all Afghan taxes, customs, duties, fees, or similar charges.

(c) The Contractor shall exclude any Afghan taxes, customs, duties, fees or similar charges from the contract price, other than those that are Afghan legal entities or residents.

(d) Afghan citizens employed by NATO contractors and subcontractors are subject to Afghan tax laws. To the extent required by Afghan law, the Contractor shall withhold tax from the wages of these employees and remit those withholdings to the Afghanistan Revenue Department. These withholdings are an individual's liability, not a tax against the Contractor.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts including subcontracts for commercial items.

(End of clause)

[FR Doc. 2015–32870 Filed 12–29–15; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS–2015–0066]

RIN 0750–AI79

Defense Federal Acquisition Regulation Supplement: Trade Agreements Thresholds (DFARS Case 2016–D003)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to incorporate increased thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.

DATES: *Effective:* January 1, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

Every two years, the trade agreements thresholds are escalated according to a predetermined formula set forth in the agreements. The United States Trade Representative has specified the following new thresholds in the **Federal Register** (80 FR 77694, December 15, 2015):

Trade agreement	Supply contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	191,000	7,358,000
FTAs:		
Australia FTA	77,533	7,358,000
Bahrain FTA	191,000	10,079,365
CAFTA–DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	77,533	7,358,000
Chile FTA	77,533	7,358,000
Colombia FTA	77,533	7,358,000
Korea FTA	100,000	7,358,000
Morocco FTA	191,000	7,358,000
NAFTA		
—Canada	25,000	10,079,365
—Mexico	77,533	10,079,365
Panama FTA	191,000	7,358,000
Peru FTA	191,000	7,358,000
Singapore FTA	77,533	7,358,000

II. Discussion and Analysis

This final rule implements the new thresholds in DFARS part 225, Foreign Contracting, for sections that include trade agreements thresholds (*i.e.,* 225.1101, 225.7017–3, 225.7017–4, and 225.7503). Additionally, the rule updates clauses 252.225–7017, Photovoltaic Devices, and 252.225–7018, Photovoltaic Devices—Certificate, with conforming changes. A minor technical amendment corrects cross references at 225.1101(10)(i) and paragraphs (b)(1)(i) and (ii) of the clause at 252.225–7018.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41. U.S.C. entitled ''Publication of Proposed Regulations.'' Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency

issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it only adjusts the thresholds according to predetermined formulae to adjust for changes in economic conditions, thus maintaining the status quo, without significant effect beyond the internal operating procedures of the Government.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision within the meaning of FAR 1.501–1, and 41 U.S.C. 1707 does not require publication for public comment.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply, because the final rule affects the prescriptions for use of the certification and information collection requirements in the provision at DFARS 252.225–7035 and the certification and information collection requirements in the provision at DFARS 252.225–7018 (both currently approved under OMB Control #0704–0229), Defense Federal Acquisition Regulation Supplement Part 225, Foreign Acquisition and Related Clauses. However, there is no impact on the estimated burden hours, because the threshold changes are in line with inflation and maintain the status quo.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and CFR chapter 1.

PART 225—FOREIGN CONTRACTING

225.1101 [Amended]

■ 2. Amend section 225.1101—

■ a. In paragraph (6) introductory text, by removing ''$204,000'' and adding ''$191,000'' in its place;

■ b. In paragraph (10)(i) introductory text, by removing ''$204,000'' and adding ''$191,000'' in its place, and removing ''at 25.401 applies'' and adding ''at FAR 25.401 or 225.401 applies'' in its place;

■ c. In paragraphs (10)(i)(A), by removing ''$204,000'' and adding ''$191,000'' in its place;

■ d. In paragraph (10)(i)(B), by removing ''$79,507'' and adding ''$77,533'' in its place;

■ e. In paragraph (10)(i)(C), by removing ''$204,000'' and adding ''$191,000'' in its place; and

■ f. In paragraphs (10)(i)(D) through (F), by removing ''$79,507'' wherever it appears and adding ''$77,533)'' in its place.

225.7017–3 [Amended]

■ 3. Amend section 225.7017–3 in paragraph (b) by removing ''$204,000'' and adding ''$191,000'' in its place.

225.7017–4 [Amended]

■ 4. Amend section 225.7017–4 in paragraphs (a)(1) and (b)(1) by removing ''$204,000'' and adding ''$191,000'' in both places.

225.7503 [Amended]

■ 5. Amend section 225.7503—

■ a. In paragraphs (a) and (b) introductory text, by removing ''$7,864,000'' and adding ''$7,358,000'' in both places;

■ b. In paragraph (b)(1), by removing ''$10,335,931'' and adding ''$10,079,365'' in its place;

■ c. In paragraph (b)(2), by removing ''$7,864,000'' and adding ''$7,358,000'' in its place, and removing ''$10,335,931'' and adding ''$10,079,365'' in its place;

■ d. In paragraph (b)(3) by removing, ''$10,335,931'' and adding ''$10,079,365'' in its place; and

■ e. In paragraph (b)(4), by removing ''$7,864,000'' and adding ''$7,358,000'' in its place, and removing ''$10,335,931'' and adding ''$10,079,365'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225–7017 [Amended]

■ 6. Amend section 252.225–7017—

■ a. By removing clause date ''(NOV 2015)'' and adding ''(JAN 2016)'' in its place;

■ b. In paragraphs (c)(2) and (3), by removing ''$79,507'' and adding ''$77,533'' in its place; and

■ c. In paragraphs (c)(4) and (5), by removing ''$204,000'' and adding ''$191,000'' in its place.

252.225–7018 [Amended]

■ 7. Amend section 252.225–7018—

■ a. By removing clause date ''(NOV 2015)'' and adding ''(JAN 2016)'' in its place;

■ b. In paragraph (b)(1) introductory text, by removing ''$204,000'' and adding ''$191,000'' in its place;

■ c. In paragraph (b)(1)(i), by removing ''DFARS 225.217–4(b)'' and adding ''DFARS 225.7017–4(b)'' in its place;

■ d. In paragraph (b)(1)(ii), by removing ''DFARS 225.217–4(a)'' and adding ''DFARS 225.7017–4(a)'' in its place;

■ e. In paragraph (b)(2), by removing ''$204,000'' and adding ''$191,000'' in its place;

■ f. In paragraphs (d)(3) and (4) introductory text, by removing ''$79,507'' and adding ''$77,533'' in both places; and

■ g. In paragraphs (d)(5) and (6) introductory text, by removing ''$204,000'' and adding ''$191,000'' in both places.

[FR Doc. 2015–32875 Filed 12–29–15; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

[Docket DARS–2015–0039]

RIN 0750–AI61

Defense Federal Acquisition Regulation Supplement: Network Penetration Reporting and Contracting for Cloud Services (DFARS Case 2013–D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide contractors with additional time to implement security requirements specified by a National Institute of Standards and Technology Special Publication.

DATES: *Effective date:* December 30, 2015.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before February 29, 2016 to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013–D018, using any of the following methods:

○ *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2013–D018'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2013–D018.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2013–D018'' on your attached document.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2013–D018 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Mr. Dustin Pitsch, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, telephone 571–372–6090.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule under this case number in the **Federal Register** (80 FR 51739) on August 26, 2015, to implement section 941 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239), section 1632 of the NDAA for FY 2015, and DoD policies and procedures with regard to cloud computing. The first interim rule expanded safeguarding requirements to cover the safeguarding of covered defense information, and required compliance with the security requirements in the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and organizations,'' to replace the table based on NIST SP 800–53. The security requirements in NIST SP 800–171 are specifically tailored for use in protecting sensitive information residing in contractor information systems and generally reduce the burden placed on contractors by eliminating Federal-centric processes and requirements.

To address concerns from industry with regard to implementation of the first interim rule, DoD held a public meeting on Monday, December 14, 2015 (80 FR 72712, November 20, 2015). There were 85 registered attendees. Various topics were discussed with industry at the public meeting, such as scope, applicability, training, subcontractor flowdown, and implementation issues. Industry representatives specifically expressed to DoD, both prior to and at the public meeting, the need for additional time to implement the security requirements specified by NIST SP 800–171.

II. Discussion and Analysis

This second interim rule amends DFARS provision 252.204–7008, Compliance with Safeguarding and Covered Defense Information Controls, and DFARS clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, to provide offerors additional time to implement the security requirements specified by NIST SP 800–171, which will be required to be in place not later than December 31, 2017. The clause is also amended to require contractors to notify the DoD Chief Information Officer (CIO) of any NIST SP 800–171 security requirements that are not implemented at the time of contract award, within 30 days of contract award. The status provided by the contractor to the DoD CIO on implementation of the NIST SP 800–171 security requirements will enable the Department to monitor progress across the Defense industrial base, identify trends in the implementation of these requirements and, in particular, identify issues with industry implementation of specific requirements that may require clarification or adjustment. Additionally, this information will inform the Department in assessing the overall risk to DoD covered defense information on unclassified contractor systems and networks.

The second interim rule makes the following additional changes:

- The subcontractor flowdown requirements in DFARS provision 252.204–7009 and clause 252.204–7012 are amended to require, when applicable, inclusion of the clause without alteration, except to identify the parties.
- The subcontractor flowdown requirement in DFARS clause 252.204–7012 is further amended to limit the requirement to flow down the clause only to subcontractors where their efforts will involve covered defense information or where they will provide operationally critical support.
- DFARS clause 252.204–7012 is amended to remove the requirement for DoD CIO acceptance of alternative but equally effective security measures prior to award.

This rule is part of DoD's retrospective plan, completed in August 2011, under Executive Order 13563, ''Improving Regulation and Regulatory Review.'' DoD's full plan and updates can be accessed at: *http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036.*

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and

Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD expects that the additional implementation period provided by this interim rule may have a significant beneficial economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, *et seq*. Therefore, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

This rule allows contractors until December 31, 2017, to implement the security requirements specified by the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and organizations,'' for safeguarding sensitive information residing in contractor information systems, contained in Defense Federal Acquisition Regulation Supplement clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting.

The objective of this rule is to allow contractors additional time to implement the security requirements necessary to improve protection for DoD information stored on or transiting contractor systems.

This rule will apply to all contractors with covered defense information transiting their information systems. DoD estimates that this rule may apply to 10,000 contractors and that less than half of those are small businesses.

This second interim rule requires contractors, within 30 days of contract award, to notify the DoD Chief Information Officer of any NIST SP 800–171 security requirements that are not implemented at the time of contract award. This new reporting requirement affects the existing information collection requirements approved under the first interim rule under OMB Control number 0704–0478, titled ''Enhanced Safeguarding and Cyber Incident Reporting of Unclassified DoD Information Within Industry,'' but the effect on the total burden hours is negligible.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

No significant alternatives, that would minimize the economic impact of the rule on small entities, were determined.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013–D018), in correspondence.

V. Paperwork Reduction Act

This rule affects the information collection requirements in the clause at DFARS 252.204–7012, currently approved under OMB Control Number 0704–0478, titled ''Enhanced Safeguarding and Cyber Incident Reporting of Unclassified DoD Information Within Industry,'' in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible, because the new reporting requirement is not anticipated to increase the estimate of total burden hours.

VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment.

The proliferation of information technology and increased information access has exposed DoD and DoD contractor information systems and networks to greater vulnerability of attacks. The first interim rule under this case number and title was necessary because of the urgent need to protect covered defense information and gain awareness of the full scope of cyber incidents being committed against defense contractors. That rule addressed the requirement for contractors and subcontractors to report cyber incidents that result in an actual or potentially adverse effect on a covered contractor information system or covered defense information residing therein, or on a contractor's ability to provide operationally critical support. However, since issuance of the first interim rule, industry has expressed to DoD the need for additional time to implement one part of the first interim rule, specifically the NIST SP 800–171 security requirements for covered contractor information systems.

This second interim rule is being issued without the benefit of public comment to provide immediate relief from the requirement to have NIST 800–171 security requirements implemented at the time of contract award. Contractors are at risk of not being able to comply with the terms of contracts that require the handling of covered defense information. Contractors will be given until December 31, 2017 for implementation of the NIST 800–171 security requirements, thereby limiting the burden imposed on industry in the first interim rule. This rule grants additional time for contractors to assess their information systems and to set forth an economically efficient strategy to implement the new security requirements at a pace that fits within normal information technology lifecycle timelines. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

■ 1. The authority citation for 48 CFR part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and CFR chapter 1.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 2. Amend section 252.204–7008 by—

■ a. Removing clause date ''(AUG 2015)'' and adding ''(DEC 2015)'' in its place;

■ b. Revising paragraph (c); and

■ c. Removing paragraph (d).

The revision reads as follows:

252.204–7008 Compliance with Safeguarding Covered Defense Information Controls.

* * * * *

(c) For covered contractor information systems that are not part of an information technology (IT) service or system operated on behalf of the Government (see 252.204–7012(b)(1)(ii))—

(1) By submission of this offer, the Offeror represents that it will implement the security requirements specified by National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations'' (see *http://dx.doi.org/10.6028/NIST.SP.800-171*), not later than December 31, 2017.

(2)(i) If the Offeror proposes to vary from any of the security requirements specified by NIST SP 800–171 that is in effect at the time the solicitation is issued or as authorized by the Contracting Officer, the Offeror shall

submit to the Contracting Officer, for consideration by the DoD Chief Information Officer (CIO), a written explanation of—

(A) Why a particular security requirement is not applicable; or

(B) How an alternative but equally effective, security measure is used to compensate for the inability to satisfy a particular requirement and achieve equivalent protection.

(ii) An authorized representative of the DoD CIO will adjudicate offeror requests to vary from NIST SP 800–171 requirements in writing prior to contract award. Any accepted variance from NIST SP 800–171 shall be incorporated into the resulting contract.

* * * * *

■ 3. Amend section 252.204–7009 by—

■ a. Removing clause date ''(AUG 2015)'' and adding ''(DEC 2015)'' in its place;

■ b. In paragraph (a), adding in alphabetical order a definition for ''Compromise''; and

■ c. Revising paragraph (c).

The addition and revision read as follows:

252.204–7009 Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

* * * * *

(a) * * *

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object, or the copying of information to unauthorized media may have occurred.

* * * * *

(c) *Subcontracts.* The Contractor shall include this clause, including this paragraph (c), in subcontracts, or similar contractual instruments, for services that include support for the Government's activities related to safeguarding covered defense information and cyber incident reporting, including subcontracts for commercial items, without alteration, except to identify the parties.

* * * * *

■ 4. Amend section 252.204–7012 by—

■ a. Removing clause date ''(SEP 2015)'' and adding ''(DEC 2015)'' in its place;

■ b. In paragraph (a), in the definition of ''Cyber incident,'' adding ''a compromise or'' after ''that result in'';

■ c. Revising paragraphs (b)(1)(ii)(A) and (B); and

■ d. Revising paragraphs (m)(1) and (2).

The revisions read as follows:

252.204–7012 Safeguarding Covered Defense Information and Cyber Incident Reporting.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) The security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations,'' *http://dx.doi.org/10.6028/NIST.SP.800-171* that is in effect at the time the solicitation is issued or as authorized by the Contracting Officer, as soon as practical, but not later than December 31, 2017. The Contractor shall notify the DoD CIO, via email at *osd.dibcsia@mail.mil,* within 30 days of contract award, of any security requirements specified by NIST SP 800–171 not implemented at the time of contract award; or

(B) Alternative but equally effective security measures used to compensate for the inability to satisfy a particular requirement and achieve equivalent protection accepted in writing by an authorized representative of the DoD CIO; and

* * * * *

(m) * * *

(1) Include this clause, including this paragraph (m), in subcontracts, or similar contractual instruments, for operationally critical support, or for which subcontract performance will involve a covered contractor information system, including subcontracts for commercial items, without alteration, except to identify the parties; and

(2) When this clause is included in a subcontract, require subcontractors to rapidly report cyber incidents directly to DoD at *http://dibnet.dod.mil* and the prime Contractor. This includes providing the incident report number, automatically assigned by DoD, to the prime Contractor (or next higher-tier subcontractor) as soon as practicable.

* * * * *

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Proposed Rules

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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.

OFFICE OF SPECIAL COUNSEL

5 CFR Part 1800

Revision of Regulations To Allow Federal Contractors, Subcontractors, and Grantees To File Whistleblower Disclosures With the U.S. Office of Special Counsel; Withdrawal of Proposed Rule

AGENCY: U.S. Office of Special Counsel.

ACTION: Withdrawal of proposed rulemaking.

SUMMARY: In the **Federal Register** published on January 22, 2015, the U.S. Office of Special Counsel (OSC) issued a proposed rule that would allow the agency to accept covered disclosures of wrongdoing from employees working under a contract or grant with the Federal government. OSC hereby withdraws this proposed rule.

DATES: The proposed rule that appeared on January 22, 2015 at 80 FR 3182 is withdrawn as of December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Lisa V. Terry, General Counsel, U.S. Office of Special Counsel, by telephone at (202) 254–3600, by facsimile at (202) 254–3711, or by email at *lterry@osc.gov*.

SUPPLEMENTARY INFORMATION: The U.S. Office of Special Counsel (OSC) proposed revising its regulations to expand who may file a whistleblower disclosure with OSC. The proposed revision would have allowed employees of Federal contractors, subcontractors, and grantees to disclose wrongdoing within the Federal government if they work at or on behalf of a U.S. government component for which OSC has jurisdiction to accept disclosures. In response to the proposed rule, published in the **Federal Register** on January 22, 2015, OSC received 16 written comments. In light of the substantive issues raised by commenters, OSC is withdrawing its proposed rule for further consideration.

Dated: December 23, 2015.

Mark P. Cohen,

Principal Deputy Special Counsel.

[FR Doc. 2015–32855 Filed 12–29–15; 8:45 am]

BILLING CODE 7405–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, and 1926

[Docket No. OSHA–H005C–2006–0870–0353]

RIN 1218–AB76

Occupational Exposure to Beryllium

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule; notice of informal public hearing.

SUMMARY: OSHA is scheduling an informal public hearing on its proposed rule ''Occupational Exposure to Beryllium and Beryllium Compounds.'' The proposed rule was published in the **Federal Register** on August 7, 2015 and the 90-day public comment period ended on November 5, 2015. This document describes the procedures that will govern this hearing.

DATES: *Informal public hearing.* The hearing will begin on February 29, 2016 at 2 p.m. If necessary, the hearing will continue from 9:30 a.m. to 5:00 p.m., local time, on subsequent days, in Washington, DC.

ADDRESSES: *Informal public hearing.* The Washington, DC hearing will be held in Room N4437 A, B, C, D at the Frances Perkins Building, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Notice of Intention to appear at the hearing: Interested persons who intend to present testimony or question witnesses at the hearing must submit (transmit, send, postmark, deliver) a notice of intention to appear, by January 29, 2016.

Hearing testimony and documentary evidence. Interested persons who request more than 10 minutes to present testimony or intend to submit documentary evidence at the hearing must submit (transmit, send, postmark, deliver) the full text of their testimony and all documentary evidence by January 29, 2016.

Methods of submission. All submissions must include the Agency name and the docket number for this rulemaking (OSHA–H005C–2006–0870–0353). Notices of intention to appear, hearing testimony, and documentary evidence may be submitted by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions online for electronically submitting materials, including attachments;

Fax: If your written submission does not exceed 10 pages, including attachments, you may fax it to the OSHA Docket Office at (202) 693–1648; or

Regular mail, express delivery, hand delivery, and messenger or courier service: Submit your materials to the OSHA Docket Office, Docket No. OSHA–H005C–2006–0870–0353, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2350 (TTY number: (877) 889–5627). Deliveries (express mail, hand delivery, and messenger or courier service) are accepted during the OSHA Docket Office's normal hours of operation, 8:15 a.m. to 4:45 p.m., E.T.

Instructions: All submission must include the Agency name and docket number for this rulemaking (OSHA–H005C–2006–0870–0353). All submissions, including any personal information, are placed in the public docket without change and may be available online at *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting certain personal information such as social security numbers and birth dates. Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of your submissions. For information about security-related procedures for submitting materials by express delivery, hand delivery, messenger, or courier service, please contact the OSHA Docket Office. For additional information on submitting notices of intention to appear, hearing testimony, or documentary evidence, see the **SUPPLEMENTARY INFORMATION** section of this notice.

Docket: To read or download comments, notices of intention to appear, and other material in the docket, go to Docket No. OSHA–H005C–2006–

0870–0353 at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index; however, some copyrighted material is not publicly available to read or download through the Web site. All submissions and other material in the docket are available for public inspection and copying in the OSHA Docket Office. For information on reading or downloading materials in the docket and obtaining materials not available through the Web site, please contact the OSHA Docket Office.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as new releases and other relevant information, also is available at OSHA's Web site at *http://www.osha.gov.*

FOR FURTHER INFORMATION CONTACT: *Press inquiries:* Kimberly Darby, Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone 202–693–1892.

Technical information: Maureen Ruskin, OSHA, Office of Chemical Hazards-Metals, Room N–3718, U.S. Department of Labor, 200 Constitution Avenue NW., Washington DC 20210; telephone (202) 693–1955.

Hearing inquiries: Gretta Jameson, OSHA, Office of Communications, Room N–3647; 200 Constitution Avenue NW., Washington, DC 20210; telephone 202–693–2176, email *Jameson.Gretta@dol.gov.*

SUPPLEMENTARY INFORMATION: On August 7, 2015, OSHA published a proposed rule to amend its existing exposure limits for occupational exposure in general industry to beryllium and beryllium compounds (80 FR 47565). The proposed rule would promulgate a substance-specific standard for general industry, regulating occupational exposure to beryllium and beryllium compounds. OSHA accepted comments concerning the proposed rule during the comment period, which ended on November 5, 2015. Commenters shared information and suggestions on a variety of topics, and the Non-Ferrous Founders' Society also requested that OSHA schedule an informal public hearing on the proposed rule.

Informal public hearing—purpose, rules and procedures. OSHA invites interested persons to participate in this rulemaking by providing oral testimony and documentary evidence at the informal public hearing. OSHA also welcomes presentation of data and documentary evidence that will provide the Agency with the best available evidence to use in developing the final rule.

Pursuant to 29 CFR 1911.15(a) and 5 U.S.C. 553(c), members of the public have an opportunity at the informal public hearing to provide oral testimony and evidence on issues raised by the proposal. An administrative law judge (ALJ) will preside over the hearing and will resolve any procedural matters relating to the hearing.

OSHA's regulation governing public hearings (29 CFR 1911.15) establishes the purpose and procedures of informal public hearings. Although the presiding officer of the hearing is an ALJ and questioning of witnesses is allowed on crucial issues, the proceeding is largely informal and essentially legislative in purpose. Therefore, the hearing provides interested persons with an opportunity to make oral presentations in the absence of rigid procedures that could impede or protract the rulemaking process. The hearing is not an adjudicative proceeding subject to the Federal rules of evidence. Instead, it is an informal administrative proceeding convened for the purpose of gathering and clarifying information. Accordingly, questions of relevance, procedure, and participation generally will be resolved in favor of developing a clear, accurate, and complete record.

Conduct of the hearing will conform to 29 CFR 1911.15. In addition, pursuant to 29 CFR 1911.4, the Assistant Secretary may, on reasonable notice, issue additional or alternative procedures to expedite the proceedings, to provide greater procedural protections to interested persons, or to further any other good cause consistent with applicable law. Although the ALJ presiding over the hearing makes no decision or recommendation on the merits of the proposal, the ALJ has the responsibility and authority necessary to ensure that the hearing progresses at a reasonable pace and in an orderly manner. To ensure a full and fair hearing, the ALJ has the power to regulate the course of the proceedings; dispose of procedural requests, objections, and comparable matters; confine presentations to matters pertinent to the issues the proposed rule raises; use appropriate means to regulate the conduct of persons present at the hearing; question witnesses and permit others to do so; limit the time for such questioning; and leave the record open for a reasonable time after the hearing for the submission of additional data, evidence, comments, and arguments from those who participated in the hearing (29 CFR 1911.16).

If you submit scientific or technical studies or other results of scientific research, OSHA requests (but is not requiring) that you also provide the following information where it is available: (1) Identification of the funding source(s) and sponsoring organization(s) of the research; (2) the extent to which the research findings were reviewed by a potentially affected party prior to publication or submission to the docket, and identification of any such parties; and (3) the nature of any financial relationships (*e.g.,* consulting agreements, expert witness support, or research funding) between investigators who conducted the research and any organization(s) or entities having an interest in the rulemaking. If you are submitting comments or testimony on the Agency's scientific or technical analyses, OSHA requests that you disclose: (1) The nature of any financial relationships you may have with any organization(s) or entities having an interest in the rulemaking; and (2) the extent to which your comments or testimony were reviewed by an interested party before you submitted them. Disclosure of such information is intended to promote transparency and scientific integrity of data and technical information submitted to the record. This request is consistent with Executive Order 13563, issued on January 18, 2011, which instructs agencies to ensure the objectivity of any scientific and technological information used to support their regulatory actions. OSHA emphasizes that all material submitted to the rulemaking record will be considered by the Agency to develop the final rule and supporting analyses. At the close of the hearing, the ALJ will establish a 45-day post-hearing comment period for interested persons who filed a timely notice of intention to appear at the hearing. During the first 30 days of the post-hearing period, those persons may submit final briefs, arguments, summations, and additional data and information to OSHA. During the remaining 15 days, they may only submit final briefs, arguments, and summations.

Notice of intention to appear at the hearing. Interested persons who intend to participate in and provide oral testimony or documentary evidence at the hearing must file a written notice of intention to appear prior to the hearing. To testify or question witnesses at the hearing, interested persons must submit (transmit, send, postmark, deliver) their notice by January 29, 2016. The notice must provide the following information:

- Name, address, email address, and telephone number of each individual who will give oral testimony;

• Name of the establishment or organization each individual represents, if any;
• Occupational title and position of each individual testifying;
• Approximate amount of time required for each individual's testimony;
• A brief statement of the position each individual will take with respect to the issues raised by the proposed rule; and
• A brief summary of documentary evidence each individual intends to present.

Participants who need projectors and other special equipment for their testimony must contact Gretta Jameson at OSHA's Office of Communications, telephone (202) 693–2176, no later than one week before the hearing begins.

OSHA emphasizes that the hearing is open to the public; however, only individuals who file a notice of intention to appear may question witnesses and participate fully at the hearing. If time permits, and at the discretion of the ALJ, an individual who did not file a notice of intention to appear may be allowed to testify at the hearing, but for no more than 10 minutes.

Hearing testimony and documentary evidence. Individuals who request more than 10 minutes to present their oral testimony at the hearing or who will submit documentary evidence at the hearing must submit (transmit, send, postmark, deliver) the full text of their testimony and all documentary evidence no later than January 29, 2016.

The Agency will review each submission and determine if the information it contains warrants the amount of time the individual requested for the presentation. If OSHA believes the requested time is excessive, the Agency will allocate an appropriate amount of time for the presentation. The Agency also may limit to 10 minutes the presentation of any participant who fails to comply substantially with these procedural requirements, and may request that the participant return for questioning at a later time. Before the hearing, OSHA will notify participants of the time the Agency will allow for their presentation and, if less than requested, the reasons for its decision. In addition, before the hearing, OSHA will provide the hearing procedures and hearing schedule to each participant who filed a notice of intention to appear.

Certification of the hearing record and Agency final determination. Following the close of the hearing and the post-hearing comment periods, the ALJ will certify the record to the Assistant Secretary of Labor for Occupational Safety and Health. The record will consist of all of the written comments, oral testimony, and documentary evidence received during the proceeding. The ALJ, however, will not make or recommend any decisions as to the content of the final standard. Following certification of the record, OSHA will review all the evidence received into the record and will issue the final rule based on the record as a whole.

Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, pursuant to section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)), Secretary of Labor's Order 1–2012 (77 FR 3912), and 29 CFR part 1911.

Signed at Washington, DC, on December 23, 2015.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2015–32764 Filed 12–29–15; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF EDUCATION

34 CFR Part 222

RIN 1810–AB24

[ED–2015–OESE–0109]

Impact Aid Programs

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Impact Aid Program regulations issued under title VIII of the Elementary and Secondary Education Act of 1965, as amended (ESEA or ''the Act''). The proposed regulations govern Impact Aid payments to local educational agencies (LEAs). The program, in general, provides assistance for maintenance and operations costs to LEAs that are affected by Federal activities. These proposed regulations would update, clarify, and improve the current regulations.

DATES: We must receive your comments on or before February 16, 2016.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

• *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the help tab at ''How To Use Regulations.gov.''

• *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these proposed regulations, address them to Kristen Walls-Rivas, U.S. Department of Education, 400 Maryland Avenue SW., Room 3C103, Washington, DC 20202–6244.

Privacy Note: The Department's policy for comments received from members of the public is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Kristen Walls-Rivas, U.S. Department of Education, 400 Maryland Avenue SW., Room 3C103, Washington, DC 20202–6244. Telephone: (202) 260–3858 or by email: *Impact.Aid@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation To Comment: We invite you to submit comments regarding these proposed regulations. We specifically invite you to comment on the ways in which school districts can collect data for counting federally-connected children for Impact Aid purposes, under proposed § 222.35; the proposed changes to the Indian policies and procedures (IPPs) in §§ 222.91 and 222.94–95; and the proposed changes to the equalization disparity test in § 222.162. Regarding the first of those topics, we invite comment on the following specific questions:

• Are there alternative methods for counting federal-connected children besides the parent-pupil survey form or source check collection tools, either in use or that you propose?

• What types of technical assistance would you like the Department to provide to properly educate and inform LEAs on the two regulatory methods of data collection, or on other methods?

• Can you propose ways in which online or electronic data collection might be used to facilitate the data collection process? This may include but is not limited to the electronic collection of parent-pupil survey forms and the use of student information systems for Impact Aid data collection.

To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments in person at 400 Maryland Avenue SW., Washington, DC, between 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

The Secretary proposes to amend certain regulations in part 222 of title 34 of the Code of Federal Regulations (CFR). The regulations in 34 CFR part 222 pertain to the Impact Aid Program and implement Title VIII of the ESEA. The purpose of this regulatory action is to update the current regulations in response to statutory changes and related issues that have arisen, as many of the regulations for this section have not been updated since 1995; to improve clarity and transparency regarding Federal program operations; and to improve the LEA's application processes to generate a more accurate data collection, which will facilitate more timely Impact Aid payments. The Department published final technical amendments for this program on June 11, 2015, deleting obsolete provisions and incorporating statutory changes that did not require notice and comment. These proposed regulations contain provisions on which we seek comment from the public.

Tribal Consultation: Before developing these proposed regulations, the Department held two nationally accessible tribal consultation teleconferences on July 15, 2015, and July 28, 2015, pursuant to Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''), to solicit tribal input on the Impact Aid program regulations broadly, and specifically on the provisions that affect LEAs that claim students living on Indian lands. The Impact Aid Program announced the consultation teleconferences via the Office of Indian Education's listserv on July 2, 2015, and July 14, 2015. During the webinars, the attendees discussed a range of topics, including Indian lands property verification and data collection, IPPs, and IPP waivers. The Impact Aid Program received the most feedback on the regulations concerning IPPs, IPP waivers, and remedies for non-compliance with IPPs.

There was a concern among many consultation participants that LEAs are not implementing IPPs with the degree of seriousness intended by the law and Impact Aid program regulations. Commenters wished to see LEAs focus more attention on equal participation of Indian students in all educational programs, including Advanced Placement courses, sports, and other extra-curricular activities. Some participants were concerned that LEAs do not provide sufficient time for tribes or parents to review data regarding participation of Indian children in the LEAs' programs; others stated that some LEAs provide outdated data to tribal leaders.

In addition, participants sought more guidance on the standard for meaningful input from tribal officials and parents of Indian children. Commenters were further concerned that there is no requirement in the current Impact Aid regulations that tribes review and affirm that an LEA is in compliance with the content in the IPP before it is submitted to the Department for review. Others stated that tribes are not receiving copies of IPPs at all. Many commenters felt that some LEAs provide tribal leaders and parents of Indian children insufficient notice of meetings.

There was also a general concern among many participants that the current remedy for non-compliance with IPPs, the withholding of an LEA's Impact Aid payments, is unhelpful, because withholding all funds would have a negative effect on Indian children. Others stated that the IPP complaint process is highly adversarial; they wished to see an intermediate step, such as a requirement that the LEA and tribal leaders attend a mediation session before a complaint is submitted to the Department. Commenters indicated that tribes would also like to be informed when the Department finds that an LEA serving children on the tribe's land is out of compliance with the IPP requirements.

With regard to the current program regulations regarding an LEA's ability to submit a waiver from a tribe in lieu of IPPs, commenters expressed the concern that tribes may be waiving rights without informed knowledge about what they are waiving.

The Impact Aid Program also heard comments about the verification of students living on Indian lands. Participants were concerned that LEAs were not providing sufficient time for tribal officials to confirm that the students in question resided on Indian land. Participants also stated that it would be helpful for them and for the officials certifying Indian land to have customized training that focuses on the Impact Aid program's requirements.

The Department considered the views gathered during the tribal consultation process in developing these proposed regulations. Specifically, proposed provisions regarding IPPs and waivers of IPPs (§§ 222.91, 222.94, and 222.95) reflect this input.

Applicability of the Every Student Succeeds Act

On December 10, 2015, the President signed the Every Student Succeeds Act (ESSA), Public Law 114–95, 129 Stat. 1802 (2015), which amends the Elementary and Secondary Education Act of 1965 (ESEA). The ESSA includes Impact Aid amendments (see new title VII of the ESEA, formerly title VIII), which take effect starting with fiscal year 2017 payments. Pub. L . 114–95, § 5(d). These proposed regulations are not directly affected by the ESSA. The statutory provisions underlying each regulatory provision in this document

were not affected in a relevant manner by the ESSA. We plan to make any conforming references needed, including authority citations, in the final regulations. The Department will be considering in the near future whether further changes to the Impact Aid regulations are needed due to the ESSA.

Summary of Proposed Changes

These proposed changes would:

- Amend the definition of ''membership'' in § 222.2 to clarify that an eligible student in membership must live in the same State as the LEA except in certain circumstances.
- Amend §§ 222.3 and 222.5 to change the date by which an LEA may amend its application from September 30 to June 30 of the year preceding the Federal fiscal year for which it seeks assistance.
- Amend § 222.22 to reflect a statutory change that would include payments in lieu of taxes (PILTs) and revenues from other Federal sources in the calculation of compensation from Federal activities, for purposes of determining eligibility and payments under section 8002 of the ESEA.
- Amend § 222.23 to replace the current provision with a new provision that describes how LEAs formerly eligible for section 8002 grants, that have consolidated with another LEA, are treated with respect to section 8002 grant payments.
- Amend § 222.30 to exclude Federal charter school startup funds from the analysis of whether Federal funds provide a substantial portion of the educational program, for purposes of determining an LEA's eligibility.
- Amend § 222.35 to specify certain unusual circumstances in which someone other than a parent or legal guardian may sign a parent-pupil survey form and to require the use of source check forms to document children residing on Indian lands or in low-rent housing.
- Amend § 222.37 to clarify the options for reporting average daily attendance and to make them available to all States.
- Amend § 222.40 to require that an SEA submit the rationale for the additional factors selected to identify generally comparable districts and describe how those factors affect the cost of educating students.
- Amend § 222.91 to add a requirement for an LEA claiming children residing on Indian lands to include with its application an assurance that the LEA has responded in writing to input from the tribes and parents of Indian children received during the IPP consultation process, prior to submitting the application for Impact Aid.
- Amend § 222.94 to add a requirement that LEAs claiming children residing on Indian lands respond in writing to input obtained from parents of Indian children and tribal officials during the IPP consultation process, disseminate these responses to the parents of Indian children and tribal officials prior to submission of the Impact Aid application, and provide a copy of the IPPs to the tribe; and changing from 60 to 90 days the time period in which an LEA must amend its IPPs based on its own determination after obtaining tribal input.
- Amend § 222.95 to allow the Department to withhold all or part of the Impact Aid payment from an LEA that is not in compliance with the requirements of § 222.94, and changing from 60 to 90 days the time within which LEAs must revise IPPs in response to Department notification.
- Amend § 222.161 to give the SEA the ability to request permission from the Secretary to make estimated State aid payments that consider an LEA's Impact Aid payment in the event that the Department does not make an equalization determination before the start of an SEA's fiscal year.

Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory changes that are technical or otherwise minor in effect.

§ 222.2 What definitions apply to this part?

Membership

Statute: Section 8003 of the ESEA provides that payments are based on the number of eligible children in average daily attendance in schools of the LEA. The definition of ''average daily attendance'' in section 9101(1) of the ESEA provides in part that average daily membership can be converted to average daily attendance.

Current Regulations: Paragraph (3) of the current definition of ''membership'' in § 222.2 excludes four categories of students.

Proposed Regulation: The proposed regulation adds an additional exclusion to paragraph (3) of the definition of ''membership.'' Under the proposed provision, LEAs could not claim students who reside in a different State, unless the circumstances described in section 8010(c) of the Act apply, or unless the student is covered under a formal State enrollment or tuition agreement.

Reasons: LEAs have sometimes attempted to claim children who reside in another State but attend school in the LEA. Children who reside in one State and attend school in a different State are generally excluded from Impact Aid eligibility by the current regulations because eligible students must be supported by State aid, and States typically do not provide State aid for the education of children who reside in other states. The proposed regulation would clarify this rule and provide the two exceptions to it: One is statutory (section 8010(c)) and the other is a situation in which children are covered under a formal written tuition or enrollment agreement between two States.

Parent Employed on Federal Property

Statute: Under section 8003 of the Act, several categories of eligible children include those who resided with a parent who is employed on Federal property.

Current Regulation: Paragraph (1)(i) of the current definition of ''parent employed on Federal property'' in § 222.2 provides that a parent employed on Federal property is a parent who is employed by the Federal government and reports to work on Federal property or whose place of work is on Federal property.

Proposed Regulation: The proposed regulation would clarify the definition of ''parent employed on Federal property'' by revising paragraph (1)(i) so it specifically includes parents employed by the Federal government but who report to an alternate duty station, such as a telework location, on the survey date.

Paragraph (1)(ii) would not change; paragraph (1)(iii) would be deleted. Finally, paragraph (2) of the definition would be amended to further clarify that children whose parent's job includes providing services on a Federal property, but who are not Federal employees and whose duty station is not on the Federal property, are not eligible to be counted for Impact Aid.

Reason: The Telework Enhancement Act of 2010 has increased the number of Federal employees who telework on a regular basis. The proposed change to paragraph (1)(i) of the regulation is intended to include the children of Federal employees who might otherwise not be considered eligible for Impact Aid purposes because they telework. We propose deleting the provision in paragraph (1)(iii) because the provision is obsolete. LEAs have not used this

provision since it was effective and the Department does not foresee it being needed in the future. We propose the revision to paragraph (2) to clarify further that parents who provide services to a Federal property, but who are not Federal employees and whose main duty station is not located on Federal property, are not eligible under the definition of ''parent employed on Federal property.''

§ 222.3 How does a local educational agency apply for assistance under section 8002 or 8003 of the Act?

Statute: Section 8005 of the Act governs the submission of applications for payments under sections 8002 and 8003 of the Act.

Current Regulations: The current regulation describes how an LEA applies for assistance under sections 8002 and 8003 of the Act. Section 222.3(b)(2) provides that, under the exceptional circumstances described in § 222.3(b)(1), an LEA must file its application either 60 days following the event or by September 30 of the Federal fiscal year preceding the year for which it seeks assistance, whichever comes later.

Proposed Regulations: The proposed regulation would change the application deadline in § 222.3(b)(2) for LEAs with exceptional circumstances from September 30 to June 30 under section 8002 and 8003.

Reasons: The proposed regulatory change would make § 222.3(b)(2) consistent with the proposed changes in § 222.5, in which the Department proposes to change the application amendment deadline from September 30 to June 30. See the discussion of proposed § 222.5 directly below for the reasons for that change.

§ 222.5 When may a local educational agency amend its application?

Statute: Section 8005 of the Act governs the submission of applications for payments under sections 8002 and 8003 of the Act.

Current Regulations: Under § 222.5(a)(2), an LEA may amend its application for situations described in § 222.3(b)(1) by September 30 following the January application deadline. In addition, § 222.5(b) permits an LEA that did not have data available at the time it filed its application, such as after a second membership count, to amend its application by September 30.

Proposed Regulations: The Department proposes to change the amendment deadlines in §§ 222.5(a)(2) and 222.5(b)(2) from September 30 to June 30.

Reasons: The National Defense Authorization Act (NDAA) of 2013 mandates that Impact Aid payments be made no later than two years after the funds are appropriated. Many LEAs submit their applications in January of each year showing incomplete counts of eligible children and submit amendments as late as September 30 to provide complete and accurate information. This procedure inhibits the Department's ability to review the applications and prepare initial payments. A June 30th amendment deadline will ensure that the Department receives complete application information for the review of data and release of funds in a timely manner.

§ 222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payment?

Statute: Section 8002(a) of the Act provides that an LEA is not eligible for a payment under section 8002 if it is substantially compensated for the loss in revenue resulting from Federal ownership of land. Compensation is measured by increases in revenue from the conduct of Federal activities, but the statute does not define ''substantial compensation.'' Section 8002(b) contains a maximum payment provision that takes into account the amount of revenue received by the LEA from activities conducted on Federal property; those revenues specifically include payments received from any Federal agency other than the Department or education-related payments from the Department of Defense (DOD).

Current Regulation: For purposes of determining an LEA's eligibility and maximum payment under section 8002, the current regulations provide in § 222.22 that an LEA is substantially compensated if its other Federal revenue exceeds its maximum payment amount under Section 8002. In § 222.22(d) the regulation excludes from ''other Federal revenue'' only payments from the DOD.

Proposed Regulation: Proposed § 222.22(b)(1) would specifically include payments in lieu of taxes (PILTS) received from any other Federal agencies in the amount of revenue received by the LEA from activities conducted on Federal property, for purposes of determining an LEA's eligibility for, and amount of, payment under section 8002 of the Act.

Reasons: This proposed revision would conform with the statutory requirements for calculating the revenue received by an LEA, in determining both eligibility and the maximum payment under section 8002 of the Act. The proposed regulation would specify that PILTs, which are payments from other Federal agencies, are part of revenues considered for eligibility and maximum payment purposes. In addition, by including, in proposed paragraph (b)(1), payments received by any *other* Federal agency, that means we do not take into account Federal funds from the Department, consistent with the statute and with current Department practice.

§ 222.23 How are consolidated local educational agencies treated for the purposes of eligibility and payment under section 8002?

Statute: Section 8002(g) of the Act contains provisions granting eligibility to certain districts that consolidated from two or more former districts prior to 1995. The Consolidated Appropriations Act of 2014 (Pub. L. 113–76) amended this provision to also permit LEAs that consolidated after 2005 to receive a section 8002 foundation payment if one of the former districts was eligible for section 8002 funds for the fiscal year prior to consolidation.

Current Regulation: There is no current regulation regarding the eligibility of consolidated districts. The current regulation at § 222.23 contains the previous formula for calculating a section 8002 payment under statutory provisions that have been replaced.

Proposed Regulation: We propose to remove § 222.23 in its entirety and replace it with the proposed regulatory language regarding consolidated districts. The new regulation would clarify which consolidated LEAs are eligible, what documentation is necessary to prove eligibility, and how foundation payments are calculated for consolidated districts when more than one former district qualifies. The regulation would also clarify that consolidated LEAs remain eligible for section 8002 funds as long as the amount of Federal land in at least one former LEA upon which eligibility is based (*i.e.* the LEA that was eligible for Section 8002 funds in the prior fiscal year) comprises at least 10 percent of the taxable value of the former LEA at the time of Federal acquisition.

Reasons: The 2014 statutory change created a new category of school districts that qualify for section 8002 grant funds, and this regulation would clarify the eligibility and payment for these districts, as well as for districts eligible under the previous statutory provision. The proposed regulation will require that the consolidated district still contains, within the boundaries of

one of its former districts, Federal property that comprises at least 10 percent of the taxable value of the former LEA at the time of Federal acquisition. This is to ensure that an LEA will not receive both tax revenue and section 8002 funds for the same property, if a significant amount of previously-eligible Federal land within the boundaries of the former district has been sold and is no longer prohibited from being taxed.

The regulation would also provide that an eligible consolidated LEA receives only a foundation payment and not any ''remaining funds.'' Remaining funds require submission of data by LEAs to calculate a maximum payment, and a consolidated LEA's payment is based only on the last payment received by a former LEA, so there is no documentation available with which to calculate a maximum payment. The provisions that are proposed in this section reflect current Department practice.

§ 222.24 How does a local educational agency that has multiple tax rates for real property classifications derive a single real property tax rate?

Statute: Section 8002(b)(2) of the Act requires the Secretary to use an LEA's current levied real property tax rate for current expenditures in calculating an LEA's maximum payment amount under section 8002 of the Act.

Current Regulation: None.

Proposed Regulation: This proposed new regulation would describe how an LEA with multiple tax rates for different property classifications derives a single tax rate. Essentially, the LEA divides the total revenues it received from property taxes by the assessed valuation of the property in the LEA.

Reasons: The statutory formula requires a single tax rate for an LEA. Taxing jurisdictions often set different tax rates for each type of property, resulting in multiple tax rates within an LEA. This provision would mandate a standardized arithmetic procedure to determine a single tax rate under section 8002, and reflects current practice.

§ 222.30 What is ''free public education''?

Statute: Section 8013(6) of the Act defines ''free public education.'' The definition includes the requirement that education must be at public expense, under public supervision and direction, and without tuition charge.

Current Regulations: The current regulatory definition of ''free public education'' in § 222.30(2)(ii) states in relevant part that education is provided at public expense if Federal funds, other than Impact Aid funds, do not constitute a substantial portion of the educational program.

Proposed Regulation: The proposed regulation would exclude Federal charter school startup grant funds (Title V, part B, subpart I) from the calculation of the Federal portion that funds an LEA's educational program. The regulation would also add a provision clarifying that the Secretary analyzes whether a substantial portion of the education program is funded by Federal sources by comparing the LEA's finances to other LEAs in the State.

Reasons: Under section 8003(a) of the Act, an LEA can only claim students for Impact Aid if the LEA provides a free public education to those students. Section 8003 Impact Aid funds are intended to replace lost local revenues due to Federal activity. Under the current regulations, if Federal funds are providing for the educational program (*e.g.* schools funded by the Department of Interior), then the lack of local tax revenue is already being compensated by another Federal source. As a result, the LEA is not eligible for Impact Aid for those students.

The proposed regulation would also exclude charter school startup funds from the calculation of whether Federal funds provide a substantial portion of an LEA's program. These funds are generally available in the first two years of a charter school's operations; they can be used for a host of purposes other than current expenditures, and they are not long-term funding sources.

Under the proposed regulation, in analyzing the portion of the education program that is funded by Federal sources, the Department would compare the LEA's finances to other LEAs in the State to account for the circumstances unique to the State.

§ 222.32 What information does the Secretary use to determine a local educational agency's basic support payment?

Statute: Section 8005(b)(1) of the Act specifies that an LEA must submit an application that includes information for the Secretary to be able to determine the LEA's eligibility and payment amount.

Current Regulations: Section 222.32(b) requires that an LEA must submit its federally connected membership based on a student count described in §§ 222.33 through 222.35 of the regulations.

Proposed Regulations: The proposed regulation would clarify that the LEA must submit its federally connected membership count in its timely and complete annual application.

Reasons: The proposed regulation would clarify that each LEA must include an accurate membership count in its application by the deadline of January 31. In recent years, the Department's Impact Aid field reviews of LEAs have revealed that some applicants submitted estimated data on the section 8003 Impact Aid application, and then relied on the amendment process to provide the actual counted data. Accurate application information must be submitted before the program can review the application and calculate payments. If LEAs submit estimated data and rely on the amendment process to provide accurate data, the Impact Aid Program is delayed in processing payments to all districts.

§ 222.33 When must an applicant make its membership count?

Statute: Section 8003 of the Act does not directly address when an LEA must make its membership count. The Secretary has the authority to regulate when an LEA calculates its membership under 20 U.S.C. 1221–e and 3474.

Current Regulations: The current regulation refers to the ''first or only'' membership count.

Proposed Regulations: The proposed regulation would remove the reference to the first or only membership count. Additionally, the proposed regulation would clarify that the data from the only membership count must be complete by the application deadline.

Reasons: The proposed regulatory change in § 222.34 (see below) would eliminate the current regulatory option of a second membership count. That change in turn would eliminate the need to reference first or only membership count, since there would be only one count. The proposed language in § 222.33(c) stating that the LEA must complete its membership count by the application deadline supports the proposed changes in § 222.32 that would help to ensure submission of a complete application by the deadline.

§ 222.34 If an applicant makes a second membership count, when must that count be made?

Statute: Section 8003 of the Act does not directly address when an LEA must make its membership count. The Secretary has the authority to regulate when an LEA calculates its membership under 20 U.S.C. 1221–e and 3474.

Current Regulations: The current regulation describes the process for undertaking a second membership survey.

Proposed Regulations: The proposed regulations would delete this provision and reserve the section for future use.

Reasons: This provision has become obsolete over time. The second membership survey provision has not been used since 2012 and at that time it was used by only two LEAs. This change would streamline the review process to support timely and accurate payments. Allowing second membership surveys late in the year causes delays in the review process and potentially delays payment. The Department has determined that the impact of removing this provision is low and the benefits outweigh any foreseen consequence.

§ 222.35 How does a local educational agency count the membership of its federally connected children?

Statute: Section 8005(b)(1) of the Act specifies that an LEA must submit an application that includes information for the Secretary to be able to determine the LEA's eligibility and payment amount.

Current Regulations: The current regulation describes the information required on a parent-pupil survey form and on a source check form.

Proposed Regulations: The proposed regulation would reorganize paragraph (a) regarding parent-pupil survey forms, to first list the information required for all types of children, followed by specific requirements for certain categories of children. In addition, proposed paragraph (a)(4) would clarify for LEAs the rare situations in which an LEA may accept a parent-pupil survey form that is not signed by a parent or legal guardian. The regulation also would clarify that the Department will not accept parent-pupil survey forms signed by an employee of the LEA, unless the employee is a parent of a child attending school within the LEA, signing their own child's form.

Proposed paragraph (b) pertains to source check documents, which are a data collection alternative to the parent-pupil survey form. The proposed regulations would require source check documents for children residing on Indian lands and for children residing in eligible low-rent housing. Under the proposed regulation, the source check forms must contain sufficient information to verify the eligibility of both the Federal property and the individual children claimed on the source check form.

Reasons: With regard to parent-pupil survey forms, recent Impact Aid field reviews of LEAs have revealed instances of LEA staff members signing forms for parents or verifying the information by phone, without a parent signature on the form. The proposed revisions to paragraph (a) would clarify the requirements and provide examples of the few unusual situations in which someone other than a parent may sign a parent-pupil survey form. In no instance would an employee of the LEA be permitted to sign a form for a parent. These proposed changes reflect current Department policy.

Paragraph (b) would be revised to require that LEAs claiming children who reside on Indian lands, and children who reside in low-rent housing, use a source check document to obtain the data required to determine the children's eligibility. The parent-pupil survey form is insufficient to document the different types of eligible Indian lands property and low-rent housing property and confirm that property's eligibility, because parents are unlikely to have the necessary documentation or information. In order to ensure accurate and timely eligibility and payment determinations, LEAs need to reach out directly to the government entities (*e.g.* for Indian lands—tribal officials, Bureau of Indian Affairs (BIA) staff, and/or tax assessors; for low-rent housing—the U.S. Department of Housing and Urban Development (HUD) and/or local housing authorities) who have access to the records that document the legal status of a specific parcel of land and can certify that the status is consistent with the Federal property definition.

§ 222.37 How does the Secretary calculate the average daily attendance of federally connected children?

Statute: Section 8003 the Act requires that payments be based on the average daily attendance (ADA) of federally connected children. Section 9101(1) of the Act defines ADA.

Current Regulations: The current regulations describe the process for calculating ADA for LEAs that reside in States that use actual ADA when determining State aid, and for LEAs that reside in States where something other than ADA is used to calculate State aid. The current regulations also describe other options for LEAs or States if the State does not use ADA for determining State aid, including the use of a State average attendance ratio (which has informally been referred to as a ''negotiated ratio,''), sampling, or the use of data similar to ADA.

Proposed Regulations: The proposed regulation would reorganize this section so that the options for LEAs, the States, and the Secretary are grouped together by actor. The proposed regulation would allow any State to ask the Secretary for a State average attendance ratio. In addition, in cases where there is reliable public data, the Secretary may calculate a State average attendance ratio.

Reasons: Use of a State average attendance ratio typically benefits most LEAs and those that do not benefit have the option to submit actual attendance data to obtain a higher payment. Currently, 35 States have a State average attendance ratio. The proposed change would give LEAs in all States the opportunity to use a State average attendance ratio and alternative options for obtaining an attendance rate. This would reduce the LEAs' data collection burden and provide more options for each LEA to obtain a higher attendance rate, which may typically result in a higher Impact Aid payment.

§ 222.40 What procedures does a State educational agency use for certain local educational agencies to determine generally comparable local educational agencies using additional factors, for local contribution rate purposes?

Statute: Section 8003(b)(1) of the Act contains the formula for determining an LEA's maximum payment amount, based in part on calculating each LEA's local contribution rate (LCR). The statute states that the LCR is to be determined under the procedures set forth in the Department's regulations as they were in effect on January 1, 1994.

Current Regulations: The current regulations in § 222.39–§ 222.41 provide that an LEA's LCR is determined by identifying generally comparable districts. Under § 222.40, for certain qualifying LEAs, the SEA may use additional factors in identifying the generally comparable LEAs for the purpose of calculating and certifying an LCR. Section 222.40(d) provides that if an SEA proposes to use a special additional factor to select a group of generally comparable districts (GCDs) to support a higher LCR for a specific LEA, it must be a generally accepted, objectively defined factor that affects the LEA's cost of educating its students.

Proposed Regulations: The proposed regulation would clarify that SEAs that wish to use special additional factors to identify GCDs for purposes of calculating a higher LCR for certain LEAs must provide a rationale and explain how the selected factor or factors affect the cost of education. The proposed regulation does not substantively alter the manner in which the LCRs are calculated.

Reasons: To determine GCDs for local contribution rate purposes, an SEA may use a special additional factor only if that factor has an impact on the cost of

education for an LEA. In the past, the Department has had to contact the SEA to learn the rationale for a specific factor or factors after the GCD data were submitted. Requiring the rationale as part of the submission process would help ensure timely and accurate payments to the LEAs in the State.

§ 222.62 How are local educational agencies determined eligible under section 8003(b)(2)?

Statute: Section 8003(b)(2) of the Act contains the requirements for eligibility and payment for heavily impacted districts.

Current Regulations: The current regulation does not address how an applicant may apply for heavily impacted funding under section 8003(b)(2) on the Impact Aid application.

Proposed Regulations: The proposed regulation would require that an LEA that wishes to be considered for a heavily impacted payment under section 8003(b)(2) submit with its initial application the information needed to establish eligibility.

Reasons: The majority of applicants that request assistance under section 8003(b)(2) do not meet the eligibility requirements for these payments, nor have they investigated the eligibility requirements and learned whether they may qualify. Requiring the LEAs to submit the supporting documentation that indicates potential eligibility would facilitate faster determinations of eligibility and payment for heavily impacted districts. This proposed regulatory change would be complemented by a change to the application forms to require submission of a brief document certified by the SEA to trigger a Department review for section 8003(b)(2) eligibility.

§ 222.91 What requirements must a local educational agency meet to receive a payment under section 8003 of the Act for children residing on Indian lands?

Statute: Section 8004 of the Act requires that an LEA claiming children who reside on Indian lands must establish IPPs. As an alternative, the LEA may obtain a waiver of this requirement from each tribe indicating that the tribe is satisfied with the educational services the LEA is providing to the children of the tribe.

Current Regulations: The current regulation requires that an LEA claiming children residing on Indian lands submit with its application its IPPs and a signed assurance attesting that the LEA developed its IPPs in consultation with the parents of Indian children and tribal officials. The current regulation provides that in the alternative, an LEA can submit documentation that the LEA has received a waiver that complies with section 8004(c) of the Act.

Proposed Regulations: The proposed regulation would require an assurance that the LEA has provided a written response to the comments, recommendations, and concerns expressed by the parents of children who reside on Indian lands and tribal officials during the IPP consultation process. In addition, the proposed regulation would require that an IPP waiver submitted with an application include a written statement from an appropriate tribal official stating that the tribe has received a copy and understands the requirements of §§ 222.91 and 222.94 that are being waived and that it is satisfied with the LEA's educational services provided to the tribe's students. An LEA would be required to submit its waiver at the time it submits its application.

Reasons: The Department's tribal consultations yielded many concerns from the Indian community that LEAs are not engaging in meaningful consultation with the tribes and families, or providing meaningful opportunities for engagement and communication. One of the concerns most frequently voiced was that LEAs have not considered the tribes or parents' comments, concerns or recommendations when creating the educational program or making decisions about school-sponsored activities.

The Department has taken these concerns into account and proposes to add to the Impact Aid section 8003 application package an assurance that the LEA has provided written responses to comments, concerns, or recommendations received through the IPP consultation process. This assurance does not mean that an LEA must adopt any specific recommendations; rather it will require the LEAs to explain in writing to the parents of Indian children and tribal officials why the LEA is not adopting the recommendations, or how it will implement or take into consideration those recommendations or concerns.

With regard to a waiver of IPPs, the proposed rules would clarify that a waiver must be voluntary and must reflect an understanding on the part of the tribal official of the rights being waived. The statutory option of a waiver was intended to be used only when a tribe is truly satisfied with an LEA's program and services, and not as a way for an LEA to avoid the IPP process. The proposed regulation would require that a waiver be submitted with the application and not later; in the past when the Department has reviewed IPPs, some LEAs have submitted a waiver as an application amendment in order to avoid amending the IPPs, under circumstances that call into question whether the waiver has been knowing and voluntary on the part of the tribe.

Based on the discussions during the consultation process, the Department is also considering administrative options, such as providing additional technical assistance to better support and assist LEAs, parents, and tribal officials as they negotiate the IPP consultation process.

§ 222.94 What provisions must be included in a local educational agency's Indian policies and procedures?

Statute: Section 8004 of the Act states that an LEA claiming children residing on Indian lands must establish and maintain a set of IPPs in order to receive funds under section 8003 of the Act. The IPPs are intended to ensure: That Indian children participate on an equal basis in the educational program and activities sponsored by the LEA; that parents of Indian children and tribal leaders are given the opportunity to present their views on programs and activities and make recommendations; that the LEA consults with parents of Indian children and tribal leaders in the planning and development of the educational program and activities; and that the LEA disseminates evaluations, reports and program plans to the parents of Indian children and the tribes.

Current Regulations: The current regulation identifies eight specific procedures than an LEA must describe in its IPPs. The IPPs must describe how the LEA: (1) Gives tribal officials and parents of Indian children the opportunity to comment on whether or not Indian children participate on an equal basis with non-Indian children in the LEA's educational program and school sponsored activities; (2) assesses whether or not Indian children participate on an equal basis; (3) modifies, if necessary, its education program to ensure equal participation for Indian children; (4) disseminates relevant documentation related to the education programs to parents of Indian children and tribes with sufficient time to allow the tribes and parents of Indian children an opportunity to review the documentation and make informed recommendations on the needs of the Indian children; (5) gathers information concerning Indian views in general and related to the frequency, location, and time of meetings; (6) notifies Indian

parents and tribes of the time and location of meetings; (7) consults and involves tribal officials and parents of Indian children in the planning and development phase of the LEA's education programs and activities; and (8) modifies the IPPs, if necessary.

Proposed Regulations: The proposed regulation would reorganize the information from §§ 222.94 and 222.95(e)–(g); it would also add a requirement that the LEA respond in writing, at least annually, to the comments and recommendations of the tribes or parents of Indian children and disseminate these responses to the tribes and parents prior to the submission of the IPPs to the Department. The regulation would also require the LEA to provide a copy of the IPPs to the tribe annually. Additionally, the proposed regulation would move paragraphs (e)–(g) of section § 222.95 to the revised § 222.94. Under those relocated provisions, proposed § 222.94(c)(3) would change the number of days that an LEA has to amend its IPPs, if it determines that they are not in compliance, from 60 days to 90 days.

Reasons: The proposed provisions of §§ 222.94 and 222.95(e)–(g) are reorganized for clarity and order. Proposed § 222.94 would emphasize that the LEA must consult with, and actively solicit involvement from, the local tribes and parents of Indian children in the development of both the IPPs and the educational program and activities.

Proposed § 222.94(b)(5) would add a requirement that the LEA provide written responses at least annually to comments and recommendations received through the IPP consultation process. This proposal stems from one of the most frequent concerns raised during the Indian consultation; that many LEAs have not considered the tribes or parents' comments, concerns or recommendations when creating the educational program or making decisions about school-sponsored activities. This provision would not require that an LEA adopt any specific recommendations; rather it would require the LEA to explain in writing to the parents of Indian children and tribal officials why the LEA is not adopting the recommendations, or how it will implement or take into consideration those recommendations or concerns. The LEA's response would demonstrate how the feedback has been thoughtfully considered in the development of the educational program, and would be reflected in the IPPs. Optimally, the outcome of the IPP consultation process would be a document that demonstrates to the tribe that the LEA has heard and acknowledged the feedback from the parents of Indian children and tribes.

In addition, we learned during consultations that tribes do not always have access to a copy of the IPPs; thus the revisions would require the LEA to provide a copy of the IPPs to the tribe annually.

Because LEAs are often required by State or local law to have the school board (or equivalent) certify any changes to the IPPs, extending the time that an LEA has to revise its IPPs from 60 to 90 days would allow time for both the revision and any necessary procedural steps. The provisions in proposed paragraph (c) were moved from current § 222.95(e)–(g) to keep the provisions related to the creation, content, and revision of IPPs under one regulatory section.

§ 222.95 How are Indian policies and procedures reviewed to ensure compliance with the requirements in section 8004(a) of the Act?

Statute: Section 8004(e) of the Act provides for a complaint procedure for tribes with regard to IPPs. Under certain circumstances following a hearing and a determination by the Secretary, if the Department finds that the LEA is still in noncompliance with the provisions of section 8004, the Department must withhold Impact Aid payments to the LEA until the LEA undertakes the required remedy, unless the withholding would substantially disrupt the LEA's education programs.

Current Regulations: The current regulation describes how the Department reviews and evaluates IPPs to ensure compliance with §§ 222.91 and 222.94. It provides that the Secretary will review IPPs periodically to ensure compliance. If an LEA is not in compliance, the Secretary will notify the LEA in writing of the deficiencies.

Current § 222.95(d) states that the Department may withhold all payments if the LEA fails to bring its IPPs into compliance within 60 days of receipt of the Department's formal notification.

Proposed Regulations: Proposed § 222.95(c) would change the number of days that an LEA has to remedy issues of noncompliance from 60 days to 90 days. The proposed regulation would also change the provision on withholding all section 8003 payments to the option to withhold all or part of the section 8003 payments. Finally, the proposed regulations would move paragraphs (e)–(g) of current § 222.95 into proposed § 222.94.

Reasons: LEAs often need to have the school board (or equivalent body) certify any changes to the IPPs. Extending the time that an LEA has to revise its IPPs following Department notification from 60 to 90 days would allow time for both the revision and school board certification.

Under the current withholding provisions, if an LEA does not correct deficiencies in its IPPs within 60 days, the Department's only sanction is to withhold all section 8003 payments, unless the withholding would substantially disrupt the LEA's education programs. As many LEAs rely heavily on Impact Aid funds, withholding all section 8003 funds would prevent some LEAs from being able to provide an adequate educational program to the students they serve. The Secretary's intent in proposing to amend this regulation is to adopt clear, fair, and flexible withholding procedures in the event a withholding action is required. We learned through the tribal consultation that tribes favor incentives to encourage LEAs to bring deficient IPPs into compliance with the law in a way that does not interrupt the educational services provided to their children. The proposed withholding procedure balances the need for compliance with the interests of ensuring the LEA has the resources needed to provide adequate educational services to the children they serve.

Regarding the comments we heard requesting a more informal process for resolving disputes about IPPs, we fully encourage school districts and tribes to use alternative methods of dispute resolution, such as mediation or arbitration. This could obviate the need for a formal complaint to the Department, and nothing in the proposed or current regulations would prevent such a step. In addition, a party, once it has initiated a formal complaint, may request the Department to stay the proceedings to pursue mediation, and the Department would do so if both parties agree. In addition, the Impact Aid Program is willing to provide technical assistance to both parties to facilitate a common understanding before a formal complaint is launched.

Subpart K—Determinations Under Section 8009 of the Act

Section 222.161 How is State aid treated under Section 8009 of the Act?

Statute: Section 8009(d)(2) of the Act prohibits States from taking Impact Aid into consideration as local revenues when making State aid payments before the Secretary certifies that the State's program of aid is equalized.

Current Regulations: The current regulation in § 222.161(a)(5) repeats the statutory prohibition against a State taking Impact Aid into consideration

before being certified. The current regulation does not specifically address the data needed from a State that was not previously certified but that is now requesting certification under section 8009 of the Act.

Proposed Regulations: Under the proposed regulations, if the Secretary has not issued a certification before the beginning of the State's fiscal year, the State may request permission from the Secretary to make estimated State aid payments that take Impact Aid into account as local revenue. Before granting permission, the Secretary would consider whether the Secretary certified the State as equalized for the prior fiscal year, and whether the State revised its State aid program since the date of the prior year's certification. Also, the State must assure that if the State does not meet the disparity standard, the State will reimburse each LEA the amount deducted, within 60 days of the Department's determination.

The proposed regulations would also clarify that if the Secretary has not previously certified a State's program of State aid and the State wishes to apply for certification, the State would submit projected data showing that it would meet the disparity standard if it were authorized to deduct Impact Aid under section 8009 of the Act.

Reasons: The Department interprets section 8009 of the Act to prohibit States from making final, as opposed to estimated, State aid payments that consider eligible Impact Aid funds as local effort without the Secretary's certification. In instances where a State or LEA requests a pre-determination hearing under § 222.164(b)(5) and the issues presented are complex, the Secretary may not be able to make a final determination as to whether the State is equalized before the beginning of the State's fiscal year. In these instances, States should have the option of including estimated eligible Impact Aid revenues as local effort when making estimated State aid payments, rather than removing these Impact Aid revenues from consideration. Because certifications apply to an entire State fiscal year, if a State were required to remove Impact Aid revenues from estimated State aid payments and the Secretary later determines that the State is equalized, the State would need to adjust all State aid payments and Impact Aid recipients would have to return funds to the State. This could seriously destabilize an LEA's budget. On the other hand, if the State begins by taking eligible Impact Aid payments into account in its estimated State aid payments, as these regulations propose, and the Secretary does not certify the State as equalized, the State would have to increase each Impact Aid LEA's State aid within 60 days. The effect on the LEA's budget would then be positive, rather than negative. Even though the State would have to come up with additional funds, States are not required to request this advanced permission to make estimated payments that consider Impact Aid.

Definition of Current Expenditures

Statute: Section 8013(4) of the Act defines ''current expenditures.''

Current Regulations: The current regulation in paragraph (c) repeats the definition of ''current expenditures'' in the Act, and lists specific exclusions from that definition for the purposes of section 8009, such as expenditures from revenues designated for special cost differentials.

Proposed Regulations: The Department proposes that the regulatory definition for ''current expenditures'' refer to, rather than repeat, the definition in section 8013(4) of the Act, and then list the additional exclusion for purposes of section 8009 of the Act. We would remove the exclusions in current subparagraphs (1) through (5) as part of the reorganized definition.

Reasons: Referring applicants to the statutory definition of ''current expenditures'' will reduce redundancy. Subparagraphs (1) and (2) are contained in the statutory definition and thus are not needed. The intent of paragraphs (3) and (4), regarding special cost differentials, will be more clearly addressed by proposed § 222.162, which would define the four acceptable methods of calculating cost differentials for purposes of the disparity test. The substance of the current subparagraph (5) is combined into the text of the proposed regulation for clarity.

Section 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

Statute: Section 8009(b)(2)(B)(ii) of the Act states that when certifying a State as equalized, the Secretary may take into account the extent to which a State aid program reflects additional costs of providing education in areas with special geographical factors or for students with particular needs, such as students with disabilities.

Current Regulations: The current regulations explain the data a State should submit to the Secretary as evidence that its State aid program is equalized. The regulations identify the types of ''special cost differentials'' a State may account for when calculating per-pupil expenditures or revenues for each LEA, but do not explain specifically how these differentials are to be considered.

Proposed Regulations: The Department proposes that a State may account for special cost differentials in one of four ways: The inclusion method on a revenue basis, the inclusion method on an expenditure basis, the exclusion method on a revenue basis, or the exclusion method on an expenditure basis. Using the inclusion method, a State would divide an LEA's revenue or total current expenditures by a pupil count that includes weights associated with special cost differentials. Using the exclusion method, a State would take an LEA's total revenues or current expenditures, subtract those revenues or expenditures associated with special cost differentials, and divide by the LEA's unweighted pupil count.

Reasons: The current regulations are not clear regarding how States should treat special cost differentials in submitting data under the disparity test. The Department's longstanding interpretation of section 8009 of the Act and § 222.162 of the regulations is that there are four methods available, logically and mathematically, for treating those cost differentials. Explicitly defining the four options for taking special cost differentials into account would clarify the Department's long-standing interpretation of the statute, and avoid potential controversy over data submission under section 8009.

Section 222.164 What procedures does the Secretary follow in making a determination under section 8009?

Statute: Section 8009(c)(2) of the Act states that before making a determination under section 8009, the Secretary shall afford the State, and LEAs in the State, an opportunity to present their views.

Current Regulations: Under the current regulations, the party initiating the proceeding under section 8009 shall notify the State and all LEAs in the State of their right to present views before the Secretary makes a determination.

Proposed Regulations: The Department proposes that the Secretary, rather than a State or LEA initiating a proceeding, notify the State and all LEAs in the State of their right to present their views before the Secretary makes a determination under section 8009.

Reasons: It is more practical for the Secretary to send the notification that the State and all LEAs in the State may present views, because the Department coordinates the predetermination

hearing, and the request for the informal hearing needs to be made to the Department. In current practice, the Department notifies all LEAs in the State when the State submits written notice of its intention to consider Impact Aid payments in providing State aid to LEAs, and at that time gives instructions for requesting a predetermination hearing.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. Upon review of the costs to the LEA, we have determined there is minimal financial or resource burden associated with these changes, and that the net impact of the changes would be a reduction in burden hours. Certain affected LEAs would need to respond in writing to comments from tribes and parents of Indian students, but this time burden would be balanced by other proposed regulatory changes that reduce the burden, which result in a net decrease of both burden hours and cost associated with these regulations.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example, *§ 222.2 What definitions apply to this part*?)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand? To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The U.S. Small Business Administration Size Standards define institutions as ''small entities'' if they are for-profit or nonprofit institutions with total annual revenue below $5,000,000 or if they are institutions controlled by governmental entities with populations below 50,000. These proposed regulations would affect LEAs that meet this definition; therefore, these proposed regulations would affect small entities, but they would not have a significant economic impact on these entities.

The proposed regulations would benefit both small and large institutions, including those that qualify as small entities, by removing the paperwork burden for reporting average daily attendance, reducing the burden for collection of data for the LEAs reporting children residing on Indian lands and low-rent housing. Multiple children can

be verified on one form instead of one form per child. Thus, small entities would experience regulatory relief and a positive economic impact as a result of these proposed regulations.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Sections 222.35, 222.37, 222.40, 222.62, and 222.91 contain information collection requirements. Under the PRA the Department has submitted a copy of these sections to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations we will display the control number assigned by OMB to any information collection requirement proposed in this NPRM and adopted in the final regulations.

The Department currently collects information from LEA applicants for the Impact Aid program using a program-specific grant application package (OMB Control Number 1810–0687). The application package, and some information grantees are required to submit, would change as a result of the proposed regulations.

We estimate the total burden for the collection of information through the application package to be 104,720 hours. Based on past experience with this program, we estimate that a total of 1,264 applications would be received annually for the grant program. We estimate that it would take each applicant 82.8 hours to complete the application package, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The proposed changes to the regulations would change the burden hours for this collection by −35,959.

Collection of Information

Section 222.35

The proposed regulations would require that LEAs claiming children who reside on Indian lands, and children who reside in low-rent housing, use a source check document to obtain the data required to determine the children's eligibility. The current burden hour estimation includes 500,000 parent respondents for the parent pupil survey form estimating 15 minutes per form for a total burden hours of 125,000 burden hours. The new provision would reduce the total number of parent respondents to 355,000 because the 145,000 children residing on Indian lands or low rent housing will no longer be surveyed using the parent pupil survey form. The burden hours for this category would reduce to 88,750 total burden hours. This is a reduction of 36,250 burden hours.

The 145,000 children are distributed across approximately 500 LEAs. The previous burden hour calculation included 500 LEAs at an average of 3 hours for source checks per LEA, resulting in 1,500 total burden hours. Under the proposed regulation, the number of LEAs would increase to 1,000 LEAs increasing the burden hours to 3,000 for source checks, an increase of 1,500 burden hours. The net change in burden hours between parent pupil survey forms and source checks is a decrease of −34,750 burden hours.

The program has also reduced the average number of hours per LEA to submit its application from 10 hours to 9 hours due to enhancements in the e-Application reporting system. This adjustment decreases the burden hours by −1,264, which results in a total decrease in this section of −36,014 burden hours.

Section 222.37

Under existing regulations, the burden estimation of hours is 900 LEAs taking 20 minutes each to report ADA for a total of 300 hours total burden. Since the last estimation of burden hours, the number of LEAs that are required to submit this data has reduced and will reduce again to zero under the proposed regulations. An LEA may exercise the option to report ADA in order to try and increase its attendance rate above the State average. We estimate that approximately 100 LEAs may use this option and the amount of time would be 5 minutes to report the data as it is readily available and accessible to the LEA. The entire estimated hours for all applicants would be an insignificant 8.3 total hours for this component.

Section 222.40

Proposed § 222.40 would require SEAs that opt to use special additional factors for the selection of GCDs to provide a rationale demonstrating how the special factors selected impact the cost of education.

In the past 10 years (2006–2016) there are 14 SEAs that have used the GCD provision. In those 10 years, only one SEA has used the special additional factors provision. The SEA already submits the data, they are simply now providing a very brief narrative justification. At a maximum, this should only take 20 minutes to complete as the majority of the work is already accounted for in the burden hour calculation. As a result, there is essentially no increase for this provision.

Section 222.62

The burden hours associated with this activity have already been factored into the active data collection total burden hours; there is no increase to the burden hour calculation.

Section 222.94

The proposed regulatory provision would require LEAs claiming children residing on Indian lands to respond in writing to comments, recommendations, and concerns from the parents of Indian children and tribal officials. There is an associated increase with this requirement for the LEA. There are approximately 800 LEAs that are required to comply with this new requirement. We estimate 1.3 hours for the completion of this requirement, which would result in an increase of 1,040 total burden hours.

Burden Hour Estimates for the Impact Aid Section 8003 Information Collection Package

The Impact Aid Program is extending the existing and approved 1810–0687, and renewing its section 8003 application package with this notice. The following charts identify the changes from the current information collection with the proposed substantive changes to this information collection. Some of the changes in burden hours are a result of the proposed regulations, while others are the result of more accurate numbers of

impacted LEAs and to account for system enhancements that make reporting easier. The activities associated directly with the changes proposed in this notice have been denoted with an asterisk. Table 1 provides a summary of the total burden hours associated with completing an Impact Aid application. Table 2 breaks down the hours associated with the completion of tables 1–5 of the Impact Aid application for reporting an applicant's federally-connected children. All applicants must complete at least one of these tables to be eligible to receive funding. Table 3 breaks down the burden hours associated with supplemental information that some or all Impact Aid applicants must submit with their applications. Table 4 shows the dollar change associated with the changes in the burden hours. For more complete information on burden hours and the justifications, please refer to the Information Collection Request (ICR).

TABLE 1—SUMMARY OF BURDEN HOURS TO SUBMIT A COMPLETE IMPACT AID APPLICATION PACKAGE

By regulatory section or subsection	Total annual burden hours under current regulations	Estimated total annual burden hours under the proposed regulations
34 CFR 222.35, 34 CFR 222.50–52, Tables 1–5	139,140	103,126
34 CFR 222.37, Table 6	1,264	100
34 CFR 222.53, Table 7	217	217
34 CFR 222.141–143, Table 8	5	5
Reporting Construction Expenditures	40	40
Housing Official Certification Form	13	5
Indian Policies and Procedures (IPPs)	0	187
IPP Responses.*	0	1,040
Total	140,679	104,720
Number of LEAs	1,265	1,264
Average Hours Per LEA (total divided by number of LEAs)	111.2	82.8

* Denotes changes directly associated with the proposed regulatory changes.

TABLE 2—REPORTING NUMBERS OF FEDERALLY-CONNECTED CHILDREN ON TABLES 1–5 OF THE IMPACT AID APPLICATION

Task	Current est. number	Proposed est. number	Average hours	Total hours	Explanation
Parent-pupil surveys*	500,000	355,000	0.25	88,750	Assumes 355,000 federally-connected children identified through a survey form completed by a parent. The number is reduced due to new regulations requiring source check forms for children residing on Indian lands or children residing on eligible low rent housing.
Source check with Federal official to document children living on Federal property (LEAs).*	500	1000	3	3,000	Assumes 3 hours verify information on a source check.
Collecting and organizing data to report on Tables 1–5 in the Application (LEAs).	1,265	1,264	9	11,376	Assumes time to complete and organize survey/source check data on federally-connected children averages nine hours.
Total Current				103,126	
Total Previous				139,140	
Change				−36,014	

* Denotes changes directly associated with the proposed regulatory changes.

TABLE 3—ADDITIONAL REPORTING TASKS AND SUPPLEMENTAL INFORMATION ON TABLES 6–10 OF THE IMPACT AID APPLICATION

Task	Current est. number	Proposed est. number	Average hours	Total hours	Explanation
Reporting enrollment and attendance data on Table 6 (LEAs).*	1,264	100	1	100	The proposed regulations would reduce the number even further to approximately 100 LEAs who will have a higher attendance rate than the State average.

TABLE 3—ADDITIONAL REPORTING TASKS AND SUPPLEMENTAL INFORMATION ON TABLES 6–10 OF THE IMPACT AID APPLICATION—Continued

Task	Current est. number	Proposed est. number	Average hours	Total hours	Explanation
Collecting and reporting expenditure data for federally-connected children with disabilities on Table 7 (LEAs).	869	868	.25	217	This assumes that an average of 868 LEAs received a payment for children with disabilities in the previous year and is required by law to report expenditures for children with disabilities for the prior year.
Reporting children educated in federally-owned school buildings on Table 8 (LEAs).	5	5	1	5	Assumes LEAs maintain data on children housed in the small number of schools owned by ED but operated by LEAs.
Reporting expenditures of Section 8007 funds on Table 10 (LEAs).	159	159	0.25	40	Assumes that the LEAs eligible to receive these funds have ready access to financial reports to retrieve and report these data.
Indian Policies and Procedures (IPPs).	625	625	0.3	187	The LEA does not have to collect any new information to meet this requirement.
IPP Response *	0	800	1.3	1,040	This assumes some LEAs may have to respond to more than one tribe.
Contact Form for Housing Undergoing Renovation or Rebuilding.	10	10	0	0	The time associated is too small to calculate (<5 minutes per applicant).
Housing Official Certification Form.	10	10	.50	5	Amount of time for the housing official to estimate the number of school-age children that would have resided in the housing had it not been unavailable due to renovation or rebuilding.
Total Current				1,594	
Total Previous				1,529	
Change				65	

* Denotes changes directly associated with the proposed regulatory changes.

TABLE 4—ESTIMATION OF ANNUALIZED COST TO APPLICANTS

Respondent	Hours per response	Rate ($/hour)	Number of respondents	Cost
Parent Respondents *	.25	10	355,000	$887,500
LEA Respondents	9	15	1,264	170,640
Total Cost				1,058,140
Prior Cost Estimate				1,443,992
Cost Change				−385,852

* Denotes changes directly associated with the proposed regulatory changes.

We have prepared an ICR for these information collection requirements. If you want to review and comment on the ICR, please follow these instructions:

In preparing your comments you may want to review the ICR, including the supporting materials, in *www.regulations.gov* by using the Docket ID number specified in this notice. This proposed collection is identified as proposed collection 1810–0687.

We consider your comments on this proposed collection of information in—

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Between 30 and 60 days after publication of this document in the **Federal Register**, OMB is required to make a decision concerning the collection of information contained in these proposed regulations. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments on this ICR by January 29, 2016. This does not affect the deadline for your comments to us on the proposed regulations.

When commenting on the ICR for these proposed regulations, please specify the Docket ID number and indicate ''Information Collection Comments'' on the top of your comments.

Written requests for information or comments submitted by postal mail or delivery related to the information collection requirements should be addressed to the Director of the Information Collection Clearance

Division, U.S. Department of Education, 400 Maryland Avenue SW., Mailstop L–OM–2E319LBJ, Room 2E115, Washington, DC 20202–4537.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department. (Catalog of Federal Domestic Assistance Number 84.041 Impact Aid)

List of Subjects in 34 CFR Part 222

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Federally affected areas, Grant programs—education, Indians—education, Reporting and recordkeeping requirements, School construction.

Dated: December 22, 2015.

Ann Whalen,

Delegated the authority to perform the functions and duties of Assistant Secretary for Elementary and Secondary Education.

For the reasons discussed in the preamble, the Assistant Secretary for Elementary and Secondary Education proposes to amend part 222 of title 34 of the Code of Federal Regulations as follows:

PART 222—IMPACT AID PROGRAM

■ 1. The authority citation for part 222 continues to read as follows:

Authority: 20 U.S.C. 7701–7714, unless otherwise noted.

■ 2. Section 222.2 is amended in paragraph (c) by:

■ A. Revising paragraph (3)(iv) under the definition of ''Membership'', and adding paragraph (3)(v).

■ B. Revising the definition of ''Parent employed on Federal property''.

The revisions and addition read as follows:

§ 222.2 What definitions apply to this part?

* * * * *

(c) * * *

Membership means the following:

(3) * * *

(iv) Attend the schools of the applicant LEA under a tuition arrangement with another LEA that is responsible for providing them a free public education; or

(v) Reside in a State other than the State in which the LEA is located, unless the student is covered by the provisions of—

(A) Section 8010(c) of the Act; or

(B) A formal State tuition or enrollment agreement.

* * * * *

Parent employed on Federal property. (1) The term means:

(i) An employee of the Federal Government who reports to work on, or whose place of work is located on, Federal property, including a federal employee who reports to an alternative duty station on the survey date, but whose regular duty station is on Federal property.

(ii) A person not employed by the Federal Government but who spends more than 50 percent of his or her working time on Federal property (whether as an employee or self-employed) when engaged in farming, grazing, lumbering, mining, or other operations that are authorized by the Federal Government, through a lease or other arrangement, to be carried out entirely or partly on Federal property.

(2) Except as provided in paragraph (1)(ii) of this definition, the term does not include a person who is not employed by the Federal government and reports to work at a location not on Federal property, even though the individual provides services to operations or activities authorized to be carried out on Federal property.

(Authority: 20 U.S.C. 7703)

* * * * *

§ 222.3 [Amended]

■ 3. Section 222.3 is amended by removing the phrase ''September 30'' in paragraph (b)(2) introductory text and adding in its place ''June 30''.

■ 4. Section 222.5 is amended by revising paragraphs (a)(2) and (b)(1) and (2) to read as follows:

§ 222.5 When may a local educational agency amend its application?

(a) * * *

(2) By June 30 of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(b) * * *

(1) Those data were not available at the time the LEA filed its application and are acceptable to the Secretary; and

(2) The LEA submits a written request to the Secretary with a copy to its SEA no later than June 30 of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

* * * * *

■ 5. Section 222.22 is amended by revising paragraph (b)(1) to read as follows:

§ 222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payments?

* * * * *

(b) * * *

(1) The LEA received revenue during the preceding fiscal year, including payments in lieu of taxes (PILOTS or PILTs) and other payments received from any other Federal Department or agency, generated directly from the eligible Federal property or activities in or on that property; and

* * * * *

■ 6. Section 222.23 is revised to read as follows:

§ 222.23 How are consolidated LEAs treated for the purposes of eligibility and payment under section 8002?

(a) *Eligibility.* An LEA formed by the consolidation of one or more LEAs is eligible for section 8002 funds, notwithstanding section 222.21(a)(1), if—

(1) The consolidation occurred prior to fiscal year 1995 or after fiscal year 2005; and

(2) At least one of the former LEAs included in the consolidation:

(i) Was eligible for section 8002 funds in the fiscal year prior to the consolidation; and

(ii) Currently contains Federal property that meets the requirements of 222.21(a) within the boundaries of the former LEA or LEAs.

(b) *Documentation required.* In the first year of application following the consolidation, an LEA that meets the requirements of paragraph (a) must submit evidence that it meets the requirements of paragraphs (a)(1) and (a)(2)(ii).

(c) *Basis for foundation payment.* (1) The foundation payment for a consolidated district is based on the total section 8002 payment for the last

fiscal year for which the former LEA received payment. When more than one former LEA qualifies under paragraph (a)(2), the payments for the last fiscal year for which the former LEAs received payment are added together to calculate the foundation basis.

(2) Consolidated LEAs receive only a foundation payment and do not receive a payment from any remaining funds.

(Authority: 20 U.S.C. 7702(g) and Pub. L. 113–76)

■ 7. Section 222.24 is added to read as follows:

§ 222.24 How does a local educational agency that has multiple tax rates for real property classifications derive a single real property tax rate?

An LEA that has multiple tax rates for real property classifications derives a single tax rate for the purposes of determining its Section 8002 maximum payment by dividing the total revenues for current expenditures it received from local real property taxes by the total taxable value of real property located within the boundaries of the LEA. These data are from the fiscal year prior to the fiscal year in which the applicant seeks assistance.

(Authority: 20 U.S.C. 7702)

■ 8. Section 222.30 is amended in the definition of ''free public education'' by revising paragraph (2)(ii) to read as follows:

§ 222.30 What is ''free public education''?

* * * * *

(2) * * *

(ii) Federal funds, other than Impact Aid funds and charter school startup funds (Title V, part B, subpart I of the Act), do not provide a substantial portion of the educational program, in relation to other LEAs in the State, as determined by the Secretary.

* * * * *

§ 222.32 [Amended]

■ 9. Section 222.32 is amended in paragraph (b) by adding the phrase ''timely and complete'' after the first instance of ''its''.

■ 10. Section 222.33 is amended by:

■ A. Revising the section heading.

■ B. Removing the phrase ''the first'' in paragraph (a)(1) and adding in its place ''its''.

■ C. Adding paragraph (c).

The revision and addition reads as follows:

§ 222.33 When must an applicant make its membership count?

* * * * *

(c) The data resulting from the count in paragraph (b) must be complete by the application deadline.

* * * * *

§ 222.34 [Removed and Reserved]

■ 10. Section 222.34 is removed and reserved.

■ 11. Section 222.35 is amended by revising paragraphs (a)(1) and (2), adding paragraphs (a)(3) and (4), and revising paragraph (b) to read as follows:

§ 222.35 How does a local educational agency count the membership of its federally connected children?

* * * * *

(a) * * *

(1) The applicant shall conduct a parent-pupil survey by providing a form to a parent of each pupil enrolled in the LEA to substantiate the pupil's place of residence and the parent's place of employment.

(2) A parent-pupil survey form must include the following:

(i) Pupil enrollment information (this information may also be obtained from school records), including—

(A) Name of pupil;

(B) Date of birth of the pupil; and

(C) Name of public school and grade of the pupil.

(ii) Pupil residence information, including:

(A) The complete address of the pupil's residence, or other acceptable location information for that residence, such as a complete legal description, a complete U.S. Geological Survey number, or complete property tract or parcel number; and

(B) If the pupil's residence is on Federal property, the name of the Federal facility.

(3) If any of the following circumstances apply, the parent-pupil survey form must also include the following:

(i) If the parent is employed on Federal property, except for a parent who is a member of the uniformed services on active duty, parent employment information, including—

(A) Name (as it appears on the employer's payroll record) of the parent (mother, father, legal guardian or other person standing *in loco parentis*) who is employed on Federal property and with whom the pupil resides; and

(B) Name of employer, name and complete address of the Federal property on which the parent is employed (or other acceptable location information, such as a complete legal description).

(ii) If the parent is a member of the uniformed services on active duty, the name, rank, and branch of service of that parent.

(iii) If the parent is both an official of, and accredited by a foreign government, and a foreign military officer, the name, rank, and country of service.

(iv) If the parent is a civilian employed on a Federal vessel, the name of the vessel, hull number, homeport, and name of the controlling agency.

(4)(i) Every parent-pupil survey form must include the signature of the parent supplying the information and the date of such signature, except as provided in paragraph (a)(4)(ii) of this section.

(ii) An LEA may accept an unsigned parent-pupil survey form, or a parent-pupil survey form that is signed by a person other than a parent, only under unusual circumstances. In those instances, the parent-pupil survey form must show why the parent did not sign the survey form, and when, how, and from whom the residence and employment information was obtained. Unusual circumstances may include, but are not limited to:

(A) A pupil who, on the survey date, resided with a person without full legal guardianship of the child while the pupil's parent or parents were deployed for military duty. In this case, the person with whom the child is residing may sign the parent-pupil survey form.

(B) A pupil who, on the survey date, was a ward of the juvenile justice system. In this case, an administrator of the institution where the pupil was held on the survey date may sign the parent-pupil survey form.

(C) A pupil who, on the survey date, was an emancipated youth may sign his or her own parent-pupil survey form.

(D) A pupil who, on the survey date, was at least 18 years old but who was not past the 12th grade may sign his or her own parent-pupil survey form.

(iii) The Department does not accept a parent pupil survey form signed by an employee of the school district who is not the student's mother, father, legal guardian or other person standing *in loco parentis.*

(b) *Source check.* A source check is a type of survey tool that groups children being claimed on the Impact Aid application by Federal property. This form is used in lieu of the parent-pupil survey form to substantiate a pupil's place of residence or parent's place of employment on the survey date.

(1) A source check is required to document children residing on Indian lands and children residing in eligible low-rent housing.

(2) The source check must include sufficient information to determine the eligibility of the Federal property and the individual children claimed on the form.

(3) A source check may also include:

(i) Certification by a parent's employer regarding the parent's place of employment;

(ii) Certification by a military or other Federal housing official as to the residence of each pupil claimed; or

(iii) Certification by a military personnel official regarding the military active duty status of the parent of each pupil claimed as active duty uniformed services.

* * * * *

■ 12. Section 222.37 is amended by revising paragraphs (b) and (c) and adding paragraphs (d) and (e) to read as follows:

§ 222.37 How does the Secretary calculate the average daily attendance of federally connected children?

* * * * *

(b)(1) For purposes of this section, actual ADA means raw ADA data that have not been weighted or adjusted to reflect higher costs for specific types of students for purposes of distributing State aid for education.

(2) If an LEA provides a program of free public summer school, attendance data for the summer session are included in the LEA's ADA figure in accordance with State law or practice.

(3) An LEA's ADA count includes attendance data for children who do not attend the LEA's schools, but for whom it makes tuition arrangements with other educational entities.

(4) Data are not counted for any child—

(i) Who is not physically present at school for the daily minimum time period required by the State, unless the child is—

(A) Participating via telecommunication or correspondence course programs that meet State standards; or

(B) Being served by a State-approved homebound instruction program for the daily minimum time period appropriate for the child; or

(ii) Attending the applicant's schools under a tuition arrangement with another LEA.

(c) An LEA may calculate its average daily attendance calculation in one of the following ways:

(1) If an LEA is in a State that collects actual ADA data for purposes of distributing State aid for education, the Secretary calculates the ADA of that LEA's federally connected children for the current fiscal year payment as follows:

(i) By dividing the ADA of all the LEA's children for the second preceding fiscal year by the LEA's total membership on its survey date for the second preceding fiscal year (or, in the case of an LEA that conducted two membership counts in the second preceding fiscal year, by the average of the LEA's total membership on the two survey dates); and

(ii) By multiplying the figure determined in paragraph (c)(1)(i)(A) of this section by the LEA's total membership of federally connected children in each subcategory described in section 8003 and claimed in the LEA's application for the current fiscal year payment.

(2) An LEA may submit its total preceding year average daily attendance data. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(i) Dividing the LEA's preceding year's total ADA data by the preceding year's total membership data; and

(ii) Multiplying the figure determined in paragraph (c)(2)(i) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i)(B) of this section.

(3) An LEA may submit attendance data based on sampling conducted during the previous fiscal year.

(i) The sampling must include attendance data for all children for at least 30 school days.

(ii) The data must be collected during at least three periods evenly distributed throughout the school year.

(iii) Each collection period must consist of at least five consecutive school days.

(iv) The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(A) Determining the ADA of all children in the sample;

(B) Dividing the figure obtained in paragraph (c)(3)(iv)(A) of this section by the LEA's total membership for the previous fiscal year; and

(C) Multiplying the figure determined in paragraph (c)(3)(iv)(B) of this section by the LEA's total membership of federally connected children for the current fiscal year, as described in paragraph (c)(1)(i)(B) of this section.

(d) An SEA may submit data to calculate the average daily attendance calculation for the LEAs in that State in one of the following ways:

(1) If the SEA distributes State aid for education based on data similar to attendance data, the SEA may request that the Secretary use those data to calculate the ADA of each LEA's federally connected children. If the Secretary determines that those data are, in effect, equivalent to attendance data, the Secretary allows use of the requested data and determines the method by which the ADA for all of the LEA's federally connected children will be calculated.

(2) An SEA may submit data necessary for the Secretary to calculate a State average attendance ratio for all LEAs in the State by submitting the total ADA and total membership data for the State for each of the last three most recent fiscal years that ADA data were collected. The Secretary uses these data to calculate the ADA of the federally connected children for each LEA in the State by—

(i)(A) Dividing the total ADA data by the total membership data for each of the three fiscal years and averaging the results; and

(B) Multiplying the average determined in paragraph (d)(2)(i)(A) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i)(B) of this section.

(e) The Secretary may calculate a State average attendance ratio in States with LEAs that would benefit from such calculation by using the methodology in paragraph (d)(2)(i) of this section.

* * * * *

■ 13. Section 222.40 is amended in paragraph (d)(1)(i) by adding the phrase ''or density'' after the word ''sparsity'' and by adding paragraph (d)(1)(iii).

The addition reads as follows:

§ 222.40 What procedures does a State educational agency use for certain local educational agencies to determine generally comparable local educational agencies using additional factors, for local contribution rate purposes?

* * * * *

(d) * * *

(1) * * *

(iii) The SEA must submit its rationale for selecting the additional factors and describe how they affect the cost of education in the LEA.

* * * * *

■ 14. Section 222.62 is amended:

■ A. By redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively.

■ B. By adding a new paragraph (a).

■ C. In newly redesignated paragraph (b), by removing the phrase ''an additional assistance payment under section 8003(f)'' and adding in its place ''a heavily impacted payment''.

■ D. In newly redesignated paragraph (c), by removing the phrase ''an additional assistance payment under section 8003(f)'' and adding in its place ''a heavily impacted payment''.

The addition reads as follows:

§ 222.62 How are local educational agencies determined eligible under section 8003(b)(2)?

(a) An applicant that wishes to be considered to receive a heavily impacted payment must submit the required information indicating eligibility under §§ 222.63 or 222.64 with the annual section 8003 Impact Aid application.

* * * * *

■ 15. Section 222.91 is revised to read as follows:

§ 222.91 What requirements must a local educational agency meet to receive a payment under section 8003 of the Act for children residing on Indian lands?

(a) To receive a payment under section 8003 of the Act for children residing on Indian lands, a local educational agency (LEA) must—

(1) Meet the application and eligibility requirements in section 8003 and subparts A and C of these regulations;

(2) Except as provided in paragraph (b), develop and implement policies and procedures in accordance with § 222.94; and

(3) Include in its application for payments under section 8003—

(i) An assurance that the LEA established these policies and procedures in consultation with and based on information from tribal officials and parents of those children residing on Indian lands who are Indian children, except as provided in paragraph (b) of this section;

(ii) An assurance that the LEA has provided a written response to the comments, concerns and recommendations received through the Indian policy and procedures consultation process, except as provided in paragraph (b) of this section; and

(iii) Either a copy of the policies and procedures, or documentation that the LEA has received a waiver in accordance with the provisions of paragraph (b) of this section.

(b) An LEA is not required to comply with § 222.94 with respect to students from a tribe that has provided the LEA with a waiver that meets the requirements of this paragraph.

(1) A waiver must contain a voluntary written statement from an appropriate tribal official or tribal governing body that—

(i) The LEA need not comply with § 222.94 because the tribe is satisfied with the LEA's provision of educational services to the tribe's students; and

(ii) The tribe was provided a copy of the requirements in § 222.91 and § 222.94, and understands the requirements that are being waived.

(2) The LEA must submit the waiver at the time of application.

(3) The LEA must obtain a waiver from each tribe that has Indian children living on Indian lands claimed by the LEA on its application under section 8003 of the Act. If the LEA only obtains waivers from some, but not all, applicable tribes, the LEA must comply with the requirements of § 222.94 with respect to those tribes that did not agree to waive these requirements.

(Authority: 20 U.S.C. 7703(a), 7704)

■ 16. Section 222.94 is revised to read as follows:

§ 222.94 What are the responsibilities of the LEA with regard to Indian policies and procedures?

(a) An LEA that is subject to the requirements of § 222.91(a) must consult with and involve local tribal officials and parents of Indian children in the planning and development of:

(1) Its Indian policies and procedures (IPPs), and

(2) The LEA's general educational program and activities.

(b) An LEA's IPPs must include a description of the specific procedures for how the LEA will:

(1) Disseminate relevant applications, evaluations, program plans and information related to the LEA's education program and activities with sufficient advance notice to allow tribes and parents of Indian children the opportunity to review and make recommendations.

(2) Provide an opportunity for tribes and parents of Indian children to provide their views on the LEA's educational program and activities, including recommendations on the needs of their children and on how the LEA may help those children realize the benefits of the LEA's education programs and activities. As part of this requirement, the LEA will—

(i) Notify tribes and the parents of Indian children of the opportunity to submit comments and recommendations, considering the tribe's preference for method of communication, and

(ii) Modify the method of and time for soliciting Indian views, if necessary, to ensure the maximum participation of tribes and parents of Indian children.

(3) At least annually, assess the extent to which Indian children participate on an equal basis with non-Indian children in the LEA's education program and activities. As part of this requirement, the LEA will:

(i) Share relevant information related to Indian children's participation in the LEA's education program and activities with tribes and parents of Indian children; and

(ii) Allow tribes and parents of Indian children the opportunity and time to review and comment on whether Indian children participate on an equal basis with non-Indian children.

(4) Modify the IPPs if necessary, based upon the results of any assessment or input described in paragraph (b) of this section.

(5) Respond at least annually in writing to comments and recommendations made by tribes or parents of Indian children, and disseminate the responses to the tribe and parents of Indian children prior to the submission of the IPPs by the LEA.

(6) Provide a copy of the IPPs annually to the affected tribe or tribes.

(c)(1) An LEA that is subject to the requirements of § 222.91(a) must implement the IPPs described in paragraph (b) of this section.

(2) Each LEA that has developed IPPs shall review those IPPs annually to ensure that they comply with the provisions of this section, and are implemented by the LEA in accordance with this section.

(3) If an LEA determines, after input from the tribe and parents of Indian children, that its IPPs do not meet the requirements of this section, the LEA shall amend its IPPs to conform with those requirements within 90 days of its determination.

(4) An LEA that amends its IPPs shall, within 30 days, send a copy of the amended IPPs to—

(i) The Impact Aid Program Director for approval; and

(ii) The affected tribe or tribes.

(Authority: 20 U.S.C. 7704)

§ 222.95 [Amended]

■ 17. Section 222.95 is amended:

■ A. In paragraph (c), by removing the number ''60'' and adding in its place ''90''.

■ B. In paragraph (d), by adding the phrase ''or part of the'' after the word ''all''.

■ C. By removing paragraphs (e), (f), and (g).

■ 18. Section 222.161 is amended by:

■ A. Adding the phrase ''Except as provided in paragraph (a)(6),'' to the beginning of paragraph (a)(5) and lowercasing the word ''A''.

■ B. Adding paragraphs (a)(6) and (b)(3).

■ C. Revising paragraph (c).

The additions and revisions read as follows:

§ 222.161 How is State aid treated under section 8009 of the Act?

(a) * * *

(6)(i) If the Secretary has not made a determination 30 days before the

beginning of the State's fiscal year, the State may request permission from the Secretary to make estimated or preliminary State aid payments that consider a portion of Impact Aid payments as local resources in accordance with this section.

(ii) The State must include with its request an assurance that if the Secretary determines that the State does not meet the requirements of section 222.162 for that State fiscal year, the State must pay to each affected LEA, within 60 days of the Secretary's determination, the amount by which the State reduced State aid to the LEA.

(iii) In determining whether to grant permission, the Secretary may consider factors including whether—

(A) The Secretary certified the State under § 222.162 in the prior State fiscal year; and

(B) Substantially the same State aid program is in effect since the date of the last certification.

(b) * * *

(3) For a State that has not previously been certified by the Secretary under § 222.162, or if the last certification was more than two years prior, the State submits projected data showing whether it meets the disparity standard in § 222.162. The projected data must show the resulting amounts of State aid as if the State were certified to consider Impact Aid in making State aid payments.

(c) *Definitions.* The following definitions apply to this subpart:

Current expenditures is defined in section 8013(4) of the Act. Additionally, for the purposes of this section it does not include expenditures of funds received by the agency under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) that are not taken into consideration under the State aid program and exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.162.

(Authority: 20 U.S.C. 7709)

■ 19. Section 222.162 is amended:

■ A. In paragraph (c)(2) introductory text, by removing the phrase ''on those bases'' in the first sentence and adding in its place ''using one of the methods in paragraph (d)''.

■ B. Revising paragraph (d).

The revision reads as follows:

§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

* * * * *

(d) *Accounting for Special Cost Differentials.* In computing per-pupil figures under paragraph (c) of this section, the State accounts for special cost differentials that meet the requirements of paragraph (c)(2) of this section in one of four ways:

(1) *The Inclusion Method on a Revenue Basis.* The State divides total revenues by a weighted pupil count that includes only those weights associated with the special cost differentials.

(2) *The Inclusion Method on an Expenditure Basis.* The State divides total current expenditures by a weighted pupil count that includes only those weights associated with the special cost differentials.

(3) *The Exclusion Method on a Revenue Basis.* The State subtracts revenues associated with the special cost differentials from total revenues, and divides this net amount by an unweighted pupil count.

(4) *The Exclusion Method on an Expenditure Basis.* The State subtracts current expenditures that come from revenues associated with the special cost differentials from total current expenditures, and divides this net amount by an unweighted pupil count.

* * * * *

■ 20. Section 222.164 is amended by revising paragraph (a)(2) to read as follows:

§ 222.164 What procedures does the Secretary follow in making a determination under section 8009?

(a) * * *

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall provide either the State or all LEAs with a complete copy of the submission required in paragraph (b) of this section. Following receipt of the submission, the Secretary shall notify the State and all LEAs in the State of their right to request from the Secretary, within 30 days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

* * * * *

[FR Doc. 2015–32618 Filed 12–29–15; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596–AD26

Extension of Comment Period on the Proposed Rule on Roadless Area Conservation; National Forests System Lands in Colorado

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed rule; extension of comment period.

SUMMARY: The Forest Service published a notice in the **Federal Register** on November 20, 2015, initiating a 45-day comment period on the proposed rule on Roadless Area Conservation; National Forests System Lands in Colorado. The closing date for the 45-day comment period was January 4, 2016. The Agency is extending the comment period to January 15, 2016.

DATES: The closing date for the proposed rule published on November 20, 2015 (80 FR 72665) has been extended. Comments must be received by January 15, 2016.

ADDRESSES: Comments may be submitted electronically via the Internet to *go.usa.gov/3JQwJ* or to *www.regulations.gov*. Send written comments to: Colorado Roadless Rule, 740 Simms Street, Golden, CO 80401.

All comments, including names and addresses when provided, will be placed in the project record and available for public inspections and copying. The public may inspect comments received on this proposed rule at USDA, Forest Service, Ecosystem Management Coordination Staff, 1400 Independence Ave. SW., Washington, DC, between 8 a.m. and 4:30 p.m. on business days. Those wishing to inspect comments should call (202) 205–0895 ahead to facilitate an appointment and entrance to the building. Comments may also be inspected at USDA, Forest Service Rocky Mountain Regional Office, Strategic Planning Staff, 740 Simms, Golden, Colorado, between 8 a.m. and 4:30 p.m. on business days. Those wishing to inspect comments at the Regional Office should call (303) 275–5156 ahead to facilitate an appointment and entrance to the building.

FOR FURTHER INFORMATION CONTACT: Ken Tu, Interdisciplinary Team Leader, Rocky Mountain Regional Office at (303) 275–5156.

Individuals using telecommunication devices for the deaf may call the Federal Information Relay Services at 1–800–

877–8339 between 8 a.m. and 8 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The State of Colorado maintains that coal mining in the North Fork Coal Mining Area provides an important economic contribution and stability for the communities of the North Fork Valley. USDA and the Forest Service are committed to contributing to energy security, and carrying out the government's overall policy to foster and encourage orderly and economic development of domestic mineral resources.

All existing Federal coal leases within CRAs occur in the North Fork Valley near Paonia, Colorado on the GMUG National Forests. Coal from this area meets the Clean Air Act definition for compliant and super-compliant coal, which means it has high energy value and low sulphur, ash, and mercury content. There are two mines currently holding leases within CRAs. One is operating, producing approximately 5.2 million tons of coal annually. The second is currently idle due to a fire and flood within their mine operation. The final rule accommodates continued coal mining opportunities within the North Fork Coal Mining Area. At approximately 19,500 acres, this area is less than 0.5% of the total 4.2 million acres of CRAs. The North Fork Coal Mining Area exception allows for the construction of temporary roads for exploration and surface activities related to coal mining for existing and future coal leases. The reinstatement of this exception does not approve any future coal leases, nor does it make a decision about the leasing availability of any coal within the State. Those decisions would need to undergo separate environmental analyses, public input, and decision-making.

A Supplemental Environmental Impact Statement (SEIS) has been prepared to complement the 2012 Final EIS for the Colorado Roadless Rule. The SEIS is limited in scope to address the deficiencies identified by the District Court of Colorado in *High Country Conservation Advocates* v. *United States Forest Service* (13–01723, D. Col), correction of boundary information, and to address scoping comments. In conjunction with the 2012 Final EIS, the SEIS discloses the environmental consequences of reinstating the North Fork Coal Mining Area exception into the Colorado Roadless Rule.

The Forest Service wants to ensure that there is sufficient time for potentially affected parties, including States, to comment. Thus the Agency is providing an extended comment period for the proposed rule and Supplemental Environmental Impact Statement.

Reviewers may obtain a copy of the proposed rule and SEIS from the Forest Service Colorado Roadless staff Web site at *go.usa.gov/3JQw,* or from Regulations.gov Web site, *www.regulations.gov*.

Dated: December 22, 2015.

Thomas L. Tidwell,

Chief, Forest Service.

[FR Doc. 2015–32872 Filed 12–29–15; 8:45 am]

BILLING CODE 3411–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 50

[EPA–HQ–OAR–2013–0572, EPA–HQ–OAR–2015–0229; FRL–9940–78–OAR]

RIN 2060–AS02

Treatment of Data Influenced by Exceptional Events

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of availability of related guidance; extension of comment period.

SUMMARY: On November 20, 2015, the Environmental Protection Agency (EPA) proposed a rule titled, ''Treatment of Data Influenced by Exceptional Events.'' The EPA is extending the comment period on the proposed rule and the notice of availability of the related draft guidance that was scheduled to close on January 19, 2016. The new comment closing date will be February 3, 2016. We are extending the comment period at the request of several stakeholders to allow interested parties additional time to thoroughly review and analyze the noted documents and provide meaningful comments.

DATES: The public comment period for the proposed rule and notice of availability of related draft guidance published in the **Federal Register** on November 20, 2015 (80 FR 72840), is being extended. Written comments must be received on or before February 3, 2016.

ADDRESSES: The EPA has established separate dockets for the proposed rulemaking and the related draft guidance (available at *http://www.regulations.gov*). For the proposed rulemaking titled, ''Treatment of Data Influenced by Exceptional Events,'' the Docket ID No. is EPA–HQ–OAR–2013–0572. For the related draft guidance titled, ''Draft Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations,'' the Docket ID No. is EPA–HQ–OAR–2015–0229. Information on both of these actions is posted at *http://www2.epa.gov/air-quality-analysis/treatment-data-influenced-exceptional-events*. Submit your comments, identified by the appropriate Docket ID, to the *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. If you need to include CBI as part of your comment, please visit *http://www.epa.gov/dockets/comments.html* for instructions. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make.

For additional submission methods, the full EPA public comment policy, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/comments.html*.

FOR FURTHER INFORMATION CONTACT: For additional information on this action, contact Beth W. Palma, Office of Air Quality Planning and Standards, Environmental Protection Agency (C539–04), Research Triangle Park, North Carolina 27711; telephone number (919) 541–5432; email address: *palma.elizabeth@epa.gov*.

SUPPLEMENTARY INFORMATION: After considering the request of several stakeholders, the EPA has decided to extend the public comment period for this action until February 3, 2016. This extension will allow interested parties additional time to thoroughly review and analyze the noted documents and provide meaningful comments.

Dated: December 21, 2015.

Stephen D. Page,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2015–32899 Filed 12–29–15; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216, 225, and 252

[Docket DARS–2015–0045]

RIN 0750–AI69

Defense Federal Acquisition Regulation Supplement: Defense Contractors Performing Private Security Functions (DFARS Case 2015–D021)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to consolidate requirements that are applicable to DoD contracts for private security functions performed in designated areas outside the United States, make changes regarding applicability, and revise applicable quality assurance standards.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before January 29, 2016 to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015–D021, using any of the following methods:

○ *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2015–D021'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2015–D021.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2015–D021'' on your attached document.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2015–D021 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Julie Hammond, OUSD (AT&L) DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Julie Hammond, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

Requirements for Defense contractors performing private security functions outside of the United States are covered in the Federal Acquisition Regulation (FAR) at 25.302 and the clause at FAR 52.225–26, Contractors Performing Private Security Functions Outside the United States, and supplemented at DFARS 225.302 and the clause at DFARS 252.225–7039, Defense Contractors Performing Private Security Functions Outside the United States. DoD is proposing to consolidate all requirements for Defense contractors performing private security functions in certain designated operational areas in the DFARS at 225.302 and the clause 252.225–7039.

II. Discussion and Analysis

A proposed FAR rule, Contractors Performing Private Security Functions (FAR case 2014–018), was published in the **Federal Register** at 80 FR 30202 on May 27, 2015, to make conforming changes to the FAR by removing the requirements specific to DoD contracts for private security functions. Under this proposed rule (DFARS case 2015–D021), DoD is proposing the following changes: (1) Amend DFARS 225.302 to require contracting officers to use the DFARS clause 252.225–7039 in lieu of the FAR clause 52.225–26, and (2) amend DFARS clause 252.225–7039 to include all of the requirements for DoD contractors performing private security functions outside the United States from FAR clause 52.225–26.

The rule also proposes to amend DFARS clause 252.225–7039 to add ''International Standard ISO 18788, Management System for Private Security Operations-Requirements with Guidance'' as an approved alternative to the ANSI/ASIS PSC.1–2012, American National Standard, Management System for Quality of Private Security Company Operations—Requirements with Guidance. Many foreign countries do not accept use of foreign national standards. As such, restricting compliance to the American National Standard may deter private security contractors from other countries from competing on DoD contracts overseas, thus restricting our ability to access security services from host countries or coalition partner states. This is contrary to the DoD policy of promoting effective competition through outreach in global markets (see Better Buying Power 3.0, September 19, 2014). In order to expand the contractor base and promote competition, this rule proposes to allow Defense contractors performing private security functions outside the United States to comply with either the American National Standard, ANSI/ASIS PSC.1–2012, or the International Standard, ISO 18788.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect that this proposed rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, *et seq.* Nevertheless, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

This rule proposes to amend the DFARS to consolidate all requirements for DoD contractors performing private security functions outside the U.S. from the FAR 25.302 and the clause at FAR 52.225–26, Contractors Performing Private Security Functions Outside the Unites States, in DFARS 225.302 and the clause at DFARS 252.225–7039, Defense Contractors Performing Private Security Functions Outside the United States.

The objectives of this rule are as follows:

• Provide DoD contracting officers and contractors a single clause covering all requirements related to the performance of private security functions outside the United States that may be updated by DoD as policies are issued that affect only defense contractors.

• Identify the international high-quality assurance standard ''ISO 18788: Management System for Private Security

Operations'' as an approved alternative to the American standard ''ANSI/ASIS PSC.1–2012'' currently required by DFARS clause 252.225–7039.

This proposed rule will apply to defense contractors performing private security functions outside of the United States in designated operational areas under DoD contracts. According to data available in the Federal Procurement Data System for fiscal year (FY) 2013, DoD awarded 159 contracts that required performance outside the United States, although not necessarily in a designated operation area, and cited the National American Industry Classification System code 561612, Security Guards and Patrol Services, of which 33 contracts (21%) were awarded to small businesses. In FY 2014, DoD awarded 123 such contracts, of which 31 contracts (25%) were to small businesses.

The private security contractors are required to report incidents when: (1) A weapon is discharged by personnel performing private security functions; (2) personnel performing private security functions are attacked, killed, or injured; (3) persons are killed or injured or property is destroyed as a result of conduct by Contractor personnel; (4) a weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or (5) active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat. As a regular record keeping requirement, private security contractors are required to keep appropriate records of personnel by registering in the Synchronized Predeployment Operational Tracker the equipment and weapons used by its personnel. The complexity of the work to prepare these records requires the expertise equivalent to that of a GS–11, step 5 with clerical and analytical skills to create the documents.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2015–D021), in correspondence.

V. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning ''Defense Contractors Performing Private Security Functions Outside the United States'' to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents: 12.

Responses per respondent: 4.

Total annual responses: 48.

Preparation hours per response: .5 hours, estimated.

Total response Burden Hours: 24.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email *Jasmeet_K._Seehra@omb.eop.gov,* with a copy to the Defense Acquisition Regulations System, Attn: Ms. Julie Hammond, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Julie Hammond, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060, or email *osd.dfars@mail.mil.* Include DFARS Case 2015–D021 in the subject line of the message.

List of Subjects in 48 CFR Parts 216, 225, and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216, 225, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 216, 225, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and CFR chapter 1.

PART 216—TYPES OF CONTRACTS

216.405–2–71 [Amended]

■ 2. In section 216.405–2–71, amend paragraph (b) by removing ''FAR 52.225–26, Contractors Performing Private Security Functions'' and adding ''252.225–7039, Defense Contractors Performing Private Security Functions Outside the United States'';

PART 225—FOREIGN ACQUISITION

225.302–6 [Amended]

■ 3. Amend section 225.302–6 introductory text by adding ''instead of FAR clause 52.225–26, Contractors Performing Private Security Functions Outside the United States,'' after ''Functions Outside the United States,'';

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.225–7039 by—

■ a. Removing clause date ''(JAN 2015)'' and adding ''(DEC 2015)'' in its place;

■ b. Redesignating paragraphs (a) and (b) as paragraphs (c) and (f) respectively;

■ c. Adding new paragraphs (a) and (b);

■ d. Revising newly designated paragraph (c);

■ e. Adding paragraphs (d) and (e);

■ f. In newly designated paragraph (f), removing ''paragraph (b)'' and adding ''paragraph (f)'' in its place.

The additions and revisions read as follows:

252.225–7039 Defense Contractors Performing Private Security Functions Outside the United States.

* * * * *

(a) *Definitions.* As used in this clause—

Full cooperation—

(1) Means disclosure to the Government of the information sufficient to identify the nature and extent of the incident and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' requests for documents and access to employees with information;

(2) Does not foreclose any contractor rights arising in law, the FAR or the terms of the contract. It does not require—

(i) The contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner or employee of the contractor, including a sole proprietor, to waive his or her attorney-client privilege or Fifth Amendment rights; and

(3) Does not restrict the contractor from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Private security functions means the following activities engaged in by a contractor:

(1) Guarding of personnel, facilities, designated sites or property of a Federal agency, the contractor or subcontractor, or a third party.

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of this contract.

(b) *Applicability.* If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the designated area. Designated areas are areas outside the United States of—

(1) Contingency operations;

(2) Combat operations, as designated by the Secretary of Defense;

(3) Other significant military operations (as defined in 32 CFR part 159), designated by the Secretary of Defense upon agreement of the Secretary of State;

(4) Peace operations, consistent with Joint Publication 3–07.3; or

(5) Other military operations or military exercises, when designated by the Combatant Commander.

(c) *Requirements.* The Contractor shall—

(1) Ensure that all employees of the Contractor, who are responsible for performing private security functions under this contract, comply with 32 CFR part 159 and any orders, directives or instructions to contractors performing private security functions that are identified in the contract for—

(i) Registering, processing, accounting for, managing, overseeing and keeping appropriate records of personnel performing private security functions;

(ii) Authorizing, accounting for and registering in Synchronized Predeployment and Operational Tracker (SPOT), weapons to be carried by or available to be used by personnel performing private security functions;

(iii) Identifying and registering in SPOT armored vehicles, helicopters and other military vehicles operated by Contractors performing private security functions; and

(iv) In accordance with orders and instructions established by the applicable Combatant Commander, reporting incidents in which—

(A) A weapon is discharged by personnel performing private security functions;

(B) Personnel performing private security functions are attacked, killed, or injured;

(C) Persons are killed or injured or property is destroyed as a result of conduct by Contractor personnel;

(D) A weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(E) Active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat;

(2) Ensure that the Contractor and all employees of the Contractor who are responsible for performing private security functions under this contract are briefed on and understand their obligation to comply with—

(i) Qualification, training, screening (including, if applicable, thorough background checks) and security requirements established by 32 CFR part 159;

(ii) Applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of private security functions;

(iii) Orders, directives and instructions issued by the applicable Combatant Commander or relevant Chief of Mission relating to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) Rules on the use of force issued by the applicable Combatant Commander or relevant Chief of Mission for personnel performing private security functions; and

(3) Provide full cooperation with any Government-authorized investigation of incidents reported pursuant to paragraph (c)(1)(iv) of this clause and incidents of alleged misconduct by personnel performing private security functions under this contract by providing—

(i) Access to employees performing private security functions; and

(ii) Relevant information in the possession of the Contractor regarding the incident concerned; and

(4) Comply with ANSI/ASIS PSC.1–2012, American National Standard, Management System for Quality of Private Security Company Operations—Requirements with Guidance or the International Standard ISO 18788, Management System for Private Security Operations—Requirements with Guidance (located at *http://www.acq.osd.mil/log/PS/psc.html*).

(d) *Remedies.* In addition to other remedies available to the Government—

(1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor or subcontractor personnel performing private security functions who fail to comply with or violate applicable requirements of this clause or 32 CFR part 159. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract;

(2) The Contractor's failure to comply with the requirements of this clause will be included in appropriate databases of past performance and considered in any responsibility determination or evaluation of past performance; and

(3) If this is an award-fee contract, the Contractor's failure to comply with the requirements of this clause shall be considered in the evaluation of the Contractor's performance during the relevant evaluation period, and the Contracting Officer may treat such failure to comply as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period.

(e) *Rule of construction.* The duty of the Contractor to comply with the requirements of this clause shall not be reduced or diminished by the failure of a higher- or lower-tier Contractor or subcontractor to comply with the clause requirements or by a failure of the

contracting activity to provide required oversight.

[FR Doc. 2015–32874 Filed 12–29–15; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 217

[Docket DARS–2015–0067]

RIN 0750–AI80

Defense Federal Acquisition Regulation Supplement: Multiyear Contract Requirements (DFARS Case 2015–D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the DFARS to implement a section of the National Defense Authorization Act for Fiscal Year (FY) 2015 and a section of the Department of Defense Appropriations Act for FY 2015, which address various requirements for multiyear contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before February 29, 2016 to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015–D009, using any of the following methods:

○ *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2014–D009'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2014–D009.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2015–D009'' on your attached document.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2015–D009 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Tresa Sullivan, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Tresa Sullivan, telephone 571–372–6176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113–291) and section 8010 of the Department of Defense Appropriations Act for FY 2015 (Division C, Title VII of Pub. L. 113–235), which address various requirements for multiyear contracts.

Section 816 of the NDAA amends subsection (i) of 10 U.S.C. 2306b to clarify that a multiyear contract may not be entered into for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear authority unless the Secretary of Defense certifies in writing that certain conditions have been met not later than 30 days before award of the contract (10 U.S.C. 2306b(i)(3)).

Section 8010 makes the following additional changes:

- A multiyear contract may not be terminated without 30-day prior notification to the congressional defense committees.
- A multiyear contract may not be entered into unless the head of the agency ensures that—
  - ○ Cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;
  - ○ The contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and
  - ○ The contract does not provide for a price adjustment based on a failure to award a follow-on contract.

II. Discussion and Analysis

DoD is proposing to make the following changes to the DFARS:

- Amend 217.170(b) to change ''10 days before termination'' to ''30 days before termination'' and remove the references to 10 U.S.C. 2306.
- Add the new section 8010 requirements for multiyear contracts to the list of requirements at 217.172(e).
- Clarify at 217.172(h) that the requirements are applicable to defense acquisition programs specifically authorized by law to be carried out using multiyear contract authority.
- Change 217.172(h)(2) to require the Secretary of Defense to certify to Congress by no later than ''30 days before entry'' into a contract, instead of no later than ''March 1 of the year in which the Secretary requests legislative authority to enter'' in such contract.
- Delete paragraph (7) at DFARS 217.172(h), which requires a notification to congressional defense committees 30 days prior to award, and redesignate paragraph (h)(8) as paragraph (7). Add to the newly redesignated paragraph (7), a reference to 10 U.S.C. 2306b(i)(4).
- Update cross references to 10 U.S.C. 2306b(i) throughout section 217.172.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because this rule implements requirements for the head of agency, which are procedures internal to the Government. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this proposed rule is to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require the head of agency to—

- Provide written notice to the congressional defense committees at least 30 days before termination of any multiyear contract;
- For defense acquisition programs specifically authorized by law to be carried out using multiyear authority, ensure the Secretary of Defense certifies to Congress certain conditions for the multiyear contract have been met no

later than 30 days before entry into the contract; and

• Ensure prior to award of a multiyear contract that—

○ Cancellation provisions in the contract do not include consideration of recurring manufacturing costs associated with the production of unfunded units;

○ The contract provides that payments to the contractor shall not be made in advance of incurred costs on funded units; and

○ The contract does not provide for a price adjustment based on failure to award a follow-on contract.

The objective of this rule is to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 and section 8010 of the Department of Defense Appropriations Act for FY 2015, which address various requirements for multiyear contracts.

The rule is not expected to impact small entities, because the rule applies to multiyear contract authorities for specific major defense acquisition programs for which small entities would not have the capacity or infrastructure to fulfill or sustain. Small entities may perform under multiyear contracts as subcontractors; however, the rule invokes requirements that apply at the prime contract level.

This rule does not create any new reporting or recordkeeping requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternatives to the rule that will meet the requirements of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2015–D009), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 217

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 217 is proposed to be amended as follows:

■ 1. The authority citation for 48 CFR part 217 continues to read as follows:

Authority: 41 U.S.C. 1303 and CFR chapter 1.

PART 217—SPECIAL CONTRACTING METHODS

217.170 [Amended]

■ 2. Amend section 217.170 in paragraph (b) by—

■ a. Removing ''10 days'' and adding ''30 days'' in its place; and

■ b. Removing ''10 U.S.C. 2306b(l)(6), 10 U.S.C. 2306c(d)(3),'';

■ 3. Amend section 217.172—

■ a. In paragraph (c), by removing ''10 U.S.C. 2306b(i)(3)'' and adding ''10 U.S.C. 2306b(i)(1)'' in its place;

■ b. In paragraph (e)(1), by removing the word ''and'';

■ c. In paragraph (e)(2), by removing the period and adding a semicolon in its place; and

■ d. By adding paragraphs (e)(3), (4), and (5);

■ e. In paragraph (h) introductory text, by removing ''under the authority described in paragraph (b) of this section:'' and adding ''for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear contract authority:'' in its place;

■ f. In paragraph (h)(2) introductory text, by removing ''March 1 of the year in which the Secretary requests legislative authority to enter'' and adding ''30 days before entry'' in its place and by removing ''10 U.S.C. 2306b(i)(1)(A) through (G)'' and adding ''10 U.S.C. 2306b(i)(3)'' in its place;

■ g. In paragraph (h)(2)(i)—

■ i. By adding ''–1'' after ''FAR 17.105'';

■ ii. By adding a comma after ''(5)''; and

■ iii. By removing ''10 U.S.C. 2306b(i)(1)(A)'' and adding ''10 U.S.C. 2306b(i)(3)(A)'' in its place;

■ h. In paragraph (h)(2)(ii), by removing ''10 U.S.C. 2306b(i)(1)(B)'' and adding ''10 U.S.C. 2306b(i)(3)(B)'' in its place;

■ i. In paragraph (h)(2)(iii), by removing ''10 U.S.C. 2306b(i)(1)(C)'' and adding ''10 U.S.C. 2306b(i)(3)(C)'' in its place;

■ j. In paragraph (h)(2)(iv), by removing ''10 U.S.C. 2306b(i)(1)(D)'' and adding ''10 U.S.C. 2306b(i)(3)(D)'' in its place;

■ k. In paragraph (h)(2)(v), by removing ''10 U.S.C. 2306b(i)(1)(E)'' and adding ''10 U.S.C. 2306b(i)(3)(E)'' in its place;

■ l. In paragraph (h)(2)(vi), by removing ''10 U.S.C. 2306b(i)(1)(F)'' and adding ''10 U.S.C. 2306b(i)(3)(F)'' in its place;

■ m. In paragraph (h)(2)(vii), by removing ''10 U.S.C. 2306b(i)(1)(G)'' and adding ''10 U.S.C. 2306b(i)(3)(G)'' in its place;

■ n. In paragraph (h)(3), by removing ''10 U.S.C. 2306b(i)(4)(A)'' and adding ''10 U.S.C. 2306b(i)(5)(A)'' in its place;

■ o. In paragraph (h)(4), by removing ''10 U.S.C. 2306b(i)(4)(B)'' and adding ''10 U.S.C. 2306b(i)(5)(B)'' in its place;

■ p. In paragraph (h)(5), by removing ''10 U.S.C. 2306b(i)(5)'' and adding ''10 U.S.C. 2306b(i)(6)'' in its place;

■ q. In paragraph (h)(6), by removing ''10 U.S.C. 2306b(i)(6)'' and adding ''10 U.S.C. 2306b(i)(7)'' in its place;

■ r. Removing paragraph (h)(7);

■ s. Redesignating paragraph (h)(8) as (h)(7); and

■ t. In newly redesignated paragraph (h)(7) introductory text, adding ''(10 U.S.C. 2306b(i)(4))'' after ''law's specific savings requirement'' before the period.

The additions read as follows:

217.172 Multiyear contracts for supplies.

* * * * *

(e) * * *

(3) Cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;

(4) The contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and

(5) The contract does not provide for a price adjustment based on a failure to award a follow-on contract (section 8008(a) of Pub. L. 105–56 and similar sections in subsequent DoD appropriations acts).

* * * * *

[FR Doc. 2015–32873 Filed 12–29–15; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 173

[Docket Number PHMSA–2009–0303 (HM–213D)]

RIN 2137–AE53

Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: PHMSA is withdrawing the notice proposing to stop the transportation of flammable liquid material in unprotected external product piping on DOT specification cargo tank motor vehicles as mandated by the ''Fixing America's Surface Transportation Act'' or the ''FAST Act''. Although PHMSA is withdrawing its rulemaking proposal, the agency will continue to consider methods to improve the safety of transporting flammable liquid by cargo tank motor vehicle. PHMSA will also continue to analyze current incident data and improve the collection of future incident data to assist in making an informed decision on methods to address this issue further, if warranted.

DATES: The notice of proposed rulemaking published January 27, 2011 (76 FR 4847) is withdrawn as of December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Dirk Der Kinderen, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration, telephone (202) 366–8553; or Leonard Majors, Office of Hazardous Materials Technology, Pipeline and Hazardous Materials Safety Administration, telephone (202) 366–4545.

SUPPLEMENTARY INFORMATION:

I. What action is PHMSA taking?

PHMSA is withdrawing notice of proposed rulemaking (NPRM) ''Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids'' (HM–213D) published January 27, 2011 (76 FR 4847) under Docket No. PHMSA–2009–0303. This rulemaking proposed to stop flammable liquids from being transported in unprotected product piping (generally referred to as the ''wetlines'') on the cargo tank of existing and newly manufactured DOT specification cargo tank motor vehicles.

II. What did PHMSA propose and why?

PHMSA proposed to stop the transportation of flammable liquids in unprotected external product piping on DOT specification cargo tank motor vehicles (CTMVs) unless the piping was protected from accident or bottom damages or the piping was designed or emptied in a way to remove the hazard of containing flammable liquid. PHMSA proposed this change because exposed piping containing flammable liquid can contribute to the severity of accidents involving a CTMV and an automobile, and because we currently do not require external piping containing flammable liquid to be protected like other hazardous material. Except for flammable liquid, § 173.33(e) of the Hazardous Materials Regulations (HMR: Parts 171–180) does not allow the transport of liquid hazardous material in piping of a DOT specification cargo tank motor vehicle unless it is equipped with accident damage or bottom damage protection devices.[1] PHMSA also issued this proposed requirement to fully address the National Transportation Safety Board (NTSB) Safety Recommendation H–98–27. This recommendation reads:

Prohibit the carrying of hazardous materials in external piping of cargo tanks, such as loading lines that may be vulnerable to failure in an accident.

III. Why is PHMSA withdrawing the rulemaking?

PHMSA is withdrawing the rulemaking in accordance with a congressional mandate. On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act, or ''FAST Act''.[2] The Act outlines legislation to improve the Nation's surface transportation infrastructure, including roads, bridges, transit systems, and the rail transportation network. Among its many provisions is a mandate for PHMSA to withdraw this rulemaking no later than thirty days from the date of enactment of the FAST Act (see section 7206 of the Fast Act).

IV. Background on Development of this Rulemaking

Although PHMSA is congressionally mandated to withdraw this rulemaking, below we discuss past and recent actions in development of this rulemaking.

A. Regulatory Assessment

PHMSA developed the assessment to evaluate regulatory action using data from hazardous materials incident reports over a 12.25-year time period (January 1999 to March 2011). PHMSA used a manual purging system [3] as the workable option to address the safety hazard of flammable liquid in unprotected wetlines. Under previous rulemaking efforts, PHMSA identified several technologies and design considerations that could allow operators of CTMVs to address this safety hazard and asked for public input on the practicality of using these options to protect against or prevent the safety hazard.[4] PHMSA's conclusions regarding the practicality of alternatives remain valid. PHMSA believes a manual purging system is the only workable option based on our understanding of currently available and implemented technologies for addressing this safety hazard.

In developing an analysis of the benefits of the rulemaking, PHMSA considered avoided injuries, property damage, traffic delays, evacuations, emergency response, and environmental damage; in developing an analysis of the costs, we considered the installation, maintenance, and associated impacts of a equipping a CTMV with a manual purging system. PHMSA evaluated various implementation timelines ranging from a 5-year period to a 20-year period as the alternative actions. The

[1] The HMR currently prohibits liquid hazardous materials in Divisions 5.1 (oxidizer), 5.2 (organic peroxide), 6.1 (toxic), and Class 8 (corrosive to skin only) to remain in wetlines after loading or unloading. Due to complications associated with the loading practices and economics of transporting Class 3 flammable liquids, the provision does not apply to flammable liquids.

[2] See Public Law 114–94, 129; Stat. 1312, December 4, 2015.

[3] The manual purging system is a pneumatic system consisting of tubes, check valves, and a control box installed on a CTMV that uses compressed air to clear the wetlines by forcing the liquid material out of the piping and into the cargo tank body.

[4] On December 30, 2004, the agency published an NPRM (69 FR 78375) that discussed a number of possible alternative actions.

best-case scenario benefit-cost ratio (BCR) was estimated to be 0.78, based on a 20-year period (which would result in a de facto applicability to new construction only, based on PHMSA's assumption of a 20-year useful service life for a CTMV), and a 7 percent discount rate.[5] The assessment used the DOT's Value of Statistical Life (VSL) of $6.1 million at the time, which now has been revised to $9.2 million. Based on PHMSA's additional review of data following the publication of the NPRM and the outcome of the Government Accountability Office (GAO) audit (discussed below), the number of fatal incidents was reduced from four to three. These two changes were not accounted for in the assessment, but the net effect on the BCR is minor because the increase in benefits from the revised VSL is similar in magnitude to the decrease in benefits associated with the decrease in fatal incidents.

B. Government Accountability Office (GAO) Report and the Moving Ahead for Progress in the 21st Century Act (MAP–21)[6]

The MAP–21, enacted in July 2012, temporarily stopped PHMSA from issuing a final rule and required the GAO to examine the risks of, and alternatives to, transporting flammable liquids in wetlines. The GAO examined PHMSA's process for identifying wetlines incidents among its reported hazardous materials incidents, analyzed how useful PHMSA's incident data from January 1999 through March 2011 are for identifying such incidents, and examined whether the data accurately captured information about the incidents' consequences.

In its final report, the GAO concluded that because PHMSA does not specifically provide an option to indicate a wetlines incident on its incident reporting form, it is difficult to identify the number of wetlines incidents from PHMSA's incident data.[7] Additionally, due to inaccuracy of the damages associated with incidents, GAO believes the magnitude of the risks wetlines pose to safety is also unclear. It also noted that, although PHMSA has made changes to improve the quality of its incident data, the concerns that GAO identified call into question the usefulness of PHMSA's data for evaluating the benefits of avoiding these incidents—particularly the extent to which a wetlines rule would prevent fatalities. Finally, the GAO stated that PHMSA's economic analysis used to support the NPRM does not account for these limitations and therefore, the analysis does not adequately convey the uncertainty of PHMSA's calculated benefit of the rule. Moreover, GAO concluded that PHMSA's analysis has not adequately addressed the market uncertainty with regard to the technology used as the basis for addressing the safety hazard. See the GAO report for the complete discussion of the GAO audit and summary of conclusions and recommendations.

C. Post-GAO Report Analysis

Following the GAO report, PHMSA examined the regulatory assessment, taking into account the GAO findings as well as industry comments to help make a determination on whether to withdraw the rulemaking. This analysis also took into account the updated VSL. The analysis considered five scenarios for calculating the estimated societal benefits and four scenarios for the estimated costs. This additional analysis served as a sensitivity analysis of the regulatory assessment for the NPRM. The different scenarios for estimated benefits were based on:

- The incident analysis data used in the regulatory assessment—*i.e.,* ''incident data'';
- the incident data, including only those incidents involving a fire;
- the incident data plus the Yonkers, NY fatal incident data;
- the incident data, adjusted to account for the GAO recommendations; and
- the incident data, adjusted to account for the GAO recommendations plus the Yonkers, NY fatal incident data.

PHMSA calculated a range of potential BCR outcomes, based on the five scenarios for estimated benefits and the two scenarios for estimated average costs. It is reasonable to assume that the BCR lies somewhere between the highest and lowest BCR outcomes from this analysis. Under the low average cost estimate, in four of the five estimated benefit scenarios the BCR at a 7 percent discount rate was not net beneficial. The BCRs ranged from 0.77 to 1.1 for the low average cost scenario. In comparison, under the high average cost estimate, in all five estimated benefit scenarios the BCR at a 7 percent discount rate was not net beneficial. The BCRs ranged from 0.47 to 0.67 for the high average cost scenario.

D. Commenter Concerns

In general, most commenters to the NPRM opposed the proposed ban and indicated that they do not believe wetlines containing flammable liquid are a safety risk, citing PHMSA's own statistics that the frequency of wetlines incidents is low and the frequency of incidents that lead to injury or death is extremely low. They also expressed concerns regarding PHMSA's incident analyses, regulatory assessment, implementation of the rule, and safety impacts of the rule. The remaining commenters either supported the rulemaking on the basis of improved safety for the public or offered suggestions to strengthen or make clearer PHMSA's efforts to address the safety hazard. The opposition comments mainly address PHMSA's incident analysis and development of the costs and benefits of the regulatory assessment. PHMSA summarizes these concerns in greater detail below. This summary of comments is for the benefit of the reader for understanding of stakeholder information presented during the notice and comment portion of this rulemaking. The complete body of comments both in opposition to and support of the rule is available for review at the docket to the rulemaking (*www.regulations.gov*).

1. Incident Analysis

Commenters questioned whether all incidents and their associated data used in PHMSA's preliminary analyses should be included in the assessment with respect to: (1) The criteria used to decide whether an incident qualified as a wetlines incident; (2) whether deaths, injuries, or any other costs were actually the result of the material contained in the wetlines; and (3) relevance of proposed requirements. For example, they asserted that any incident involving the release of more than fifty gallons[8] without a fire resulting from a wetlines release should be excluded based on the assumption that a spill of more than fifty gallons indicates that there was a breach of the cargo tank itself (*e.g.,* tank shell rupture, damage to an internal valve) such that any action to comply with the proposed performance standard—like purging the wetlines—would not have prevented the larger release of material. Additionally,

[5] A BCR is an indicator of the relative benefits of a project to its cost. A BCR of 1.0 indicates the benefits equal the cost. Thus, for the best-case scenario the BCR of 0.78 indicates that the estimated costs of complying with the rulemaking are greater than the estimated safety benefits.

[6] See Public Law 112–141, 126; Stat. 405, July 6, 2012.

[7] CARGO TANK TRUCKS: Improved Incident Data and Regulatory Analysis Would Better Inform Decisions about Safety Risks, Report to Congressional Committees, GAO–13–721, September 2013, *http://www.gao.gov/assets/660/657755.pdf.*

[8] A basic assumption used in wetlines incident determination is that depending on the number of cargo tank compartments and the size of the product piping, wetlines can contain up to 50 gallons of product.

they argued that data indicating damages not directly linked to wetlines damage or release should not be included. For example, costs associated with damage to the CTMV from a motor vehicle collision should not be included in the total for purposes of the analysis.

PHMSA agrees that only those costs associated with damages to the wetline and release of material from the wetlines should be counted. Unfortunately, under the current format of incident report information it is difficult to parse out the costs of wetlines-related damages from the total body of damages where damages occur beyond those associated with wetlines, unless some assumptions are made. For instance, in the case of an incident involving a fire, PHMSA assumed the fire was started and was propagated by the wetlines release.

Upon consideration of the comments, PHMSA conducted further review of the 172 incidents that were initially determined to be wetlines incidents in our preliminary analyses. Prior to this review, PHMSA became aware that some of the data in our original set of incidents was not accurate and likely led to the critical comments. This data had since been corrected and a revised list of incidents was placed in the docket (8/12/2011; PHMSA–2009–0303–0048). PHMSA also reviewed additional CTMV incidents that occurred from January 1, 2009 to March 31, 2011 to capture more recent data. This review resulted in a final determination of 132 wetlines incidents. A total of 59 incidents where removed after a review of the original 172 incidents, and 19 incidents were added after a review of more recent data.

2. Benefit and Cost Estimation

Manual Purging System. Most commenters took issue with PHMSA's estimation of the costs of installing a manual purging system.[9] In general, they believe PHMSA underestimated the total cost presented through incorrect assumptions and inclusion of cost factors that do not reflect real-world applications. Commenters indicated that PHMSA underestimated the true costs of a manual purging system by, for example, not incorporating a markup cost. Commenters provide a range of cost estimates from $4,000 to $10,000. Some also think the regulatory assessment should have been developed using a mix of costs of the manual system and the more expensive automated purging system. Commenters suggest this because they believe that owners will invest in the automated system out of concern that drivers will forget to operate the manual system and because an automated system will provide the added benefit of discovery of a faulty emergency valve and would continue to purge the lines during transportation if such a faulty valve were present. Details of this pricing can be found in the regulatory assessment and other documents submitted to the docket for this rulemaking. PHMSA's post-GAO analysis took into consideration the cost of the automated system.

Operational delays. Many commenters argued that PHMSA has not accounted for delay costs to the shipper or carrier due to operation of a purging system at the loading rack of a terminal facility. The delay would be caused by the driver of the CTMV waiting anywhere from three to six minutes for the system to complete the purging process prior to moving the CTMV. Commenters based this on their understanding that the regulations would not allow the vehicle to move until it is essentially empty—only a residue remains in the piping. Completion of the purging process would be an indicator that it is empty.

Weight penalty. PHMSA estimated that a manual purging system is expected to add about 48 pounds to a CTMV. To the extent that a shipper or carrier operates at Federal or State gross weight limits, the shipper or carrier would have to ship less product because of this additional weight. Commenters disagreed with the estimate that only 25% of vehicle trips are at the maximum allowable weight and therefore affected by the additional weight of a purging system. Informal surveys of carriers by the American Trucking Association and the National Tank Truck Carriers found that as much as 80% of trips are at the maximum allowable weight. Again, PHMSA's post-GAO analysis accounted for this.

Yonkers, NY Incident. Commenters believe the Yonkers, NY incident that led to NTSB Safety Recommendation (H–98–27) should not be included in the regulatory assessment for several reasons, including:

(1) The belief that the fire in the incident was not caused by a wetlines release because the original NTSB accident report concluded that the fire was fed by fuel from the cargo tank compartments, implying a breach of the cargo tank;

(2) the incident predates the incident analysis period; and

(3) the uncertainty that such an event will ever occur again—no data supports the PHMSA assumption that this is a 20-year event.

E. Findings

Although a safety hazard exists, the regulatory assessment and further analysis indicate that prohibiting the transportation of flammable liquids in wetlines is unlikely to be cost beneficial. Additionally, the GAO report has pointed out a number of uncertainties with the data collection and analysis that would have a direct impact on PHMSA's ability to fully characterize the degree of risk that wetlines containing flammable liquids pose to the safety of transportation.

V. Conclusion

PHMSA is withdrawing this rulemaking in accordance with the FAST Act. PHMSA, however, will continue to examine this issue, particularly by monitoring flammable liquid wetlines incidents, in consideration of any future actions. Likely future actions include non-regulatory initiatives to improve the safety of transporting flammable liquid in unprotected external product piping on CTMVs.

Issued in Washington, DC, on December 22, 2015, under authority delegated in 49 CFR Part 1.97.

William S. Schoonover,

Deputy Associate Administrator.

[FR Doc. 2015–32681 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–60–P

[9] PHMSA used a per-unit price of $2,300 based on the advertised price of the one manufacturer of purging systems currently designing and installing such systems.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 393

[Docket No. FMCSA–2014–0428]

RIN 2126–AB67

Parts and Accessories Necessary for Safe Operation: Federal Motor Vehicle Safety Standards Certification for Commercial Motor Vehicles Operated by United States-Domiciled Motor Carriers; Withdrawal

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of withdrawal.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) withdraws its June 17, 2015, notice of proposed rulemaking (NPRM), which would have required each commercial motor vehicle (CMV) operated by a

United States-domiciled (U.S.-domiciled) motor carrier engaged in interstate commerce to display a label applied by the vehicle manufacturer or a U.S. Department of Transportation (DOT) Registered Importer to document the vehicle's compliance with all applicable Federal Motor Vehicle Safety Standards (FMVSSs) in effect as of the date of manufacture. FMCSA withdraws the NPRM because commenters raised substantive issues which have led the Agency to conclude that it would be inappropriate to move forward with a final rule based on the proposal. Because the FMVSSs critical to the operational safety of CMVs are cross-referenced in the Federal Motor Carrier Safety Regulations (FMCSRs), FMCSA has determined that it can most effectively ensure that motor carriers maintain the safety equipment and features provided by the FMVSSs through enforcement of the FMCSRs, making an additional FMVSS certification labeling regulation unnecessary.

DATES: The NPRM ''Parts and Accessories Necessary for Safe Operation: Federal Motor Vehicle Safety Standards Certification for Commercial Motor Vehicles Operated by United States-Domiciled Motor Carriers,'' published on June 17, 2015 (80 FR 34588), is withdrawn as of December 30, 2015.

FOR FURTHER INFORMATION CONTACT: If you have questions on this Notice of withdrawal, contact Mr. Michael Huntley, Chief, Vehicle and Roadside Operations Division, Office of Policy, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, by telephone at (202) 366–9209 or via email at *Michael.Huntley@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background/General Issues Raised During Comment Period

On June 17, 2015, FMCSA published an NPRM to require motor carriers to display an FMVSS certification label (80 FR 34588).

The FMCSRs require that motor carriers operating CMVs in the U.S., including Mexico- and Canada-domiciled carriers, ensure that the vehicles are equipped with the applicable safety equipment and features specified in 49 CFR part 393, Parts and Accessories Necessary for Safe Operations, which includes cross references to safety equipment and features that must be installed at the time of production. The National Highway Traffic Safety Administration (NHTSA) requires vehicle manufacturers to certify that the vehicles they produce for sale and use in the U.S. meet all applicable FMVSSs in effect at the time of manufacture. In addition, they must affix an FMVSS certification label to each vehicle in accordance with the requirements of 49 CFR part 567.

As proposed, the NPRM would have required U.S.-domiciled motor carriers engaged in interstate commerce to use only CMVs that display an FMVSS certification label affixed by the vehicle manufacturer indicating that the vehicle: (1) Satisfied all applicable FMVSSs in effect at the time of manufacture; or (2) has been modified to meet those standards and legally imported by a DOT-Registered-Importer. In the absence of such a label (*e.g.,* because of vehicle damage or deliberate removal), the motor carrier would have been required to obtain, and a driver upon demand present, a letter issued by the vehicle manufacturer stating that the vehicle satisfied all applicable FMVSSs in effect on the date of manufacture.

Discussion of Comments to the NPRM

FMCSA received 19 comments on the NPRM. The Commercial Vehicle Safety Alliance (CVSA), which represents State and Provincial agencies throughout North America responsible for motor carrier safety enforcement, supported the proposed rule, but stated ''While CVSA supports the NPRM, it should be noted that, in our opinion, the best way to prevent non-FMVSS-compliant vehicles from operating in the U.S. by U.S.-domiciled motor carriers is to identify them at the point of titling, vehicle registration, or importation. Roadside inspections should be the secondary means of verifying that CMVs were FMVSS compliant at the time of manufacture.'' One anonymous commenter also supported the proposed rule.

Each of the remaining commenters opposed the proposal, including six trade associations representing the trucking industry, equipment manufacturers, and dealers (One trade association submitted two comments each covering a different issue). These associations are the American Trucking Associations (ATA), the National Automobile Dealers Association (NADA), the National Propane Gas Association (NPGA), the Truckload Carriers Association (TCA), the Owner-Operator Independent Drivers Association (OOIDA), and the Truck and Engine Manufacturers Association (EMA). Three motor carriers submitted comments: Double D Distribution (Mark Droubay), United Parcel Service (UPS) and YRC Freight (YRC). Nine individuals submitted comments, including Congressman Richard L. Hanna from New York.

Comments in Opposition to the NPRM

Commenters opposed the proposed rule for the following reasons:

- The rule would provide no safety benefits.
- FMVSS markings, particularly on trailers, are subject to damage, over-painting, and loss over the life of the vehicle. No certification marking is permanent.
- Many of the manufacturers have gone out of business, been purchased, or are overseas; obtaining a replacement certification or letter may not be possible.
- The proposal does not recognize the issues raised by interlining and other operational patterns.
- The rule would impose significant costs on carriers, which FMCSA has failed to estimate.
- The National Transportation Safety Board (NTSB) recommendation on which the proposal was based resulted from a bus crash that was unrelated to the standards to which the coach was manufactured.

No Safety Benefits

Several of the industry associations, the three motor carriers, and seven individuals who opposed the proposed rule in general stated that it would not enhance safety and that FMCSA had provided no safety rationale for the rule. OOIDA stated that most small carriers and owner/operators purchase used equipment. OOIDA also stated that it failed to see how maintaining proof of a CMV's compliance at the time of manufacture would improve safety years later. ATA and TCA stated that original certification has little if anything to do with the condition and safe operation of a CMV after it is purchased. ATA stated that FMCSA had provided no evidence of any crashes where lack of certification was responsible for the crash. UPS stated that the proposal appeared to be for the convenience of inspectors, not to improve safety.

Issues Related to Markings

ATA and others stated that no external markings on a CMV are permanent. YRC stated that it was primarily concerned with markings on trailers, converter dollies, and container chassis, which are affixed to the outside of the vehicle and subject to wear and tear from road conditions and may be painted over or removed during refurbishment. ATA submitted

information from a survey of motor carriers. Of the responding motor carriers, 42 percent reported having missing or unreadable certification labels. No motor carrier surveyed indicated that the equipment did not have a label because it had not been designed to be compliant with the FMVSSs.

Issues Related to Replacement Certifications

The industry associations stated that FMCSA had not understood the difficulty of obtaining a replacement certification. ATA, Congressman Richard L. Hanna and others stated that many of the vehicle manufacturers have gone out of business or have been sold. Those that are out of business could not produce a replacement; the new owners of the manufacturers that have been sold might not have the records or may be unwilling to be liable for vehicles produced by the original manufacturer. ATA provided a list of 21 manufacturers that are out of business or have been sold. It also noted that current manufacturers may be reluctant out of fear of liability to provide certificates for equipment that may not have been maintained or may have been altered. For intermodal chassis, many of which were manufactured overseas, ATA stated that it will not be possible to identify or find the manufacturer.

EMA raised a related issue: Multiple companies are involved in the manufacture and certification of most Class 3 through 7 vehicles and about half of the Class 8 vehicles. Under the proposal, EMA stated that a carrier would have to contact the final-stage manufacturer for a replacement, but the identity of that manufacturer may not be obvious as it is frequently not the nameplate company. EMA stated that its members charge a fee for replacement certificates.

YRC and UPS stated that the alternative of a letter, kept with the equipment, is problematic. YRC stated that trailers and converter dollies are routinely used by non-owners during interlining, intermodal agreements, and equipment leases. UPS stated that the requirement to keep the letter with the trailer would require a secure compartment, which trailers do not currently have. ATA stated that containers and trailers may be sealed and asked if FMCSA was expecting inspectors to break seals to review a letter that spoke to compliance years in the past. ATA also stated that the proposed rule would result in penalizing drivers and carriers for missing labels on equipment they did not own which was in safe operating condition. ATA stated that for intermodal chassis, a database exists that would provide a better source of the information for inspectors.

Cost Impacts

The industry associations and motor carriers stated that FMCSA had failed to consider or estimate the significant costs associated with the proposed rule. They listed the following potential costs:

- The time required to survey equipment to determine whether certificate information still existed on equipment.
- The time required to identify the manufacturer and obtain a replacement certificate or letter.
- The time required for a driver/carrier picking up equipment owned by another carrier to check for the label, certificate, or letter.
- The operational disruption if CMVs had to be removed from service until replacements could be obtained or replaced altogether if the manufacturer no longer exists.
- The fees charged for replacement certificates.

UPS estimated that of its 77,000 trailers, 10,000 no longer have the decals. It would need to identify the manufacturer, if it still exists, to request a replacement. YRC stated that the initial audit of its equipment would require hundreds of hours of time by drivers, mechanics, and others, followed by the process of obtaining a replacement label if possible. If the manufacturer no longer exists, the rule would require that the equipment be removed from service. One carrier (32 tractors with 70 trailers) estimated that it would cost $18,000 to add/replace labels currently missing and $4,000–$6,000 annually to audit the equipment to ensure that tags are still there. ATA cited a comment from a member that it was charged $150 for a replacement decal for a trailer. ATA provided data from 20 carriers on the number of pieces of equipment missing decals—8,411 out of 47,000 CMVs.

ATA also cited another member, a propane distributor, which had 29 trailers without certificates, most manufactured by companies that no longer exist. The proposal would require replacement of all of these trailers. NPGA stated that even when replacements could be obtained, taking the equipment out of service until the certificate or letter arrived would disrupt services and impose significant costs to lease replacements. NPGA and others noted that, even if the manufacturer is still in business, the carrier has no way to compel it to process a request quickly. EMA noted that completing a letter would take an hour or more of a manufacturer's expert's time. NADA's American Truck Dealers Division stated that any requirement that dealers not sell CMVs that lack certificates would be unacceptable and could cost dealers $3 million annually (assuming 1 hour/week to examine vehicles and obtain replacements), it also noted that small dealerships spend considerably more per employee on compliance than larger firms do.

OOIDA stated that FMCSA must do a cost-benefit analysis and then publish a supplemental notice.

Other Comments

NPGA stated that it could support the requirement if it applied only to CMVs manufactured after the effective date of the rule. In the alternative, FMCSA should set the compliance period at 24 months to give carriers enough time to implement the provision without disrupting operations. UPS and YRC stated that they would support a prospective requirement provided the label was a permanent plate. UPS stated that it understood that the data connecting serial number and status at manufacture are available in State databases. Although these data may not be accessible at roadside inspection, they are available electronically. OOIDA stated that the burden should be on the seller of used vehicles, not the purchaser.

Many of the industry commenters stated that the NTSB report did not provide a justification for the proposal.

FMCSA Decision To Withdraw the NPRM

After review and analysis of the public comments discussed in the preceding section, FMCSA has decided to withdraw the June 2015 NPRM. We will continue to uphold the operational safety of CMVs on the Nation's highways through continued enforcement of the FMCSRs, many of which cross-reference specific FMVSSs.

Generally, U.S.-domiciled motor carriers operating CMVs (as defined in 49 CFR 390.5) in interstate commerce have access only to vehicles that either were manufactured domestically for use in the United States with the required certification label or were properly imported into the United States in accordance with applicable NHTSA regulations, including certification documentation requirements of 49 CFR part 567. Furthermore, FMCSA's safety regulations incorporate and cross reference the FMVSSs critical to continued safe operation of CMVs.

FMCSA believes continued strong enforcement of the FMCSRs in real-world operational settings, coupled with existing regulations and enforcement measures, will ensure the safe operation of CMVs in interstate commerce. Under the Motor Carrier Safety Assistance Program, FMCSA and its State and local partners conduct more than 2.3 million roadside vehicle inspections each year of CMVs (domiciled in the United States, Canada, or Mexico) operating in interstate commerce. Enforcement of the FMCSRs, and by extension the FMVSSs they cross-reference, is the bedrock of these compliance assurance activities.

Simply requiring CMVs to bear FMVSS certification labels would not ensure their operational safety. An FMVSS label certifying compliance with performance standards applicable to lights, brakes, and other wear items does not ensure real-world safety in the absence of compliance with the operational and maintenance standards imposed by the FMCSRs, especially in the case of vehicles built many years ago. Although the presence or absence of an FMVSS compliance label can certainly provide a useful tool in this regard, inspection of the CMV's compliance with the FMCSRs remains the benchmark by which enforcement officials identify and remove from service vehicles likely to break down or cause a crash. The American public is better protected by the FMCSRs than solely through a label indicating a CMV was originally built to certain manufacturing performance standards.

Therefore, after careful consideration, FMCSA has concluded it is not necessary to amend the FMCSRs to require CMVs to display an FMVSS certification label in order to achieve effective compliance with the FMVCRSs.

In view of the foregoing, the NPRM concerning certification of compliance with the Federal Motor Vehicle Safety Standards is withdrawn.

Issued under the authority of delegation in 49 CFR 1.87 on December 23, 2015.

T.F. Scott Darling, III,

Acting Administrator.

[FR Doc. 2015–32868 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–EX–P

Notices

Federal Register
Vol. 80, No. 250
Wednesday, December 30, 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

Forest Service

Information Collection; Recreation Fee and Wilderness Program Administration

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the extension to the information collection: Recreation Fee and Wilderness Program Administration.

DATES: Comments must be received in writing on or before February 29, 2016 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Al Remley, USDA Forest Service, Recreation, Heritage, and Volunteer Resources Program, 1400 Independence Avenue SW., Mailstop 1125, Washington, DC 20250.

Comments also may be submitted via facsimile to Al Remley at 202–403–8986 or by email at *recreation2300@fs.fed.us.*

The public may inspect comments received at the USDA Forest Service Washington Office, during normal business hours. Visitors are encouraged to call ahead to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Al Remley, Fee Program Manager, at 202–403–8986 or via email at *recreation2300@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Recreation Fee and Wilderness Program Administration.

OMB Number: 0596–0106.

Expiration Date of Approval: May 31, 2016.

Type of Request: Extension.

Abstract: The Federal Lands Recreation and Enhancement Act (16 U.S.C. 6801–6814) authorizes the Forest Service to issue permits and charge fees for recreation uses of Federal recreational lands and waters, such as group activities, recreation events and motorized recreational vehicle use. In addition, permits may be issued as a means to disperse use, protect natural and cultural resources, provide for the health and safety of visitors, allocate capacity, and/or help cover the higher costs of providing specialized services.

FS–2300–26, *Recreation Fee Envelope.* Information collected includes the amount enclosed in the envelope, date in, date out, number of days paid, time and date of purchase, visitor's vehicle model and license number and registered State, visitor's home zip code, number in party, other charges (if applicable), visitor's Senior, Access Pass or Golden Passport number (if applicable), planned departure date (if applicable), site name, camp's site type: Single campsite or group campsite (if applicable), campsite number (if applicable), and the number in group.

FS–2300–26a, *Recreation Fee Envelope,* is the same form as FS–2300–26; the difference is the color of the form is different to signify a specific region's use.

FS–2300–30, *Visitor's Permit.* Information collected includes the visitor's name and address, area(s) to be visited, dates of visit, length of stay, location of entry and exit points, method of travel, number of people in the group, and where applicable, the number of pack and saddle stock (that is, the number of animals either carrying people or their gear), the number of dogs, and the number of watercraft and/or vehicles (where allowed).

The Forest Service employee who completes the Visitor's Permit will note on the permit any special restrictions or important information the visitor should know. The visitor receives a copy of the permit and instructions to keep the permit with them for the duration of the visit.

FS–2300–32, *Visitor Registration Card.* Information collected includes the visitor's name and address, area(s) to be visited, dates of visit, length of stay, location of entry and exit points, method of travel, number of people in the group, and where applicable, the number of pack and saddle stock (that is, the number of animals either carrying people or their gear) in the group, the number of dogs, and the number of watercraft and/or vehicles (where allowed).

FS–2300–43, *Permit for Short-Term, Noncommercial Use of Government-Owned Cabins and Lookouts* is used to record contact information including name, address, and telephone number, requested dates of occupancy, party size, and additional items if applicable, such as number of pack animals and/or snowmobiles. If unable to collect this information, National Forests would not be able to manage their permit programs or disperse use, protect natural and cultural resources, provide for the health and safety of visitors, allocate capacity, and/or help cover the higher costs of providing specialized services on National Forest System recreational lands.

FS–2300–47, *National Recreation Application,* is a form used to apply for a recreation permit. Information collected includes the applicant's name, address, phone number and email address, location and activity type, date and time of requested use, itinerary, number in party, entry and exit points, day or overnight use, method of travel (if applicable), group organization or event name (if applicable), group leader name and contact information (if applicable), vehicle or boat registration and license number and State of issue (if applicable), type and number of boats, stock or off-highway vehicles (if applicable), and assessed fee and method of payment (if applicable).

FS–2300–48, *National Recreation Permit,* is used to authorize specific activities at particular facilities or areas. Information collected includes the group or individual's name, responsible person's signature, address, phone number, date of permit, method of travel, license number and description of vehicle and tow type, payment method and amount, number and types of water craft (if applicable), number in a group at a cabin or campsite (if applicable), number and type of off-highway vehicles or other vehicles, and

number and type of other use (if applicable).

This information is used to manage the application process and to issue permits for recreation uses of Federal recreational lands and waters. The information will be collected by Federal employees and agents who are authorized to collect recreation fees and/or issue recreation permits. Name and contact information will be used to inform applicants and permit holders of their success in securing a permit for a special area. Number in group, number and type of vehicles, water craft, or stock may be used to assure compliance with management area direction for recreational lands and waters and track visitation trends. A National Forest may use zip codes to help determine where the National Forest's visitor base originates. Activity information may be used to improve services. Personal information such as names, addresses, phone numbers, email addresses, and vehicle registration information will be secured and maintained in accordance with the system of records, National Recreation Reservation System (NRRS) USDA/FS–55.

Estimate of Annual Burden: 3–15 minutes.

Type of Respondents: Individuals.

Estimated Annual Number of Respondents: 2,363,600.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 121,781 hours.

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the request for Office of Management and Budget approval.

Dated: December 18, 2015.

Glenn P. Casamassa,

Associate Deputy Chief, National, Forest System.

[FR Doc. 2015–32847 Filed 12–29–15; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596–AD14

Ski Area Water Clause

AGENCY: Forest Service, USDA.

ACTION: Notice of final directive.

SUMMARY: The U.S. Forest Service (Forest Service or Agency) is amending its internal directives for ski area concessions by adding two clauses to the Special Uses Handbook, Forest Service Handbook (FSH) 2709.11, Chapter 50, addressing the sufficiency of water for operation of ski areas on National Forest System (NFS) lands. The Forest Service recognizes the importance of winter sports opportunities on NFS lands and the need to address the sufficiency of water for ski areas operating on NFS lands. By addressing this need, this final directive will promote the long-term sustainability of ski areas on NFS lands and the economies of the communities that depend on revenue from those ski areas.

DATES: This directive is effective January 29, 2016.

ADDRESSES: The final directive will be available for inspection at the office of the Director, Recreation and Heritage Resources Staff, Forest Service, USDA, 4th Floor Central, Sidney R. Yates Federal Building, 1400 Independence Avenue SW., Washington, DC, during regular business hours (8:30 a.m. to 4:00 p.m.), Monday through Friday, except holidays. Those wishing to inspect these documents are encouraged to call ahead to facilitate access to the building. Copies of documents in the record may be requested under the Freedom of Information Act. The final directive will be posted on the Forest Service's Web site at *http://www.fs.fed.us/specialuses* on the effective date. Only the sections of the FSH that are the subject of this notice have been posted, *i.e.,* FSH 2709.11, Special Uses Handbook, Chapter 50, Standard Forms and Supplemental Clauses, Section 52.4.

FOR FURTHER INFORMATION CONTACT: Sean Wetterberg, National Winter Sports Program Manager, Recreation, Heritage, and Volunteer Resources staff, 801–975–3793, or Jean Thomas, National Water Rights Program Manager, Watershed, Fish, Wildlife, Air, and Rare Plants staff, 202–205–1172. Individuals who use telecommunication devices for the deaf may call the Federal Information Relay Service at 800–877–8339 between 8:00 a.m. and 8:00 p.m., eastern daylight time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

1. Background and Need for the Final Directive

Constitutional and Statutory Authority

The Forest Service's authority to manage lands under its jurisdiction derives from the Property Clause of the United States Constitution, which empowers Congress to ''make all needful Rules and Regulations respecting the . . . Property belonging to the United States.'' U.S. Const. art. IV, sec. 3, cl. 2. The Supreme Court has emphasized that Congressional authority over Federal lands is ''without limitations.'' *Kleppe* v. *New Mexico,* 426 U.S. 529, 539 (1976). In turn, Congress entrusted the Forest Service with authority to ''make such rules and regulations and establish such service as will insure the objects of the [national forests], namely to regulate their occupancy and use and to preserve the forests thereon from destruction.'' Organic Administration Act of 1897 (16 U.S.C. 551). The Organic Administration Act constitutes an ''extraordinarily broad'' delegation to the Forest Service to regulate use of NFS lands and ''will support Forest Service regulations and management . . . unless some specific statute limits Forest Service powers.'' Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests* 59 (1987). *See also Wyoming Timber Indus. Ass'n* v. *United States Forest Serv.,* 80 F. Supp. 2d 1245, 1258–59 (D. Wyo. 2000). In the Organic Administration Act, Congress explicitly recognized that Forest Service regulations may affect the use of water on NFS lands (16 U.S.C. 481) (water on NFS lands may be used ''under the laws of the United States and the rules and regulations established thereunder'').

The Forest Service has broad authority to regulate and condition the use and occupancy of NFS lands under the Term Permit Act of 1915 (16 U.S.C. 497) (authorizing the Secretary of Agriculture to permit use and occupancy of National Forest land ''upon such terms and conditions as he may deem proper''); Multiple Use—Sustained Yield Act (MUSYA) (16 U.S.C. 529) (authorizing the Secretary of Agriculture to develop and administer the surface resources of the National

Forests); and Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1765) (authorizing the Secretary of Agriculture to impose terms and conditions of rights-of-way on Federal land). In 1986, Congress directly addressed the Forest Service's authority to regulate development of ski areas on NFS lands. In the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b), Congress explicitly provided that permits are to be issued ''subject to such reasonable terms and conditions as the Secretary deems appropriate'' (16 U.S.C. 497b(b)(7)).

Regulatory Authority

Consistent with its constitutional and statutory authority, the Forest Service regulates the occupancy and use of NFS lands, including ski area operations, through issuance of special use authorizations (36 CFR part 251, subpart B). The Forest Service must include in special use authorizations terms and conditions that the Forest Service deems necessary to protect Federal property and economic interests (36 CFR 251.56(a)(ii)(A)); efficiently manage the lands subject to and adjacent to the use (36 CFR 251.56(a)(ii)(B)); protect the interests of individuals living in the general area of the use who rely on resources of the area (36 CFR 251.56(a)(ii)(E)); and otherwise protect the public interest (36 CFR 251.56(a)(ii)(G)).

Purpose of the Final Directive

One of the Forest Service's statutory duties is to provide the American public with outdoor recreation opportunities on NFS lands on a sustainable basis. One of these recreation opportunities is skiing, as many ski areas are operated on NFS lands under a permit issued by the Forest Service. Because water for snowmaking and other uses is critical to the continuation of ski areas on NFS lands, the Forest Service has a strong interest in addressing the long-term availability of water to operate permitted ski areas. This final directive will promote the long-term sustainability of ski areas on NFS lands by addressing the long-term availability of water to operate ski areas before permit issuance, during the permit term, and upon permit termination or revocation. Providing for the sustainability of ski areas on NFS lands will support jobs and the local economies that depend on revenue from ski areas on Federal lands. There are 122 ski areas that encompass about 180,000 acres of lands managed by the Forest Service. Ski areas receive roughly 23 million visitors annually, who contribute $3 billion yearly to local economies and support approximately 64,000 full- and part-time jobs in rural communities.

Additionally, the final directive will reduce administrative costs to the United States by providing for more effective administration of ski area permits. The final directive will provide Agency employees and ski area permit holders with a consistent and comprehensive understanding of how water rights and water facilities should be managed under a ski area permit. Specifically, the final directive will provide direction related to the treatment of ski area water rights and authorization of water facilities under ski area permits, including at permit issuance, during the permit term, and upon permit termination or revocation.

Approach of the Final Directive

The final directive contains two clauses for ski area water rights, one for eastern States that follow the riparian doctrine for water rights and one for western States that follow the prior appropriation doctrine for water rights. Under a riparian doctrine system, water rights are appurtenant to the land, whereas under a prior appropriation doctrine system, water rights may be severed from the land. Most ski areas on NFS lands are in western states that adhere to the prior appropriation doctrine.

For the last 30 years, the Forest Service has required ownership by the United States, either solely or in narrow circumstances jointly with the permit holder, of water rights developed on NFS lands to support operation of ski areas in prior appropriation doctrine states. This policy was motivated by the concern that if water rights used to support ski area operations are severed from a ski area—for example, are sold for other purposes—the Forest Service would lose the ability to offer the area to the public for skiing.

The final directive does not provide for ski area water rights to be acquired in the name of the United States; instead, the final directive focuses on sufficiency of water to operate ski areas on NFS lands. This modified approach for ski areas is appropriate given the characteristics of ski area water rights and ski areas. Unlike water rights diverted from and used on NFS lands by holders of other types of special use permits, ski area water rights may involve long-term capital expenditures. In western States like Colorado and New Mexico, holders of ski area permits may have to purchase senior water rights at considerable expense to meet current requirements for snowmaking to maintain viability. Holders of ski area permits need to show the value of these water rights as business assets, particularly during refinancing or sale of a ski area. The value of these water rights is commensurate with the significant investment in privately owned improvements at ski areas. These investments were recognized by Congress in enactment of the National Forest Ski Area Permit Act, which authorizes permit terms of up to 40 years. 16 U.S.C. 497b(b)(1).

In addition to these financial issues, the land ownership patterns at ski areas—particularly the larger ones—often involve a mix of NFS and private lands inside and outside the ski area permit boundary, which makes it difficult to implement a policy of sole Federal ownership for ski area water rights. Much of the development at ski areas is on private land at the base of the mountains. As a result, water diverted and used on NFS lands in the ski area permit boundary is sometimes used on private land, either inside or outside the permit boundary.

With respect to sufficiency of water for ski area operations, the final directive includes a definition for the phrase, ''sufficient quantity of water to operate the ski area,'' and clarifies when and how the holder must demonstrate sufficiency of water to operate the permitted ski area and new ski area water facilities; addresses availability of Federally owned ski area water rights during the permit term; and addresses availability of holder-owned ski area water rights during the permit term and upon permit revocation or termination. In particular, the final directive:

- Requires applicants for a ski area permit to submit documentation prepared by a qualified hydrologist, *i.e.,* an individual with the requisite education (*e.g.,* in geology, forestry, soils, or engineering), training, and experience in hydrology to address sufficiency of water, or licensed engineer demonstrating sufficiency of water to operate the permitted ski area before permit issuance;
- Requires the permit holder to submit documentation prepared by a qualified hydrologist or licensed engineer demonstrating a sufficient quantity of water to operate a ski area water facility, as defined by paragraph F.1.a and b of the final directive, before it is installed;
- Requires the permit holder to demonstrate a sufficient quantity of water to operate the ski area before transferring or repurposing original water rights (water rights with a point of diversion and use inside the ski area permit boundary that were originally

established by a permit holder) during the permit term;

- Addresses the availability of Federally owned ski area water rights during the permit term;
- Provides that Federally owned original water rights remain in Federal ownership;
- Requires the holder to maintain all ski area water rights, and reserves the right of the United States to maintain Federally owned original water rights;
- Requires the holder to offer to sell the holder's interest in original water rights to the succeeding permit holder upon permit termination or revocation; and
- If the succeeding permit holder declines to purchase the holder's interest in original water rights jointly owned by the United States, requires the holder to offer to sell that interest at market value to the United States.

Water clauses for special uses other than ski areas are not affected by this final directive.

2. Response to General Comments on the Proposed Directive

Public Input

Prior to publishing the proposed directive for public comment, the Forest Service conducted four listening sessions and three open houses in April 2013 to identify interests and views from a diverse group of stakeholders regarding a revised water clause for ski areas (78 FR 21343, Apr. 10, 2013). Two listening sessions were held in Washington, DC; one was held in Denver, Colorado; and one was held in the Lake Tahoe area in California. Additionally, open houses were held in Denver, Colorado; Salt Lake City, Utah; and the Lake Tahoe area in California. The Agency used input from these listening sessions and open houses in developing the proposed directive.

On June 23, 2014, the Forest Service published the proposed directive in the **Federal Register** (79 FR 35513). The proposed directive was posted online at *http://www.gpo.gov/fdsys/pkg/FR-2014-06-23/pdf/2014-14548.pdf*. The Forest Service received 12,721 letters in response to the proposed directive, of which 35 were unique. Additionally, the Agency provided a 120-day government-to-government Tribal consultation period beginning on July 28, 2014. The Agency received written responses from 5 Tribes.

Comments Generally in Favor of the Proposed Directive

Comment: More than 12,000 commenters were generally in favor of the proposed directive and offered various reasons as to why they supported the proposed directive. It was characterized as a carefully crafted directive that balanced protecting rivers and streams with commercial interests. One commenter praised the Agency for balancing the fundamental principles of Agency land management with ski industry expectations. These principles include being able to carry out the Forest Service's statutory responsibilities to manage NFS lands on behalf of the American people, to assert control over water that originates and is used on NFS lands for multiple-use purposes, and to apply conditions of use to special use authorizations. Several county or regional commenters believed the proposed directive protected the long-term viability of skiing and winter sports in mountain communities that have tourism-based economies while preserving the economic viability of ski areas operating on Federal lands.

Response: The Forest Service agrees with these comments.

Comments Generally Opposed to the Proposed Directive

Comment: Several commenters representing the ski industry, other business interests, or water districts and municipalities were generally opposed to the proposed directive. The ski industry asserted that the proposed directive was a heavy-handed approach that would be counterproductive to the desire to maintain ski area uses over the long term. Additionally, some commenters stated that the proposed directive was overbroad and exceeded federal authority, particularly in regards to proposed Clause D–30. Some water districts or municipalities simply objected to the proposed directive as drafted and requested that it not be adopted or revised.

Response: Several important substantive modifications have been made in the final directive in response to comments the Agency received on the proposed directive. The final directive does not insert the Forest Service into day-to-day management of ski areas water rights. Rather, the final directive takes the Forest Service out of day-to-day management of ski area water rights by providing for the holder to establish, acquire, maintain, and perfect original water rights. Specific comments and responses related to proposed Clause D–30 are contained herein.

General Comments

Comment: One commenter suggested that the **Federal Register** notice for the final directive clarify that the Forest Service has not consistently required ski areas to acquire water rights in the name of the United States. This commenter believed that the **Federal Register** notice for the proposed directive was misleading in indicating that the proposed directive was a substantial change from prior policy.

Response: While there may be examples of inconsistent application of prior policy, the **Federal Register** notice for the proposed directive correctly characterizes that policy.

Comment: One commenter believed that the issues raised by the Agency could be addressed with existing mechanisms. This commenter requested that the Forest Service withdraw the proposed directive and consult with the States to address Forest Service participation in water allocation and management processes.

Response: The Agency believes that the final directive is needed to address management of water resources on NFS lands and in particular to ensure that ski areas providing public services on NFS lands will have a sufficient quantity of water to operate. The Agency has made several significant changes to the proposed directive in response to comments received. The primary change with respect to ski area water rights is a shift in emphasis from non-severability to ensuring a sufficient quantity of water to operate the ski area. The Agency believes that the public comment period provided reasonable opportunity for States and others to provide input on the proposed directive. The proposed and final directives do not affect the States' role in allocating water rights in States that follow the prior appropriation doctrine.

Comment: One commenter stated that the **Federal Register** notice for the proposed directive suggests that the Forest Service has had a uniform practice of administering special use permit clauses requiring the permit holder to acquire water rights in the name of the United States, but in many cases these clauses were not enforced. This commenter recommended clarifying in the final directive that the clauses in the final directive will displace all prior ski area water clauses, assuming that the Forest Service modifies the proposed directive to be acceptable as identified in the comments. Further, one commenter urged the Forest Service not to enforce prior ski area water clauses in prior or existing ski area permits.

Another commenter submitted that there are probably many ski area permits that have no provision for United States ownership or control of water rights. This commenter believed that holders of those permits have little incentive to request inclusion of the

proposed clause in their permits. The commenter also noted that often when ski area permits are modified, the amendment addresses only the proposed change that triggered the amendment (*e.g.,* expansion of the permit area). This commenter suggested that the Forest Service make a concerted effort to add the new clause to ski area permits when other modifications are made to the permits.

Response: Per the instructions in the final directive, once the final directive goes into effect, clauses D–30 and D–31 supersede all previous ski area water rights clauses in the Directive System. When ski area permits are issued, reissued, or modified under 36 CFR 251.61 to reflect new, changed, or additional uses or area, the appropriate new clause (D–30 or D–31) will be included in ski area permits, and any other water clauses in the permits will be removed.

Holders of existing ski area permits that are not being reissued or modified under 36 CFR 251.61 may opt to amend their permit to include the appropriate new clause within one year of the effective date of the final directive, provided they:

(1) Agree to have all water facilities on NFS lands that are used primarily for operation of the ski area and that are not authorized under a separate permit:

(a) Authorized by their ski area permit;

(b) designated on a map attached to the permit; and

(c) included in an inventory in an appendix to the permit; and

(2) submit documentation prepared by their qualified hydrologist or licensed engineer:

(a) Demonstrating that they hold or can obtain a sufficient quantity of water to operate the permitted portion of the ski area; and

(b) identifying all water sources, water rights, and water facilities necessary to demonstrate a sufficient quantity of water to operate the ski area, including all original water rights; all water facilities authorized by the ski area permit; and any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service.

These requirements, which are enumerated in paragraphs 1 and 2 of the instructions for clauses D–30 and D–31, must be met to implement the new clauses.

Per *National Ski Areas Association, Inc.* v. *United States Forest Service,* 910 F. Supp. 2d 1269 (D. Colo. 2012), the 2011 and 2012 ski area water clauses in existing permits are not enforceable. However, previous water clauses in ski area permits are valid and enforceable as long as they remain in the permit.

Comment: One commenter suggested that the Forest Service needs an effective tool to ensure ski area compliance with this directive. In this commenter's experience, ski area permit holders fight enforcement of even minor requirements that get in the way of the industry's development plans. This commenter noted that when a ski area signs a permit with the new water clause, the ski area must abide by that clause, as was the case with prior water clauses in ski area permits. The commenter further stated that the American public cannot afford future litigation on legal requirements that a ski area agrees to one day and disavows later.

Response: The Agency agrees that the terms of a ski area permit executed by the holder are binding on the holder. When the appropriate water clause in the final directive is included in a ski area permit executed by the holder and the Forest Service, it will be binding on and enforceable against the holder.

Comment: One commenter noted that the proposed directive would not change the Forest Service's policy on water rights for special uses other than ski areas. This commenter believed that the Forest Service would continue to take a possessory interest in water rights for other special uses, which would continue to affect municipal water providers, the agricultural and energy industries, and all other water users.

Response: The proposed and final directives affect only ski area permits. Changes to water clauses for other special uses are outside the scope of the proposed and final directives. The possessory interest provision in Forest Service directives applies only to water rights for Forest Service programs administered on NFS lands, *i.e.,* to permits where both the water facility and the water use are on NFS lands. Forest Service Manual (FSM) 2541.32, para. 2. The possessory interest provision does not apply to water rights held by municipal water providers and the agricultural and energy industries, since these water rights are not associated with both a water facility and water use on NFS lands. Likewise, the possessory interest provision does not apply to water rights held by other water users that are not associated with a point of diversion and water use on NFS lands.

Comment: Commenters questioned the Agency's legal authority to manage water rights on NFS lands and included citations in support of this position. One commenter requested that the Forest Service specifically identify the statutory provisions granting the Agency authority to control water rights. Another commenter noted that Congress granted the Forest Service authority to permit the use of water rights on NFS lands, but not otherwise regulate them.

Response: Prior appropriation doctrine States adjudicate and allocate water rights for all water users, including the Federal government. The Forest Service has the authority to manage use and occupancy of NFS lands, including use of NFS lands for ski areas. The Forest Service has broad authority to condition special use authorizations that allow use and occupancy of NFS lands, including the authority to put water clauses in permits to ensure sufficiency of water for authorized uses and to protect public property, public safety, and natural resources on NFS lands. The Agency cited numerous authorities in the **Federal Register** notice for the proposed directive and this **Federal Register** notice supporting this position. 79 FR 35516 (June 23, 2014); 16 U.S.C. 481, 497, 497b, 529, 551; 43 U.S.C. 1765; 36 CFR 251,56(a)(ii)(A), (a)(ii)(B), (a)(ii)(E), (a)(ii)(G).

Comment: One commenter cited *United States* v. *New Mexico* for the proposition that there is no implied Forest Service reservation of water for secondary purposes and that the United States must acquire water rights in the same manner as any other public or private appropriator. Citing the Federal Task Force Report issued pursuant to section 389(d)(3) of Public Law 104–127, this commenter asserted that the Forest Service must attain the secondary purposes of the National Forests without interfering with the diversion, storage, and use of water for non-Federal purposes.

Response: Ski area water rights do not qualify as reserved water rights. The Forest Service, like any other public or private party, must acquire water rights from prior appropriation doctrine States. These States adjudicate and allocate water rights, including water rights for the Federal government.

3. Response to Comments Relating to Specific Clauses

a. PRIOR APPROPRIATION DOCTRINE STATES—CLAUSE D–30

Proposed Instructions

Only the first, second, fourth, and sixth paragraphs in the proposed instructions for clause D–30 received comment.

Proposed Paragraph 1

Paragraph 1 of the proposed instructions provided that clause D–30 supersedes all previous ski area water rights clauses in the Directive System. Paragraph 1 also provided that clause D–30 be included in ski area permits in prior appropriation doctrine States when these permits are issued, reissued, or modified under 36 CFR 251.61 and that clause D–30 not be included in Michigan, Vermont, and New Hampshire, which are riparian doctrine States.

Comment: A concern was raised that because the instructions cited a specific version of the ski area permit and two specific interim directives, the new clause would be used only in permits with these versions of the water rights clause, rather than in all new or modified ski area permits.

Response: It was not the Agency's intent to limit the new clauses to permits containing these versions of prior clauses. To clarify this intent, the Agency has removed these references from paragraph 1 of the instructions in the final directive.

Proposed Paragraph 2

The second paragraph of the proposed instructions for clause D–30 provided that before issuing a new or modified ski area permit in a prior appropriation doctrine State, the authorized officer would have to (1) ensure that the holder is in compliance with all water facility and water use requirements in clause D–30; (2) inventory ski area water rights; (3) classify the ski area's water rights consistent with the tables in clause D–30; and (4) ensure that the water rights inventory in paragraph 8 of clause D–30 is approved in writing by the Regional Forester.

Comment: There was a general concern regarding the increased magnitude of work involved in implementing these instructions. One commenter suggested that it is unnecessary for Regional Foresters to approve water rights inventories in writing.

Response: The Agency agrees with the concern regarding the potential magnitude of work involved in implementing these instructions. Therefore, the Agency has revised paragraph 2 of the instructions for clause D–30 in the final directive to address authorization of water facilities that are used primarily for operation of the ski area under the ski area permit and designation of those water facilities on a map. Additionally, the inventory in this paragraph is limited to water facilities on NFS lands that are used primarily for operation of the ski area and that are authorized by this permit. The final directive recognizes that there may be existing water facilities used primarily for operation of the ski area that are authorized by a separate, valid special use permit and that those water facilities may remain under that separate authorization, including upon reissuance, if eligible. The Forest Service will determine eligibility based on the primary use of that water facility and applicable statutory authority at the time of reissuance.

The Agency has added a provision to the instructions requiring the applicant for a new or modified ski area permit to submit documentation prepared by the applicant's qualified hydrologist or licensed engineer demonstrating that the applicant holds or can obtain a sufficient quantity of water to operate the permitted portion of the ski area. The documentation submitted must identify all water sources, water rights, and water facilities necessary to demonstrate a sufficient quantity of water to operate the ski area, including all original water rights; all water facilities to be authorized by the ski area permit; and any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. This provision is consistent with the conceptual shift in the final directive from non-severability of ski area water rights to sufficiency of water to operate the ski area.

The Agency agrees that it is unnecessary for Regional Foresters to approve inventories in writing and therefore has removed that requirement from the instructions in the final directive.

Proposed Paragraph 4

Paragraph 4 of the proposed instructions for clause D–30 provided that only water facilities and water rights that are necessary for and that primarily support operation of the ski area being authorized may be included in the ski area permit. Comments received on the terms ''necessary'' and ''primarily support'' are addressed in the response to comments on proposed paragraph F. The standard for determining which water facilities should be included under a ski area permit is addressed in the response to comments on proposed paragraph F.1.d.

Proposed Paragraph 6

Paragraph 6 of the proposed instructions for clause D–30 provided that, prior to authorizing a permit amendment for a new water facility at a ski area, the authorized officer would have to ensure that sufficient water is available to operate the water facility. The comments received on the standard for determining sufficiency of water in this context are addressed in the response to comments on proposed paragraph F.

The remaining paragraphs in the proposed instructions for clause D–30 (paragraphs 3, 5, and 7) did not receive specific comment.

Proposed Paragraph F—Water Facilities and Water Rights

Proposed paragraph F provided that ''necessary,'' in relation to a water facility or water right, means that without that water facility or water right, the ski area would not be able to operate. Proposed paragraph F provided that ''primarily supports'' in relation to a water facility or water right means that the water facility or water right serves the ski area improvements on NFS lands significantly more than any other use.

Comment: Several commenters believed that the definitions of ''necessary'' and ''primarily supports'' in the proposed clause were so broad that they could include water rights located off NFS lands used to support the operation of ski area improvements and could even include the water rights of municipal water providers that are used in connection with ski areas. These commenters believed such expansive coverage overreaches and should be narrowed to apply only to water rights that are necessary for operation of a ski area and to exclude any other water rights, such as water rights on non-NFS lands or water acquired from municipalities. Additionally, some commenters stated that, as proposed, the term ''necessary'' implied a determination of whether an individual water right or water facility is essential to the viability of the entire ski area. There was a concern that if considered individually, a water right might not be deemed necessary, whereas in total, a ski area's portfolio of water rights would be necessary for operation of the ski area. Several commenters recommended either redefining ''necessary'' to recognize the cumulative necessity of water rights or deleting the term ''necessary'' because the term ''primarily supports'' is adequate.

Some commenters stated that to determine whether a water right ''primarily supports'' a ski area, a comparison would be made between water associated with a ski area use and any other use. Since water at ski areas is used for a wide assortment of purposes, these commenters believed it would be difficult to determine whether

the water primarily supports a ski area. For example, water may be used inside or outside the ski area permit boundary on either NFS or private land for condominiums, golf courses, retail shops, and restaurants. These commenters also believed it would be difficult to determine whether a particular water right ''primarily supports'' ski area use because there are seasonal changes in the use of a particular water right. For example, snowmaking in the winter may change to golf course irrigation in the summer.

Commenters noted that the amount of necessary water for a ski area is dynamic and that permit holders need flexibility to manage their water rights in the best interest of ski areas. Another commenter noted that there is variability from year to year as well as over the 40-year term of a ski area permit in the amount of water that is necessary to operate a ski area. These variations may be due to the amount of natural snowfall, levels of visitation, increases in snowmaking efficiency or other operational and technical advances in the use of water, availability of water based on seniority in appropriation, and changes in climate. This commenter stated that all these variables can result in decreases or increases in the amount of water necessary to support ski area operations.

One commenter stated that the proposed definition of ''necessary'' in paragraph F is too narrow because many water rights are important to the planned and approved operation of the ski area. According to this commenter, the ski area could still operate with a reduced level of service or quality of skiing experience in their absence. For example, the partial loss of snowmaking water supply during one year might not result in closing the ski area, but those snowmaking water rights should nonetheless be protected under the new clause. This commenter believed that, under the proposed directive, a ''necessary'' water facility or water right would be subject to the new clause only if it also ''primarily supports'' the ski area operation.

Another commenter believed that the combination of ''necessary'' and ''primarily supports'' was problematic and that a particular water right serving multiple purposes, such as domestic uses for condominiums and commercial operations at the base of a ski area and snowmaking inside the permit boundary, should not result in the exclusion of the entire water right from the protections of the new clause.

One commenter expressed concern that the term ''sufficient water'' was not defined, which would create ambiguity for States and permit holders. This commenter sought clarity as to whether water associated with water rights and water facilities that are ''necessary for'' and that ''primarily support'' a ski area would be deemed sufficient. Commenters requested that the Forest Service provide reasonable criteria and guidance for determining sufficiency of water for ski area operations because the concept is complex and could involve detailed hydrological analysis and projections of future climatic conditions. Commenters believed that establishing criteria would avoid disputes, unreasonable expense, and delay.

One commenter asserted that with respect to existing water rights, a water court has already determined sufficiency of water for ski area operations and approved water use for ski area purposes. This commenter encouraged Forest Service recognition of the water court's or State engineer's determinations of sufficiency of water and appropriateness of water use and acceptance of these findings. This commenter noted that the permit holder's water rights may be used at a ski area or they may be used at the holder's discretion to supply water for other purposes, provided that sufficient water remains to operate the ski area.

One commenter observed that the requirement for sufficient water to be available is an important tool for the Forest Service to determine whether new water facilities, such as snowmaking systems, will be able to operate in dry years. However, this requirement may not ensure that sufficient water is available to operate in dry years in every case, for example, where the facility is served by water diverted from a location off NFS lands. This commenter also stated that, as proposed, this requirement did not explicitly apply to the issuance of a permit, which would present an important opportunity to conduct a sufficiency analysis.

Another commenter was concerned that ensuring sufficient water to operate the ski area could conceivably dry up a stream and negatively affect flow-dependent resources and aquatic organisms, especially when water is withdrawn during low-flow periods in winter. This commenter recommended amending the second-to-last paragraph of the instructions to address the requirements of streamflow-dependent resources.

Response: The Agency agrees that the amount of water necessary to operate a ski area may fluctuate from year to year and that the proposed definition of the term ''necessary'' is problematic. The Agency has removed the term ''necessary'' from the final directive. The Agency has changed the phrase ''primarily supports'' to the phrase ''used primarily for operation of the ski area.'' In relation to a water facility or water right, ''used primarily for operation of the ski area'' means that the water facility or water right provides significantly more water for operation of the permitted portion of the ski area than for any other use. Water facilities and water rights that are used primarily for operation of a ski area are relevant to the provisions of the new clauses, including those that address sufficiency of water for ski area operations.

In addition, the Agency has added a definition for the term ''sufficient quantity of water to operate the ski area.'' This term means that under typical conditions, taking into account fluctuations in utilization of the authorized improvements, fluctuations in weather and climate, changes in technology, and other factors deemed appropriate by the applicant's qualified hydrologist or licensed engineer, the applicant has sufficient water rights or access to a sufficient quantity of water to operate the permitted facilities, and to provide for the associated activities authorized under the ski area permit in accordance with the approved operating plan. This new term and definition are consistent with the shift from non-severability of water rights to sufficiency of water to operate the ski area. The definition recognizes that the quanity of water is not static and allows for appropriate factors to be considered in the sufficiency determination. Before issuance of a new or modified ski area permit, applicants will be required to submit documentation demonstrating that they hold or can obtain a sufficient quantity of water to operate the permitted portion of the ski area. The submitted documentation will identify any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. Addressing streamflow-dependent resources generally is beyond the scope of this directive.

Proposed Paragraph F.1—Water Facilities

Proposed Paragraph F.1.a

This provision defined the term ''water facility'' to mean a ditch, pipeline, reservoir, well, tank, spring, seepage, or any other facility or feature that withdraws, stores, or distributes water.

Comment: Several commenters opined that the definition of ''water facility'' in the proposed directive was not limited to facilities located on NFS lands and should be narrowed to apply only to those facilities.

Response: The Agency has revised the definition of ''water facility'' in the final directive to clarify its scope. The definition in the final directive references only human-made features and removes references to natural features such as springs and seeps. In addition, the Agency has added the following definition for ''ski area water facility'' in the final directive: ''Any water facility on NFS lands that is authorized by this permit and used primarily for operation of the ski area authorized by this permit.'' This definition clarifies that only water facilities that are used primarily for operation of a ski area may be authorized by the ski area permit. The Forest Service does not authorize water facilities located on non-NFS lands.

Proposed Paragraph F.1.b

This proposed provision stated that no water facility for which the point of withdrawal, storage, or distribution is on NFS lands may be initiated, developed, certified, permitted, or adjudicated by the holder unless expressly authorized by a special use authorization.

Comment: One commenter believed that proposed paragraph F.1.b would provide for total Forest Service control over the adjudication, operation, and transfer of surface water and groundwater rights on NFS lands and that the requirement for Forest Service permission for slight changes to those water rights would constitute a taking of private property in contravention of State water law, direction from Congress, and U.S. Supreme Court rulings. Another commenter alleged that a water right appropriator does not need a landowner's permission to adjudicate water rights on the landowner's lands. Yet another commenter questioned the need for and the Agency's authority to require authorization prior to initiation or adjudication of water rights associated with a water facility on NFS lands. This commenter observed that it is common practice for water users to appropriate and adjudicate water rights on Federal land prior to obtaining a special use permit. One commenter observed that the Forest Service can impose reasonable conditions on the development of water rights located on NFS lands through its special use permit process when facilities to access those water rights are developed, but not when the water rights are acquired.

Additionally, a commenter was concerned that the proposed restrictions on taking action regarding water facilities on NFS lands without a special use authorization would apply to water facilities that do not primarily support a ski area. One commenter observed that the proposed restrictions would affect diversions of water off NFS lands and would limit exercise of the associated water rights. A commenter also expressed concern that the permitting process can take a considerable amount of time, during which the priority date, and therefore the value of the water right, would be in jeopardy.

One commenter recommended limiting paragraph F.1.b to construction of water facilities on NFS lands and deleting the reference to ''initiation, permitting, or adjudication of water rights on NFS lands.'' Others suggested that the provision be revised to clarify that the appropriation and adjudication of a water right for ski area operations on NFS lands are subject to State law and are not pre-conditioned on the existence of Forest Service permission because the Forest Service has agreed to be bound by State water law.

Response: The Forest Service agrees that proposed paragraph F.1.b to a certain degree conflates acquisition of water rights from the State with Forest Service authorization of water facilities on NFS lands. In addition, paragraph F.1.b is unnecessary to the extent it provides that water facilities on NFS lands must be authorized by a special use authorization, as this requirement is already stated in applicable Forest Service regulations. Therefore, the Agency has removed proposed paragraph F.1.b from the final directive.

Proposed Paragraph F.1.c

Proposed paragraph F.1.c provided that the United States may place any conditions on installation, operation, maintenance, and removal of any water facility that are deemed necessary by the United States to protect public property, public safety, and natural resources on NFS lands. Numerous comments were received on this provision.

Comment: Some commenters interpreted proposed paragraph F.1.c as a mechanism for the Forest Service to manage water use and water rights on NFS lands. These commenters noted that the Agency's authority to condition special use authorizations is not limitless, and that while the National Forest Ski Area Permit Act allows the Secretary to make permit changes from time to time, those changes must be in accordance with applicable law. These commenters recommended that proposed paragraph F.1.c be revised to add ''in accordance with applicable laws.''

Another commenter observed that when the Forest Service has raised the possibility of imposing a bypass flow on an existing water facility, a solution has been negotiated that protects both the water user who is seeking approval to use Federal land and the national objectives and interests of taxpayers. This commenter observed that the proposed directive provides flexibility and represents a rededication and commitment to common-sense water policies on Federal lands without jeopardizing the legitimate interests of taxpayers, ordinary citizens who use and enjoy those lands, or corporate permit applicants like ski areas. Additionally, this commenter observed that regardless of disagreement over the Forest Service authority to impose bypass flow requirements, many water rights holders with water facilities on NFS lands have found innovative ways to accommodate their water rights while meeting the water needs of other forest resources. The commenter credited the Forest Service with showing a growing willingness to accept workable alternatives to the imposition of bypass flow conditions.

Several commenters favored the ability granted by proposed paragraph F.1.c to condition use of water facilities on NFS lands to protect aquatic and other environmental resources (*e.g.,* by imposing bypass flow requirements). These commenters believed that the Agency has the legal authority and the legal obligation to do so and that failure to do so could expose the United States to substantial litigation risk. Other commenters noted that in some cases, the imposition of certain conditions such as bypass flow requirements may be the only practical way to protect environmental resources. Commenters cited State and Federal cases and Federal statutes in support of their position.

Some commenters were concerned generally about environmental and social impacts associated with ski area water rights. One commenter requested that the Forest Service first determine how much water is needed to meet public purposes, such as instream flows for aquatic life, the movement of wood and sediment through the stream system, and seasonal inundation of floodplains, before allowing ski areas to divert and appropriate water. Another commenter requested that the Forest Service ensure that the proposed directive protect all public rights and interests in water on NFS lands, including Federal reserved water rights that date back to the establishment of

the national forest reserves. This commenter wanted the Forest Service to compensate for impacts on flows due to climate change, such as impacts from rain on snow, by protecting flows during critical periods and avoiding activities that would increase peak flows. This commenter also recommended evaluating snowmaking practices to ensure that hydrology, peak flows, and water quality are not adversely affected.

Response: The Agency has modified proposed paragraph F.1.c in the final directive. The first sentence of paragraph F.1.c in the final directive provides that the authorized officer may place conditions, as necessary to protect public property, public safety, and natural resources on NFS lands, on the installation, operation, maintenance, and removal of any water facility, but only in accordance with applicable law. The Forest Service recognizes that its actions must be in accordance with applicable law and that the Agency has authority under applicable law to condition special use authorizations that allow use and occupancy of NFS lands to protect public property, public safety, and natural resources on NFS lands.

The second sentence of paragraph F.1.c in the final directive states that clause D–30 does not expand or contract the Agency's authority to place conditions on the installation, operation, maintenance, and removal of water facilities at issuance or reissuance of the permit, throughout the permit term, or otherwise. Thus, clause D–30 does not affect the Agency's authority to place conditions on water facilities under existing legal authority.

The third sentence of paragraph F.1.c in the final directive states that the holder must comply with present and future laws, regulations and other legal requirements in accordance with section I of the ski area permit. This provision reinforces existing provisions in the ski area permit that provide protection for natural resources in connection with water facilities.

In response to concerns regarding environmental impacts associated with water facilities, the sufficiency documentation an applicant must submit before receiving a new or modified ski area permit must include any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. The Forest Service conducts environmental analysis, as appropriate, on a site-specific basis of the effects of water facilities on NFS lands. This type of site-specific analysis is beyond the scope of this notice of final directive.

Proposed Paragraph F.1.d

Proposed paragraph F.1.d provided that only water facilities that are necessary for and that primarily support operation of a ski area may be authorized by a ski area permit.

Comment: One commenter recommended that proposed paragraph F.1.d provide examples of what is and what is not considered necessary for ski area operations. This commenter suggested that snowmaking and on-mountain restaurant uses may be necessary for ski area operations, but that base area water needs for condominiums, golf courses, and other uses not authorized by the ski area permit should not be considered necessary for ski area operations.

One commenter believed this provision would impose unreasonable limitations on water facilities within the permit boundary. This commenter stated that ''necessary'' as proposed in paragraph F.1.d would impose an unreasonably high threshold and would include only facilities that are ''mission-critical,'' would create confusion at the field level, and would invite controversy and possibly third-party challenges regarding whether a proposed water facility met the applicable standard.

Response: The Agency agrees that the term ''necessary'' is not needed. The Agency has removed the term ''necessary'' from paragraph F.1.d in the final directive and has revised this provision to clarify that only water facilities which are on NFS lands and are used primarily for operation of the ski area may be authorized by the ski area permit.

Proposed Paragraph F.1.e

Proposed paragraph F.1.e provided that any change in the water facilities authorized by the permit would result in termination of the authorization for those water facilities, unless the change was expressly authorized by a permit amendment. Examples of changes to water facilities included (1) use of the water in a manner that does not primarily support operation of the ski area authorized by this permit; (2) a change in the ownership of associated water rights; or (3) a change in the beneficial use, location, or season of use of the water.

Comment: One commenter raised a concern that if unauthorized changes to water facilities resulted in termination of the authorization, it would create an incentive for the holder not to make changes to water facilities that should be made. This commenter also observed that if the penalty for a violation is merely the loss of the right to use the water facility, the holder may abandon a water facility even if it is essential to providing the current level of public service. Other commenters asserted that restrictions on the ability to make changes to water facilities per paragraph F.1.e would impede the holder's ability to maximize the value and utility of the associated water right and would undercut the Agency's interest in sustaining ski area operations.

One commenter observed that proposed paragraph F.1.e does not clearly identify the types of actions that are prohibited without authorization and recommended specifically listing all changes to a water facility that, if not authorized by a permit amendment, would trigger termination of authorization for the water facility. Similarly, another commenter observed that it would be difficult to determine consistently which modifications require approval because States define water rights broadly and do not assign a percentage of the total water right dedicated to each use. This commenter noted that the purposes of a ski area water right might simply be listed as ''commercial or domestic'' or ''irrigation, domestic water for condominiums and homes, restaurants, and snowmaking,'' and the amount of water a ski area uses for each purpose could change.

Another commenter raised a concern that this clause would impose an undue burden on permit holders by placing restrictions on holders' ability to obtain, develop, maintain, or enhance water rights and thus would create additional impediments to the development of water resources to support permitted ski areas. Additionally, this commenter noted that the requirement for Forest Service approval of changes would delay compliance with State deadlines and could result in the forfeiture of water rights or impairment of their value.

Response: The Agency agrees that clarification is needed regarding the types of changes to water facilities that, if not authorized by a permit amendment, will result in termination of authorization of the water facilities under the ski area permit. In contrast to proposed paragraph F.1.e, which provided that any unauthorized change to water facilities would result in termination of their authorization under the ski area permit, paragraph F.1.e in the final directive provides that if, due to a change, a ski area water facility will primarily be used for purposes other than operation of the ski area,

authorization for that water facility under the ski area permit will terminate. Paragraph F.1.e in the final directive gives examples of the types of changes to water facilities that would result in their being used primarily for purposes other than operation of the ski area. These examples include a change in the ownership of the water facility or the associated water rights or a change in the beneficial use, location, or season of use of the water. Other changes to ski area water facilities could also result in their ceasing to be used primarily for operation of the ski area.

Proposed Paragraph F.1.f

Proposed paragraph F.1.f provided that the holder must obtain a separate special use authorization to initiate, develop, certify, or adjudicate any water facility on NFS lands that does not primarily support operation of the ski area authorized by the ski area permit.

Comment: One commenter observed that water right adjudications do not require prior permission from the owner of the land on which the point of diversion will be located. This commenter stated that the Forest Service has agreed to be bound by State law and has no authority to use the requirement for a new special use authorization to adjudicate water rights on NFS lands.

One commenter was concerned that if a separate permit is required for water facilities on NFS lands that do not primarily support operation of the ski area, that permit would include water clauses for other special uses, which the commenter believed require transfer of water rights to the United States, or would provide for claiming a possessory interest in water rights in the name of the United States, consistent with FSM 2541.32. This commenter believed that Agency testimony before Congress is inconsistent with claiming a possessory interest in ski area water rights as provided in FSM 2541.32 and that the Agency should clarify in the final directive that it will not require ski areas to transfer ownership of water rights to the United States in any separate permit for water facilities on NFS lands that do not primarily support operation of a ski area.

Response: The Agency has revised proposed paragraph F.1.f and consolidated it with paragraph F.1.e in the final directive. Paragraph F.1.e in the final directive provides that when authorization for a water facility under the ski area permit terminates because a change in the water facility results in its ceasing to be used primarily for operation of the ski area, a separate special use authorization is required to operate that water facility or to develop a new water facility, unless the holder has a valid existing right for the water facility to be situated on NFS lands. A valid existing right in this context is a legal right, typically a statutory right, to use and occupy NFS lands. In the absence of a valid existing right, a separate special use authorization is required under these circumstances because it is not appropriate to utilize the National Forest Ski Area Permit Act to authorize water facilities that do not primarily support operation of a ski area. 16 U.S.C. 497b(a), (b). Paragraph F.1.e in the final directive also provides that unless the holder has a valid existing right for the water facility to be situated on NFS lands, if the holder does not obtain a separate special use authorization for these water facilities, the holder must remove them from NFS lands.

The Forest Service agrees that it is inappropriate to use the words ''initiate,'' ''develop,'' ''certify,'' or ''adjudicate'' in connection with proper authorization of a new water facility and has removed these words from paragraph F.1.e in the final directive. However, it would be prudent for the permit holder to communicate with the Forest Service regarding the likelihood of approval of a proposed water facility, regardless of whether it is used primarily for operation of the ski area, before incurring expenses in acquiring associated water rights.

Neither the proposed nor the final directive provides for the United States to claim a possessory interest in ski area water rights. The instructions for clauses D–30 and D–31 provide that the possessory interest policy in FSM 2541.32, paragraph 2, will not apply to ski area permits. Moreover, under paragraph F.1.e in the final directive, when the water facilities continue to support approved ski area operations at any time of year, the separate permit will not contain the possessory interest provision, any waiver provision, or any power of attorney provision. The Agency will develop new or modified water clauses for these permits.

Proposed Paragraph F.1.g

Proposed paragraph F.1.g provided for documentation of restrictions on withdrawal and use of water that are required by regulation or policy, an adjudication, or a settlement agreement or that are based on a decision document supported by environmental analysis.

Comment: Commenters opined that proposed paragraph F.1.g is very broad and would allow the Forest Service to limit the exercise of privately held water rights established under State law by unilaterally imposing restrictions without statutory or regulatory authority. Specifically, these commenters were concerned that a single ski area permit administrator could determine that a regulation or policy requires restrictions on withdrawals and impose those limits under the permit; that Forest Service staff is not qualified to interpret the regulations of other Federal and State agencies; that restrictions could be based on any settlement agreement with any party on any subject matter, regardless of whether the holder of the water right was a party or had notice and regardless of whether the Forest Service was a party to that settlement agreement; that restrictions based on a decision document supported by environmental analysis would not be limited to decision documents prepared by the Forest Service and might include past or future critical habitat designations for aquatic species made by the U.S. Fish and Wildlife Service; and that allowing restriction of water rights ''based on'' environmental documents would leave too much discretion to the permit administrator. One commenter believed that proposed paragraph F.1.g did not accomplish the stated objective in the **Federal Register** notice for the proposed directive of ensuring the availability of water resources for ski areas and recommended deleting proposed paragraph F.1.g.

Response: The Agency believes that it is important to document existing restrictions on withdrawal and use of water from the permitted NFS lands so that permit administrators can ensure that these legal requirements are met during the typically 40-year term of the permit. However, the Agency agrees that the scope of the restrictions should be limited to those that are legally required and that it would be more appropriate to include the requirement in the instructions for the new water clauses. Consequently, the instructions for the new water clauses in the final directive require the documentation of a sufficient quantity of water submitted by an applicant prior to issuance of a new or modified ski area permit to identify any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. Additionally, the Agency has removed the table in the water clause appendix on restrictions on withdrawal and use of water, since that information will be

contained in the sufficiency documentation.

Proposed Paragraph F.2—Water Rights

Proposed paragraph F.2 defined the term ''water right'' to mean a right to use water that is recognized under State law under the prior appropriation doctrine. Additionally, proposed paragraph F.2 provided that the permit does not confer any water rights.

Comment: One commenter recommended that the term ''water right'' be defined in a way that could be consistently applied, regardless of State definitions and processes. This commenter noted that in Colorado a conditional water decree or right establishes a priority date for the possible future grant of an absolute water right. In Colorado, an individual or entity can ''use'' a water right only when that individual or entity has put the water to beneficial use and has been granted an absolute water right. Treating a conditional water right as a water right in the proposed directive would in many respects be like treating an application as a water right in other prior appropriation doctrine States.

Response: The Forest Service believes that the definition of ''water right'' in the proposed directive is appropriate. The definition should encompass any water right that is recognized under State law, including conditional water rights in the State of Colorado. The Agency has not changed the proposed definition of ''water right'' in the final directive.

Proposed Paragraph F.3—Acquisition and Maintenance of Water Rights
Proposed Paragraph F.3.a

This proposed paragraph defined ''NFS ski area water right'' to mean ''any water right acquired by the holder or a prior holder that is for water facilities that would divert or pump water from sources located on NFS lands, either inside or outside the permit boundary, for use that primarily supports operation of the ski area authorized by this permit.''

Comment: Commenters objected to the term ''NFS ski area water right'' on the grounds that it implies that these water rights belong to the United States; that the water rights are appurtenant to NFS lands; and that the Forest Service, rather than the State, grants the water rights. These commenters also objected to the term on the grounds that it could include water rights that may be unnecessary for ski area operations and recommended that the definition be revised to apply only to water rights that are necessary for ski area operations. It was also recommended that ''NFS'' be removed from the term.

Response: The Agency agrees that ''NFS'' is unnecessary in the term ''ski area water right'' and may lead to confusion. Consequently, the Agency has removed ''NFS'' from that term in the final directive and has simplified the definition to include any water right for use of water from a point of diversion on NFS lands, either inside or outside the permit boundary, that is primarily for operation of the ski area.

In addition, the Agency has added terms and definitions for two categories of ski area water rights: ''original'' water rights and ''acquired'' water rights. Using these terms of art simplifies the wording in subsequent clauses that differentiate between these two types of ski area water rights. An ''original water right'' is defined as ''any existing or new ski area water right with a point of diversion that was or is, at all times during its use, located within the permit boundary for this ski area and originally established under State law through an application for a decree to State water court, permitting, beneficial use, or otherwise recognized method of establishing a new water right, in each case by the holder or a prior holder of the ski area permit.'' The definition further clarifies that an original water right cannot become an acquired water right by virtue of sale of the water right to a subsequent ski area permit holder.

An ''acquired water right'' is defined as ''any ski area water right that is purchased, bartered, exchanged, leased, or contracted by the holder or by any prior holder.'' The distinguishing characteristics between these two types of ski area water rights is whether they were originally acquired from the State by a ski area permit holder to be used primarily for the operation of the ski area within the ski area permit boundary.

Comment: One commenter suggested that the definition for ''NFS ski area water right'' be revised to limit its applicability to the holder's interest in water facilities and water rights because it may be only a partial interest. Another commenter believed that water rights that would not constitute NFS ski area water rights, such as water rights that are used for ski area purposes but arise from a point of diversion on private land, could still be affected by the proposed directive. As an example, this commenter cited an unauthorized change in ownership of a snowmaking pipeline diverting water from a stream on private land to the permitted ski area on NFS lands, which could result in termination of authorization for that water facility. Not having authorization for use of the water facility would in turn limit exercise of the associated water right.

One commenter wanted to know the reason for treating water rights that arise from a point of diversion on NFS lands differently from water rights that arise from a point of diversion off NFS lands. This commenter also requested consideration of alternatives that would provide protection of all ski area water rights, regardless of land ownership at the point of diversion. Another commenter requested that further consideration be given to the effectiveness of the proposed directive in accomplishing its underlying policy objectives with respect to water rights for water that is stored, diverted, or pumped on non-NFS lands to support authorized ski area facilities within the permit area.

Response: Water rights that are used for ski area purposes but arise from a point of diversion located on non-NFS lands are not affected by this final directive. Consistent with the definition for ''ski area water right'' in the final directive, which applies to water rights that are used primarily for operation of the ski area and that arise from a point of diversion located on NFS lands, only water facilities on NFS lands that are used primarily for operation of the ski area may be authorized under the ski area permit. The Forest Service does not authorize water facilities located on non-NFS lands. Therefore, in the example cited by the commenter, there would be no Forest Service permit, the water facility would not be subject to permit terms addressing change in ownership of the water facility, and there would be no effect on exercise of associated water rights.

Proposed Paragraph F.3.b

Proposed paragraph F.3.b provided that NFS ski area water rights must be acquired in accordance with applicable State law; that the holder must maintain NFS ski area water rights, including Federally owned NFS ski area water rights, for the term of the permit, as well as for the term of any subsequent permits that may be issued to the holder for the uses authorized by the permit; that the holder is responsible for submitting any applications or other filings that are necessary to protect those water rights in accordance with State law; and that the holder and not the United States must bear the cost of acquiring, maintaining, and perfecting NFS ski area water rights, including Federally owned NFS ski area water rights.

Comment: Some commenters sought clarity on what it means to ''maintain''

NFS ski area water rights. One commenter suggested that the term ''maintain'' lends itself to water facilities but is unclear as applied to water rights. Some commenters asked whether voluntary or court-ordered surrender of part of a conditional water right would constitute a failure to maintain the water right under proposed paragraph F.3.b. Some commenters asked whether loss of a water right due to failure to maintain it would trigger termination of the permit per proposed paragraph F.1.e.

Response: Voluntary or court-ordered surrender of part of a conditional water right would not constitute a failure to maintain the water right. Maintaining a water right means exercising due diligence to preserve it in accordance with applicable State law, including submitting required filings. The holder, rather than the Forest Service, is responsible for submitting applications or other filings that are necessary to maintain ski area water rights and for the cost of those filings. The Agency has redesignated proposed paragraph F.3.b as paragraph F.3.c in the final directive and simplified it to provide that the holder shall bear the cost of establishing, acquiring, maintaining, and perfecting original water rights, including any original water rights owned solely or jointly by the United States. Loss of a water right due to failure to maintain it will trigger termination of authorization of the associated water facility under the ski area permit (not termination of the ski area permit) under paragraph F.1.e in the final directive only if the associated water facility ceases to be used primarily for operation of the ski area.

Comment: Several commenters requested clarification that proposed paragraph F.3.b would not apply to third-party water rights, such as water rights leased from municipalities, that are used in connection with a ski area or that are located on NFS lands.

Response: Paragraph F.3.b in the proposed directive has been moved to paragraph F.3.c in the final directive and has been clarified so that it will not apply to water rights leased from third parties and other acquired water rights as defined in the final directive. Paragraph F.3.c in the final directive applies only to original water rights as defined in the final directive, including those owned solely or jointly by the United States.

Comment: One respondent believed that the requirement to maintain NFS ski area water rights would unlawfully insert the Forest Service into the day-to-day management of ski area water rights.

Response: Paragraph F.3.c in the final directive does not insert the Forest Service into day-to-day management of ski areas water rights. Rather, this paragraph takes the Forest Service out of day-to-day management of ski area water rights by providing for the holder to establish, acquire, maintain, and perfect original water rights.

New Paragraph F.3.b

The Agency has added a new paragraph F.3.b in the final directive. This new provision requires that an inventory of all ski area water facilities and original water rights be included in an appendix to the ski area permit and that the inventory be updated by the holder upon reissuance of the permit, installation or removal of a ski area water facility, when a listed ski area water facility is no longer authorized by the ski area permit, or when an original water right is no longer used for operation of the ski area. This new paragraph is needed to administer the requirements in the new water clauses regarding ski area water facilities and original water rights.

Proposed Paragraph F.3.c

Proposed paragraph F.3.c provided that NFS ski area water rights that are jointly or solely owned by the United States must remain in Federal ownership; that if the holder's ski area permit utilizes NFS ski area water rights acquired in the name of or transferred to the United States or held jointly with the United States, the holder must submit any applications or other filings that are necessary to protect those water rights as the agent of the United States in accordance with State law; and that notwithstanding the holder's obligation to maintain Federally owned NFS ski area water rights, the United States reserves the right to take any action necessary to maintain and protect those water rights, including submitting any applications or other filings that may be necessary to protect those water rights.

Comment: Some commenters suggested that the Agency lacked the authority to force a permit holder to act as an agent of the United States by requiring the holder to maintain and bear the cost of acquiring, maintaining, and perfecting Federally owned NFS ski area water rights. These commenters also stated that the Forest Service cannot delegate its legislated duty to manage NFS lands to non-Federal entities.

Response: The Forest Service has broad authority to condition special use authorizations, including the authority to require that the holder of a ski area permit establish, acquire, maintain, and perfect Federally owned original water rights and bear the cost of those actions.

Comment: One commenter believed that the requirement in proposed paragraph F.3.c that any ski area water rights owned by the United States remain in Federal ownership was inconsistent with the purpose of the proposed directive and was unfair. This commenter asserted that permit holders who complied with prior requirements in ski area water clauses to transfer ownership to the United States should be able to recover those water rights under the final directive.

Response: The final directive is not retroactive. Any water right owned solely or jointly by the United States was acquired in accordance with permit terms that were in effect at that time. Additionally, the Forest Service lacks authority to forfeit ownership of water rights to ski area permit holders. In an investigation of a land exchange in Utah conducted by the U.S. Department of Agriculture, Office of Inspector General (OIG), OIG stated that if water rights were excess to public needs, the water rights could be exchanged for properties or services of equal value. Excess water rights may also be disposed of pursuant to U.S. General Services Administration real property procedures. The Forest Service is not aware of any authority that would allow the Agency to relinquish title to water rights other than by exchange or disposal as noted above.

In the final directive, the Agency has moved proposed paragraph F.3.c to paragraph F.3.d and revised it to state that original water rights owned solely by the United States and the United States' interest in jointly owned original water rights shall remain in Federal ownership. In addition, paragraph F.3.d in the final directive provides that notwithstanding the holder's obligation to maintain original water rights owned by the United States, the United States reserves the right to take any action necessary to maintain and protect those water rights, including submitting any applications or other filings that may be necessary to protect the water rights.

Proposed Paragraph F.3.d

Proposed paragraph F.3.d provided that if a water facility corresponding to an NFS ski area water right was or is initiated, developed, certified, permitted, or adjudicated by the holder on NFS lands without a special use authorization, then the water facility is in trespass; that the owner of the NFS ski area water right must apply for authorization of the water facility; and that if authorization is denied, the owner of the NFS ski area water right

must promptly remove the point of diversion and water use from NFS lands or must abandon the NFS ski area water right.

Comment: One commenter observed that it may not be possible to determine whether existing water facilities are properly authorized or in trespass because they may not be listed in the ski area permit or identified on a map attached to the permit. This commenter stated that, in practice, ski area improvements may have been considered authorized if they were located within the permit boundary and approved in a decision document pursuant to an environmental analysis. Several commenters asserted that the proposed directive would have retroactive effect because many water facilities for previously adjudicated ski area water rights would be found in trespass. These commenters also noted that proposed paragraph F.3.d is contrary to State laws that do not require landowner approval before adjudication of a water right. These commenters also believed that proposed paragraph F.3.d is contrary to numerous authorizations that allow development of privately owned water facilities on NFS lands and could jeopardize the availability of water for ski area operations. These commenters recommended that proposed paragraph F.3.d be revised or deleted. One commenter opined that the Agency lacks the legal authority to apply rules retroactively and suggested striking the words ''was or'' from proposed paragraph F.3.d.

Response: The Agency is removing proposed paragraph F.3.d from the final directive because this provision is unnecessary. Existing regulations at 36 CFR 251.50(a) require a special use authorization for water facilities on NFS lands. Moreover, per paragraph 1 in the final instructions for the new ski area water clauses, all water facilities on NFS lands that are used primarily for operation of the ski area will be authorized under the ski area permit. Existing water facilities on NFS lands which are authorized by a separate, valid special use permit may remain under that separate permit, including upon reissuance, if eligible. These water facilities will not be eligible for reissuance under a separate permit if they are used primarily for operation of the ski area and the separate permit is issued under a statute other than the National Forest Ski Area Permit Act. This Act provides for ski areas and associated facilities on NFS lands to be authorized under its provisions. 16 U.S.C. 497b(a), (b). In that case, upon termination of the separate permit, the water facilities will be authorized under the ski area permit.

In addition, under paragraph F.1.e in the final directive, when authorization for a water facility under the ski area permit terminates because a change in the water facility results in its ceasing to be used primarily for operation of the ski area, a separate special use authorization is required to operate that water facility or to develop a new water facility, unless the holder has a valid existing right for the water facility to be situated on NFS lands. A valid existing right in this context is a legal right, typically a statutory right, to use and occupy NFS lands. In the absence of a valid existing right, a separate special use authorization is required under these circumstances because it is not appropriate to utilize the National Forest Ski Area Permit Act to authorize water facilities that do not primarily support operation of a ski area. 16 U.S.C. 497b(a), (b). Paragraph F.1.e in the final directive also provides that unless the holder has a valid existing right for the water facility to be situated on NFS lands, if the holder does not obtain a separate special use authorization for these water facilities, the holder must remove them from NFS lands.

Proposed Paragraph F.4—Non-Severability of Certain Water Rights

Proposed Paragraph F.4.a

Proposed paragraph F.4.a provided that when the United States owns any NFS ski area water rights, the Forest Service may not take any action that would adversely affect availability of those water rights to support operation of the ski area during the term of the permit, unless deemed necessary by the Forest Service to satisfy legal requirements.

Comment: Several commenters did not believe that proposed paragraph F.4.a provided enough assurance that the Forest Service would not take any action that would adversely affect the availability of Federally owned NFS ski area water rights for ski area operations during the permit term. Some commenters asserted that it was unclear what was meant by ''legal requirements'' that might release the Agency from this commitment and questioned whether land management plan standards and guidelines would be deemed legal requirements. Additionally, commenters recommended narrowing the term ''legal requirement'' to ''the Endangered Species Act'' or striking the words ''unless deemed necessary by the Forest Service to satisfy legal requirements'' from the final directive. One commenter suggested striking proposed paragraph F.4.a entirely and addressing the Forest Service's commitment not to take any action adversely affecting the availability of Federally owned NFS ski area water rights on a case-by-case basis. One commenter suggested that this provision be revised to give ski area permit holders the right to approve changes the Forest Service makes to Federally owned NFS ski area water rights, so that they are dedicated to ski area operations for the benefit of the subsequent holder.

Response: In the final directive, the Agency has revised paragraph F.4.a to state that the Agency shall not divide or transfer ownership of or seek any change in Federally owned water rights used by the holder that would adversely affect their availability for operation of the ski area during the term of this permit, unless required to comply with a statute or an involuntary court order that is binding on the Forest Service.

Paragraph F.1.c in the final directive states that clause D–30 does not expand or contract the Agency's authority to place conditions on the installation, operation, maintenance, and removal of water facilities at issuance or reissuance of the permit, throughout the permit term, or otherwise. Thus, paragraph F.4.a does not expand or contract the Agency's ability to place conditions on water facilities under existing legal authority.

Proposed Paragraph F.4.b

Proposed paragraph F.4.b provided that when the holder has an interest in any NFS ski area water rights, or water rights that the holder has purchased or leased from a party other than a prior holder that are changed or exchanged to provide for diversion from sources on NFS lands for use that primarily supports operation of the ski area authorized by the permit (''changed or exchanged water rights''), the holder may not take any action during the permit term that would adversely affect the availability of those water rights to support operation of the ski area authorized by the permit, unless approved in writing in advance by the authorized officer. Actions that require advance written approval by the authorized officer included any division or transfer of ownership of the water rights and any modification of the type, place, or season of use of the water rights.

Comment: Some commenters believed that the restriction in proposed paragraph F.4.b would inhibit ski area permit holders' ability to manage their water rights and would substitute the

permit holders' discretion with that of the Forest Service in this context. Other commenters asserted, for example, that a permit holder may desire to sell water rights that once were necessary for ski area operations, but which the permit holder has determined are no longer necessary because of changed circumstances, such as increased efficiency. Alternatively, these commenters suggested that the permit holder may determine that it is in the best interests of the ski area to replace certain sources of necessary water with other sources, but would be unable to do so under proposed paragraph F.4.b. Some commenters believed that this provision would undermine the Forest Service's stated objective of ensuring sustainability of ski areas by impairing the holder's ability to develop and maintain water rights and ultimately would make less water available for successive permit holders. These commenters noted that ski area permit holders have acquired and maintained sufficient water rights at ski areas to provide outstanding recreation to the public on NFS lands at no cost to the Forest Service without a restriction on severability.

One commenter noted that the type of actions that would require approval by the authorized officer, including ''any modification of the type, place, or season of use of the water rights,'' would be difficult to determine consistently because frequently in decrees and certificates States define water rights very broadly or list every conceivable water use. For example, this commenter stated that a decree for one ski area might simply list the uses for a ski area water right as ''commercial and domestic,'' while another decree for a ski area water right might list the uses as ''irrigation and domestic water for condominiums and homes, restaurants, and snowmaking.'' This commenter further noted that the difficulty would be compounded by the fact that States frequently do not assign a percentage of the total water right that is dedicated to each use, which would essentially leave it to the holder to tell the Agency how much water is typically consumed for each use.

Commenters were concerned that the restriction in proposed paragraph F.4.b would apply to water rights that the holder does not own, in addition to water rights the holder has purchased or leased from a party other than a prior holder, and that the Forest Service lacks the authority to impose this restriction. One commenter noted that the Forest Service does not have sole discretion to determine whether it is legally entitled or required to interfere with a ski area water right. These commenters believed that State water administration authorities may also play a significant role in determining the appropriateness of the Forest Service's actions related to water rights. These commenters recommended that the directive recognize the need for the Forest Service to comply with State law and coordinate with State agencies before making any legal determination regarding ski area water rights. These commenters also suggested that the directive recognize the permit holder's right to seek judicial review of the accuracy of the Agency's determination that interference with a water right was required by law. Some commenters were concerned that the restriction in proposed paragraph F.4.b would have a retroactive effect because it would apply to water rights acquired many years ago.

One commenter suggested that the proposed definition for ''changed or exchanged water rights'' was too narrow, in that it would apply only to water rights ''that the holder has purchased or leased from a party other than a prior holder.'' This commenter noted that this proposed definition would not include water rights that (1) are located off NFS lands; (2) are used under a change or exchange decree to allow diversion of water on NFS lands; and (3) were originally appropriated by the current or prior holder of the ski area permit, rather than being ''purchased or leased'' from another party. The commenter believed there is no reason to exclude these water rights from the scope of clause D–30. Another commenter recommended reinforcing that the restriction in proposed paragraph F.4.b would apply not only to purchased or leased ski area water rights, but also to ski area water rights acquired by the holder or a prior holder through appropriation. This commenter also recommended clarifying that the directive would not apply to water purchased by a ski area permit holder from a municipality or other entity that retains ownership of the associated water right.

Response: A primary objective of the proposed and final directives is to address the long-term availability of water for ski areas on NFS lands so as to support the public recreation opportunity they provide and the economies of the local communities that depend on their revenue. The Agency believes that ensuring the long-term availability of water to operate ski areas on NFS lands can be accomplished by focusing on original water rights, *i.e.,* water rights with a point of diversion and use inside the ski area permit boundary that were originally established by a permit holder.

In the final directive paragraph F.4.b applies only to original water rights owned solely or jointly by the holder, which are critical to addressing sufficiency of water to operate a ski area on NFS lands. In addition, in deciding whether to approve division or transfer of or a change to an original water right, the authorized officer must consider any documentation prepared by the holder's qualified hydrologist or licensed engineer demonstrating that the proposed action will not result in a lack of a sufficient quantity of water to operate the permitted portion of the ski area.

Moreover, the Agency has added paragraph F.4.c in the final directive, which states that the holder may seek to change, abandon, lease, divide, or transfer ownership of or take other actions with respect to acquired water rights at any time and solely within its discretion. Paragraph F.4.c in the final directive also provides that, following these actions, paragraph F.1.e will apply to the associated ski area water facilities. Paragraph F.1.e in the final directive addresses proper authorization, and in certain circumstances removal, of water facilities after certain changes have been made in connection with those water facilities.

Paragraph F.4.b in the final directive applies only to original water rights that are owned solely or jointly by the holder, not to water that is purchased or leased from municipalities or other entities. The concerns regarding the definition for ''changed or exchanged water rights'' are moot because the Agency has removed that definition from the final directive. The Forest Service's authority to include a water clause in ski area permits to address availability of water for operation of ski areas on NFS lands is separate from prior appropriation doctrine States' authority to adjudicate and allocate water rights. Paragraph F.4.b in the final directive will not have retroactive effect because it will apply to the current holder of the ski area permit.

Proposed Paragraph F.5—Transfer of Certain Water Rights

Proposed Paragraph F.5.a

Proposed paragraph F.5.a provided that upon termination or revocation of the permit, the holder must sell the holder's interest in any NFS ski area water rights or changed or exchanged water rights to the purchaser of the ski area improvements. Proposed paragraph F.5.a also provided that the holder will

retain the full amount of any consideration paid for those water rights by the purchaser of the ski area improvements, and that those water rights must continue to be used primarily in support of the ski area.

Comment: Several commenters objected to proposed paragraph F.5.a on the grounds that limiting the market for ski area water rights to one buyer would undermine that market and devalue the water rights. Commenters believed the Forest Service should recognize that the existing holder is not the sole source of water rights for a succeeding holder. These commenters noted that the succeeding holder may have purchased water rights from another source prior to applying for the ski area permit or may be able to obtain sufficient water by acquiring water rights from the State or by purchasing or leasing water from municipalities, water districts, reservoir companies, or other entities. These commenters noted that the Forest Service should not restrict the succeeding holder to acquiring water rights from the current holder.

Additionally, commenters questioned whether the Agency's concern regarding insufficiency of water rights for ski area operations was valid. These commenters believed it was unlikely that the holder would sell a viable ski area with insufficient water rights to operate because it would not be in the best interests of the holder to do so. The commenters also asserted that the Forest Service's authority under special use permit regulations at 36 CFR 251.54 and 251.59 to require that succeeding permit holders have a sufficient quantity of water to operate a ski area before issuing a new ski area permit was adequate to address the Agency's concern in this context.

Three commenters believed that the existing permit holder should be required only to offer to sell certain types of ski area water rights at market value to the succeeding permit holder. These commenters believed that requiring the holder to offer to sell, rather than to sell, certain types of ski area water rights to the succeeding permit holder would maintain the value of the water rights while satisfying the Agency's interest in ensuring that sufficient water is available for ski area operations. The commenters believed this approach would be less likely to result in legal controversy because the approach would be more consistent with the ski area's property rights. These commenters recommended that the market value of these water rights be determined by appraisal and that the cost of the appraisal be split between the holder and the succeeding holder. Additionally, the commenters recommended that existing holders not be required to sell to the succeeding holder any water rights associated with undeveloped phases of a ski area's master development plan. Further, these commenters recommended that payment of the full price of ski area water rights purchased by the succeeding holder be due within 30 days of purchase or an otherwise agreed-upon timeframe.

Conversely, other commenters supported the transfer requirement in proposed paragraph F.5.a because the requirement is premised on the commercial reality that water rights associated with a ski area permit are customarily included in the assets that are transferred to a buyer as part of the overall asking price, and because the transfer requirement is consistent with the requirement under the special use regulations at 36 CFR 251.60(i) to remove privately owned improvements from NFS lands when they are no longer authorized. One commenter agreed that it is appropriate for the holder to retain the full amount of the consideration paid by the succeeding holder for the holder's interest in ski area water rights.

One commenter criticized the transfer requirement in proposed paragraph F.5.a as a perpetual allocation by the Federal government of Colorado's scarce water supply to an activity that could become economically marginal, but would be perpetuated as long as an individual or entity is willing to apply for a permit. This commenter believed that tying privately held water rights to a particular use in this manner could thwart the allocation of senior water rights to new and higher-value uses that are important for Colorado's future development.

Response: The Agency believes that its concern regarding sufficiency of water for ski area operations can be addressed by requiring the holder to offer to sell, rather than to sell, the holder's interest in original water rights to the succeeding permit holder. This requirement, combined with the new requirement in the instructions for the purchaser of a ski area to submit documentation demonstrating that the purchaser holds or can obtain a sufficient quantity of water to operate the permitted portion of the ski area prior to obtaining a permit, will meet the Agency's objective of addressing sufficiency of water to operate the ski area while giving the succeeding permit holder the option to purchase the holder's interest in original water rights or obtain water from other sources. Neither the proposed nor the final directive provides for water rights to be tied perpetually to a use that may cease to be viable. Like the proposed directive, the final directive addresses disposition of ski area water rights when the ski area is not reauthorized upon termination or revocation of the permit.

Paragraph F.5.a in the final directive also provides that if the succeeding permit holder declines to purchase original water rights owned solely by the holder, the holder may transfer them to a third party. If the succeeding permit holder declines to purchase the holder's interest in original water rights jointly held with the United States, the holder must offer to sell that interest at market value to the United States. If the United States declines to purchase that interest, the holder may abandon, divide, lease, or transfer its interest at its sole discretion.

Paragraph F.5.a in the final directive imposes no restrictions on the transfer or abandonment of acquired water rights.

Paragraph F.5.a in the final directive provides that the holder will retain the full amount of any consideration paid for the holder's interest in original or acquired water rights. Paragraph F.5.a in the final directive does not prescribe a valuation mechanism or payment timeframe, as the Agency believes these issues are more appropriately addressed by the parties to the sale.

In addition, paragraph F.5.a in the final directive provides that following transfer or abandonment of water rights under that paragraph, paragraph F.1.e will apply to the associated ski area water facilities. Paragraph F.1.e in the final directive addresses proper authorization, and in certain circumstances removal, of water facilities after certain changes have been made in connection with those water facilities.

Proposed Paragraph F.5.b

Proposed paragraph F.5.b provided that if the Forest Service does not reauthorize the ski area, the holder must promptly petition in accordance with State law to remove the point of diversion and water use from NFS lands for any changed or exchanged water rights and NFS ski area water rights owned solely by the holder, or the holder may relinquish those water rights. Proposed paragraph F.5.b further provided that the holder must relinquish its ownership interest in any water rights owned jointly by the holder and the United States.

Comment: Some commenters objected to the requirement in proposed paragraph F.5.b to remove from NFS lands the point of diversion for any changed or exchanged water rights or

NFS ski area water rights owned solely by the holder if the ski area is not reauthorized. These commenters believed that the reason for this requirement is unclear and that it would be inconsistent with the purpose of the Supreme Court finding that the Forest Service's Organic Act reserved the National Forests primarily to provide water to western settlers. Commenters believed that changing the points of diversion for these water rights would require State proceedings, which would be administratively onerous and expensive. These commenters suggested that the Forest Service authorize those points of diversion under a separate permit and thus maintain the value of the water rights. Another commenter observed that allowing the holder to transfer water rights to different points of diversion and use if the ski area is not reauthorized is consistent with Colorado State law and would mitigate any potential for forfeiture of the holder's solely owned water rights to the United States.

One commenter was concerned that the requirement to relinquish to the United States the holder's interest in jointly owned water rights if the ski area is not reauthorized would eliminate any market for those water rights. Another commenter noted that water rights appropriated under State law in western states are not appurtenant to the land, and that the owner of these water rights can sever them from the land and transfer them to a different point of diversion and use, provided that the transfer does not impair other water rights. One commenter stated that there would be no impact on ski area recreation opportunities on NFS lands if the holder transferred its interest in jointly owned ski area water rights to a different point of diversion and use if the ski area is not reauthorized by the Forest Service.

Response: In the final directive, the Agency has revised paragraph F.5.b to allow the holder to submit a proposal to the Forest Service for a permit authorizing a different use for the ski area water facilities. If a different use is not authorized for those water facilities, the holder must remove them from NFS lands. The Agency has replaced the requirement to relinquish the holder's interest in jointly owned ski area water rights to the United States if the ski area is not reauthorized with the requirement to offer to sell that interest to the United States at market value. Paragraph F.5.b in the final directive provides that if the United States declines to purchase that interest, the holder may abandon, divide, lease, or transfer its interest at its sole discretion. The Forest Service agrees that when a ski area is not reauthorized, there most likely would be no impact on ski area recreation opportunities on NFS lands if the holder severed its interest in jointly owned ski area water rights from the United States' interest in those water rights. Paragraph F.5.b in the final directive also clarifies that the holder may, in its sole discretion, abandon, divide, lease, or transfer any water rights solely owned by the holder.

Proposed Paragraph F.6—Documentation of Transfer

Proposed paragraph F.6 provided that when the foregoing provisions in proposed clause D–30 require the holder to transfer the holder's interest in any NFS ski area water rights or changed or exchanged water rights to the holder of a subsequent permit, the holder or the holder's heirs and assigns must execute and properly file any documents necessary to transfer the holder's interest, including but not limited to executing a quit claim deed. Proposed paragraph F.6 also provided that by executing the permit, the holder grants a limited power of attorney to the authorized officer to execute, on behalf of the holder, any documents necessary to transfer ownership under the foregoing provisions.

Comment: Commenters objected to the limited power of attorney in proposed paragraph F.6 with regard to execution of documents necessary to transfer ownership of water rights on the grounds that it is offensive, heavy-handed, adversarial, unnecessary, and unsupported by law. Several commenters recommended that the Agency remove the limited power of attorney provision from the final directive or provide further justification for its need.

Response: The Agency has removed proposed paragraph F.6 from the final directive, as it is not necessary to support the revised concept for addressing sufficiency of water for operation of ski areas on NFS lands. In particular, since the final directive no longer requires transfer of water rights, there is no need for a limited power of attorney on behalf of the Forest Service to ensure water rights are transferred if the holder declines to do so.

Proposed Paragraph F.7—Waiver

Proposed paragraph F.7 provided that the holder waives any claims against the United States for compensation for any water rights the holder transfers, removes, or relinquishes as a result of the foregoing provisions in proposed clause D–30; any claims for compensation in connection with imposition of restrictions on severing any water rights; and any claims for compensation in connection with imposition of any conditions on installation, operation, maintenance, and removal of water facilities in support of the ski area authorized by the permit.

Comment: Commenters objected to proposed paragraph F.7 on the grounds that it would require waiver of their constitutional protections and that the Forest Service lacks statutory authority to require waiver of those protections. Other commenters believed that the waiver requirement was unnecessary. One commenter recommended that the Agency rely on the constitutionality of the final directive, rather than require permit holders to waive constitutional claims. Several commenters requested that proposed paragraph F.7 be removed from the final directive.

Response: The Agency does not believe that a waiver provision is necessary, since the Agency does not believe that proposed and final clause D–30 effect a taking of private property. Therefore, the Agency has removed proposed paragraph F.7 from the final directive.

Proposed Paragraph F.8—Inventory of Necessary Water Rights

Proposed paragraph F.8 included 5 tables for recording certain information about water rights, including the state identification number; owner; purpose of use; decree, license, or certificate number; point of diversion; and point of use. Each table addressed a different category of water rights, including NFS ski area water rights that are owned solely by the United States; NFS ski area water rights that are owned solely by the holder; NFS ski area water rights that are owned jointly by the United States and the holder; changed or exchanged water rights; and water rights for points of diversion on non-NFS lands for use on NFS lands within the permit boundary.

Comment: One commenter opposed the requirement to create and maintain an inventory of ski area water rights on the grounds that it would impose an unnecessary burden on the Forest Service and could introduce a conflict between the States' or permit holder's water rights records and the Agency's inventory. Additionally, this commenter asserted that the inventory was not necessary to ensure that a succeeding permit holder had sufficient water for operation of the ski area and would impose unnecessary bureaucratic delay on permit holders and needless workload on Agency staff. Another commenter noted that the inventory was

unnecessary given the Agency's lack of water rights oversight to date and the ski industry's history of using those water rights to provide outstanding recreation opportunities at no cost to the Agency.

Some commenters were concerned that inventorying water rights for points of diversion on non-NFS lands for use on NFS lands within the permit boundary per proposed paragraph F.8.e could be interpreted as imposing limitations on third-party water rights owned by entities that have no interest in the permitted ski area and that such restrictions would unreasonably interfere with the use of water that is located outside the permit area and is unrelated to the ski area. One commenter asserted that there is no connection between inventorying water rights for points of diversion on non-NFS lands and the Forest Service's interest in ensuring continuity of recreation opportunities for skiing on NFS lands and protecting water resources within the ski area permit boundary.

Some commenters generally supported inventorying NFS ski area water rights because the inventory would disclose water uses by ski areas on Federal land. One commenter requested that the final directive be revised to specify a procedure for updating the inventory of ski area water rights that primarily support operation of the ski area when a ski area permit is amended or reissued to a new holder. This commenter believed that an updated inventory would reflect any additions or deletions from the list of ski area water rights and that these changes should be subject to public notice and comment.

One commenter was concerned that focusing on ski area water rights in their entirety, rather than on the specific interest in water rights held by the permit holder for ski area purposes, would invite arguments about the scope of the inventory; risk excluding water supplies that are important to the continued operation of the ski area; and possibly create problems for third parties, such as a reservoir company and its shareholders, who also have ownership or other interests in the water rights. The commenter observed that ski area water rights in Colorado may be divided into fractional interests that are separately owned. In that case, different uses of the same water right may be subject to separate terms and conditions for purposes of administration by the State engineer. Alternatively, ski area water rights could be owned by nonprofit corporate entities such as ditch and reservoir companies, and the interests in those water rights could be represented by shares of stock in those companies.

Response: An inventory of ski area water facilities is necessary to implement clauses D–30 and D–31 in the final directive to track water facilities that are authorized under the ski area permit, both at permit issuance and during the permit term, *i.e.,* after changes are made in connection with water facilities that affect whether they are being used primarily for operation of the ski area. An inventory of original water rights is necessary to implement clause D–30 in the final directive to track original water rights for purposes of implementing paragraphs in clause D–30 that apply to those water rights. Per paragraph F.4.b in the final directive, the inventory will be updated by the holder upon reissuance of the ski area permit, installation or removal of a ski area water facility, when a listed ski area water facility is no longer authorized by the permit, or when an original water right is no longer used for operation of the ski area.

The Agency does not believe that maintaining an inventory of original water rights will impose an unnecessary burden on the Forest Service or pose the risk of a conflict with the States' or permit holder's water rights records. Holders have a record of their ski area water rights and can provide the requisite information to the authorized officer to ensure that the inventory is accurate and updated as needed. Maintaining the inventory in the final directive will be simpler than maintaining the inventory in the proposed directive. In the final directive, the Agency has moved the inventory tables to an appendix and has reduced the 5 tables to 2, to track only original water rights and ski area water facilities authorized under the ski area permit. Finally, the Agency has removed the requirement for Regional Forester approval of the inventory before issuance of a new or modified ski area permit.

The Agency agrees that water rights for points of diversion off NFS lands for use on NFS lands inside the ski area permit boundary should not be tracked in the inventory. These water rights do not arise from a point of diversion on NFS lands and therefore do not meet the definition of ''ski area water rights'' in the final directive.

The Agency does not believe that changes to the inventory should be subject to public notice and comment. The inventory is a tracking mechanism. Prior appropriation doctrine States, not the Federal government, adjudicate and allocate water rights. Forest Service decisions regarding installation or removal of ski area water facilities will be subject to appropriate environmental analysis, including public involvement, as appropriate.

Proposed Paragraph F.9—Performance Bond

Proposed paragraph F.9 provided that when the holder owns any changed or exchanged water rights or solely owns any NFS ski area water rights, the holder must maintain a performance bond that fully covers the cost of removing all privately owned ski area improvements and restoring the site if the use is not reauthorized. Proposed paragraph F.9 also provided for the minimum amount of the bond to be specified and for the amount of the bond to be determined by the authorized officer.

Comment: One commenter asserted that Forest Service form SF–25 is not appropriate for implementing the proposed performance bond requirement because of the form's references to ''contracts'' and ''contractors.'' This commenter recommended that a new form be developed that is tailored specifically to the obligations under FSM 6560.5. Other commenters questioned the need for a new performance bond requirement that would cover the cost of removing facilities and site restoration if a ski area is not reauthorized. Some commenters sought clarification as to how this performance bond compares to the existing performance bond requirements in the ski area permit. One commenter asserted that this requirement is unnecessary because of the existing performance bond clause in the ski area permit, which allows the Forest Service to require a performance bond at its discretion. One commenter asked for clarification as to whether the performance bond requirement would apply only to water facilities or to any ski area facilities. Additionally, some commenters objected to the cost of the performance bond.

Some commenters supported the performance bond requirement to ensure that the permit holder removes authorized water facilities when the permit terminates and suggested that the performance bond requirement be extended to all special use permits.

Response: The shift in focus with respect to ski area water rights from non-severability in the proposed directive to ensuring sufficiency of water for ski area operations in the final directive makes the performance bond requirement unnecessary in the final directive. Therefore, the Agency has removed proposed paragraph F.9 from the final directive. The objection to the

use of form SF–25 is moot because the bonding requirement has been removed. The recommendation to expand the performance bond requirement to other types of special use permits is beyond the scope of this directive.

Acknowledgment of Terms

This provision stated that the holder has read and agrees to all terms and conditions of the permit, including the authorization provided in proposed paragraph F.6 that allows the authorized officer to act on the holder's behalf in executing all necessary documents to transfer ownership of NFS ski area water rights and changed or exchanged water rights as provided in the permit. No comments were received on this provision. Since proposed paragraph F.6 has been removed from the final directive, the acknowledgment of terms provision is moot and has also been removed from the final directive.

b. RIPARIAN DOCTRINE STATES—CLAUSE D–31

In several respects, the comments and responses on proposed clause D–30 apply to proposed clause D–31. Consequently, where applicable, the Agency has revised clause D–31 in the final directive, including the instructions, to track the changes to clause D–30 in the final directive, including the instructions.

Proposed Paragraph F.1—Water Facilities

Proposed Paragraph F.1.d

Proposed paragraph F.1.d provided that the United States may place conditions on installation, operation, maintenance, and removal of any water facility that are deemed necessary by the United States to protect public property, public safety, and natural resources on NFS lands.

Comment: Commenters asserted that the Forest Service does not have unfettered rights to impose any condition it sees fit on ski area water facilities as implied by proposed paragraph F.1.d. These commenters recommended that proposed paragraph F.1.d be amended in the final directive to add ''in accordance with applicable laws'' as required by the National Forest Ski Area Permit Act.

Response: The Forest Service has redesignated proposed paragraph F.1.d as F.1.c in the final directive and revised paragraph F.1.c to track the revisions to the corresponding paragraph in proposed clause D–30. The response to comments on the corresponding proposed paragraph in clause D–30 is incorporated here by reference.

Proposed Paragraph F.1.e

Proposed paragraph F.1.e provided that only water facilities that are necessary for and that primarily support operation of the ski area authorized by the permit may be included in the permit. No specific comments were received on proposed paragraph F.1.e in clause D–31. The Forest Service has redesignated proposed paragraph F.1.e as F.1.d and revised the paragraph to track the revisions made to the corresponding proposed paragraph in clause D–30.

New Paragraph F.1.e

The Agency has added a new paragraph F.1.e requiring an inventory of all ski area water facilities on NFS lands to be included in the appendix of the permit. The inventory must be updated by the holder upon reissuance of the ski area permit, installation or removal of a ski area water facility, or when a listed ski area water facility is no longer authorized by the ski area permit. This new paragraph corresponds to the new inventory provision in clause D–30 and is needed to track water facilities that are authorized under the ski area permit, both at permit issuance and during the permit term, *i.e.,* after changes are made in connection with water facilities that affect whether they are being used primarily for operation of the ski area.

Proposed Paragraph F.1.f

Proposed paragraph F.1.f provided that any change in water facilities authorized by this permit will result in termination of the authorization for those water facilities, unless the change is expressly authorized by a permit amendment. As examples of this type of change, proposed paragraph F.1.f listed use of the water in a manner that does not primarily support operation of the ski area authorized by the permit and a change in the beneficial use, location, or season of use of water.

Comment: A commenter was concerned that proposed paragraph F.1.f would unreasonably restrict the maintenance and management of water resources and that greater flexibility was needed by holders in this context. For example, this commenter cited the need for flexibility to respond to changes in technology, weather conditions, or operational priorities and the need to make decisions quickly or in the case of a Federal government shutdown.

Response: In the final directive, the Agency has revised proposed paragraph F.1.f to track the revisions made to the corresponding paragraph in proposed clause D–30. The response to comments on the corresponding proposed paragraph in clause D–30 is incorporated here by reference.

Proposed Paragraph F.1.g

Proposed paragraph F.1.g provided that the holder must obtain a separate special use authorization to initiate, develop, certify, or permit any water facility on NFS lands that does not primarily support operation of the ski area authorized by the permit.

Comment: Commenters were concerned that separate permits issued under proposed paragraph F.1.g would not include the ski area water clauses, but rather would include standard water clauses for other special uses that require ownership of the water rights to be transferred to the United States.

Response: In the final directive, the Agency has combined proposed paragraph F.1.g with paragraph F.1.f. In addition, the Agency has revised proposed paragraph F.1.g to track the revisions made to the corresponding provision in proposed clause D–30. The response to comments on the corresponding proposed paragraph in clause D–30 is incorporated here by reference.

Proposed Paragraph F.2—Water Rights

Comment: Some commenters recommended revising proposed paragraph F.2 to dedicate ski area water rights to ski area purposes to the extent the United States has any right, title, or interest in them as a riparian or littoral landowner.

Response: In riparian doctrine States, water rights are appurtenant to the land and cannot be severed from the land. Therefore, in contrast to clause D–30, there is no need for clause D–31 to address severability of water rights from the permitted NFS lands.

No Takings Implications

Comment: Several commenters were concerned that proposed clause D–30 would effect a taking of private property by the Federal government. Commenters asserted several bases for this concern, including the fact that the proposed directive would not rescind water clauses for other special uses that require transfer of ownership of water rights to the United States; would require transfer of NFS ski area water rights to a succeeding permit holder; and would require transfer of the holder's solely owned NFS ski area water rights to the United States if the holder fails to move the point of diversion and use for those water rights when a ski area is not reauthorized. In addition, these commenters cited their belief that proposed clause D–30 would

establish absolute control over the adjudication and operation of ski area water rights, for example, by requiring Forest Service permission for even minor changes; would allow the Forest Service to impose unlimited restrictions on water rights; and would not rescind prior ski area water rights clauses that required transfer of ownership of water rights to the United States. Several commenters asserted that the Forest Service lacks the legal authority to require holders to relinquish water rights under the ski area permit.

Response: The Forest Service does not believe the proposed and final directives effect a taking of private property. Including requirements regarding ski area water rights in ski area permits that are issued, reissued, or modified under 36 CFR 251.61, rather than in existing ski area permits, does not effect a taking of private property. The Forest Service has broad authority to include appropriate terms and conditions in special use permits, including ski area permits. 79 FR 35516 (June 23, 2014); 16 U.S.C. 481, 497, 497b, 529, 551; 43 U.S.C. 1765; 36 CFR 251,56(a)(ii)(A), (a)(ii)(B), (a)(ii)(E), (a)(ii)(G). A ski area permit is a voluntary transaction, and a holder can decline the permit or accept the permit subject to its new conditions.

Neither the proposed nor the final directive provides for Forest Service adjudication of water rights. The provisions governing use of water facilities have been clarified and narrowed consistent with the objectives of the final directive. When it becomes effective, the final directive will supersede prior ski area water clauses in the Forest Service's Directive System and standard ski area permit form.

Water clauses in existing ski area permits, other than the 2011 and 2012 water clauses that were invalidated by the court's order in *National Ski Areas Association, Inc.* v. *United States Forest Service,* remain in effect. Holders of existing permits that are not being reissued or modified under 36 CFR 251.61 may elect to have these water clauses replaced with the appropriate water clause in the final directive within one year of the effective date of the final directive, provided they:

(1) agree to have all water facilities on NFS lands that are used primarily for operation of the ski area and that are not authorized under a separate permit:

(a) authorized by their ski area permit;

(b) designated on a map attached to the permit; and

(c) included in an inventory in an appendix to the permit; and

(2) submit documentation prepared by their qualified hydrologist or licensed engineer demonstrating that:

(a) they hold or can obtain a sufficient quantity of water to operate the permitted portion of the ski area; and

(b) identifying all water sources, water rights, and water facilities necessary to demonstrate a sufficient quantity of water to operate the ski area, including all original water rights; all water facilities authorized by the ski area permit; and any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service.

Per paragraph F.3.d of the final directive, original water rights owned solely by the United States and the United States' interest in jointly owned original water rights will remain in Federal ownership.

Water clauses for special uses other than ski areas are beyond the scope of this directive.

Controlling Paperwork Burdens on the Public

Comment: One commenter recommended developing a new standard form to document the bonding requirement for removal of ski area improvements and site restoration, rather than relying on Forest Service form SF–25, which is intended to secure performance under the terms of the permit.

Response: This comment is moot, since the Agency has removed the bonding requirement from the final directive.

Federalism and Consultation and Coordination With Indian Tribal Governments

The Agency has considered the final directive under the requirements of E.O. 13132 on federalism and has concluded that the final directive conforms to the federalism principles in the E.O. The final directive will not impose any compliance costs on the States and will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary at this time.

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Forest Service has assessed the impact of this policy on Indian tribes and determined that this directive does not, to our knowledge, have tribal implications that require tribal consultation under E.O. 13175. However, the Forest Service provided a 120-day government-to-government consultation period for recognized Tribes starting July 28, 2014. Tribes were provided the **Federal Register** notice for the proposed directive and proposed clauses D–30 and D–31. Tribes were encouraged to contact their local Forest Service administrative unit to engage in government-to-government consultation. Five Tribes submitted written comments in response to the request for consultation. The Hopi and Navajo Tribes acknowledged receipt of the comment opportunity, but did not provide comments.

The summaries of those Tribes that did comment and the Agency's responses follow.

Comment: The Tulalip Tribes stated that their water rights pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927), include a water right for instream flows to protect and enhance fish species and their habitat and to provide the habitat for flora and fauna harvested under the Treaty. The Tulalip Tribes want the Forest Service to ensure that water rights for ski areas in the State of Washington are held by the Federal government and are specifically limited to the term, place, and uses in the ski area permit. The Tulalip Tribes believed that this restriction would ensure that waters important for preservation of NFS lands and resources could not be transferred to other uses. The Tulalip Tribes further noted that the proposed directive addresses providing recreation opportunities, economic benefit to holders of special use permits, and protecting the public interest in water and other resources under the Agency's jurisdiction, but fails to acknowledge the Agency's legal duty to protect the Tulalip Tribes' water rights, which predate any other water rights pursuant to the Treaty of Point Elliot and an E.O. dated December 23, 1873.

Response: For the reasons stated above, the final directive modifies the

Forest Service's approach to accomplishing the objective of long-term availability of water to sustain ski area uses. In particular, the final directive does not provide for ski area water rights to be acquired in the name of the United States. With respect to ski area water rights, the final directive emphasizes sufficiency of water for ski area operations. In particular, the final directive includes a definition for the term, ''sufficient quantity of water to operate the ski area,'' and clarifies when and how the holder must demonstrate a sufficient quantity of water to operate the ski area; provides that the holder may not make changes that would adversely affect the availability of the holder's solely or jointly owned original water rights for ski area operations during the permit term, unless approved in writing in advance by the authorized officer; requires the holder to offer to sell the holder's interest in original water rights to the succeeding permit holder; and provides that if a purchaser of the ski area declines to buy the holder's interest in jointly owned original water rights, the holder must offer to sell that interest to the United States.

The Forest Service is committed to honoring Tribal treaty and other reserved rights, including Tribal water rights. Nothing in the final directive will infringe upon these rights. Water rights acquired under State law in connection with ski area permits are subject to the valid existing water rights of other water rights holders, including valid existing Tribal treaty and other reserved water rights, if any. Reference to the water rights of specific Tribes would be outside the scope of this directive, which sets forth water clauses for ski area permits.

Comment: The Winnebago Tribe of Nebraska stated that the proposed directive may proceed, but asked to be notified if any burial sites or cultural properties are found during construction, as the Tribe has cultural properties on NFS lands. Similarly, the Ysleta Del Sur Pueblo Tribe asked to be consulted if any human remains or artifacts that fall under Native American Graves Protection and Repatriation Act (NAGPRA) guidelines are unearthed in connection with the proposal. The Ysleta Del Sur Pueblo Tribe stated that it does not have any other comments, does not object to the proposed directive, and does not believe that it would otherwise adversely affect any traditional, religious, or culturally significant sites of the Tribe.

Response: The final directive does not implement any site-specific decisions regarding the conditioning or construction of water facilities at ski areas on NFS lands. If a Tribe requests consultation on the final directive, the Forest Service will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress. The Forest Service will evaluate the need for and conduct appropriate tribal consultation on such site-specific projects if and when they are proposed. Prior to any permit being issued or conditions being placed, the authorized officer must, pursuant to Executive Orders 12898 and 13175 and NFS Directives, consult with relevant populations, including tribes having a current or historical interest in the NFS lands authorized by the permit or condition. Additionally, in accordance with NAGPRA, an existing clause in the standard ski area permit form states that if the holder inadvertently discovers human remains, funerary objects, sacred objects, or objects of cultural patrimony on NFS lands, the holder must immediately cease work in the area of the discovery; make a reasonable effort to protect and secure the items; and immediately notify the authorized officer by telephone of the discovery and follow up with written confirmation of the discovery.

4. Regulatory Certifications

Environmental Impact

This final directive revises national Forest Service policy governing water rights in ski area permits. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' The Agency has concluded that this final directive falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

This final directive has been reviewed under USDA procedures and E.O. 12866 on regulatory planning and review. The Office of Management and Budget (OMB) has determined that this final directive is significant and therefore subject to OMB review under E.O. 12866. The final directive is not economically significant because it will not have an annual effect of $100 million or more on the economy; it will not adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments; and it will not alter the budgetary impact of entitlement, grant, or loan programs or the rights and obligations of beneficiaries of those programs or interfere with an action taken or planned by another agency.

The cost-benefit analysis prepared by the Agency for the final directive concludes that the benefits of the final directive to the Forest Service substantially outweigh the costs because the Agency has corrected the procedural deficiencies associated with 2011 and 2012 ski area water clauses and because the final directive will enhance treatment of ski area water rights and administration of ski area water facilities under ski area permits. The cost-benefit analysis also concludes that the costs to permit holders associated with the final directive are minimal and are substantially outweighed by the benefits of enhanced sustainability of ski areas on NFS lands and improved administration of ski area permits.

The Agency has considered the final directive in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). Pursuant to a threshold Regulatory Flexibility Act analysis, the Agency has determined that the final directive will not have a significant economic impact on a substantial number of small entities as defined by the Act because the final directive will impose only modest record-keeping requirements on them; will not affect their competitive position in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market. The final directive will likely have a positive economic effect on current and future ski area permit holders and local communities close to ski areas because the final directive addresses long-term sustainability of ski areas. The basis for this determination is enumerated in the threshold Regulatory Flexibility Act analysis for the final directive.

No Takings Implications

The Agency has analyzed the final directive in accordance with the principles and criteria contained in E.O.12630 and has determined that the final directive will not pose the risk of a taking of private property.

Civil Justice Reform

The Agency has reviewed the final directive under E.O. 12988 on civil justice reform. Upon adoption of the final directive, (1) all State and local laws and regulations that conflict with the final directive or that impede its full implementation will be preempted; (2) no retroactive effect will be given to the

final directive; and (3) it will not require administrative proceedings before parties file suit in court challenging its provisions.

Energy Effects

The Agency has reviewed the final directive under E.O. 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' The Agency has determined that the final directive does not constitute a significant energy action as defined in the E.O.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Agency has assessed the effects of the final directive on State, local, and Tribal governments and the private sector. The final directive will not compel the expenditure of $100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

The information collection associated with the final directive is different from the information collection associated with the proposed directive. In particular, rather than requiring an inventory of 5 different types of water rights, the final directive requires an inventory of only original water rights and ski area water facilities authorized by the permit. In addition, the final directive requires an applicant for a new or modified ski area permit to document a sufficient quantity of water to operate the ski area and an applicant for a new water facility to document a sufficient quantity of water to operate the proposed water facility.

Therefore, through this **Federal Register** notice, the Agency is providing an opportunity to comment on the information collection associated with the final directive during the 30-day period between the publication date and the effective date of the final directive. When this information collection has been approved for use, it will be incorporated into OMB control number 0596–0082, *Special Uses Administration.* All other information collections associated with the ski area permit are already covered by OMB control number 0596–0082.

The following summarizes the information collection associated with the final directive:

OMB Control Number: 0596–0235.

Estimated Burden per Response: 1.5 hours.

Type of Respondents: Ski area permit holders.

Estimated Annual Number of Respondents: 40.

Estimated Annual Average Number of Responses per Respondent: 1.5.

Estimated Total Annual Burden on Respondents: 90 hours.

Comment is invited on (1) whether this information collection is necessary for the stated purposes and proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden associated with the information collection, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All comments received in response to the notice of this information collection, including names and addresses when provided, will be included in the record for the final directive. The comments will be summarized and included in the package submitted to OMB for approval.

5. Access to the Final Directive

The Forest Service organizes its Directive System by alphanumeric codes and subject headings. The intended audience for this direction is Forest Service employees charged with issuing and administering ski area permits. To view the final directive, visit the Forest Service's Web site at *http://www.fs.fed.us/specialuses.* Only the sections of the FSH that are the subject of this notice have been posted, *i.e.,* FSH 2709.11, Special Uses Handbook, Chapter 50, Standard Forms and Supplemental Clauses, Section 52.4.

Dated: December 23, 2015.

Thomas L. Tidwell,

Chief, Forest Service.

[FR Doc. 2015–32846 Filed 12–29–15; 8:45 am]

BILLING CODE 3411–15–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Illinois Advisory Committee to Discuss Approval of a Project Proposal to Study Civil Rights and Environmental Justice in the State

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Illinois Advisory Committee (Committee) will hold a meeting on Friday, January 22, 2016, at 1:00 p.m. CST. The purpose of this meeting is to review and discuss approval of a project proposal to study civil rights and environmental justice in the State. The Committee met on November 20, 2015 and approved a study of this topic, particularly as it relates to coal ash disposal in communities of color in Illinois. This study is in support of the Commission's nationally focused 2016 statutory enforcement study on the same topic.

This meeting is available to the public through the following toll-free call-in number: 888–481–2844, conference ID: 2949512. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement at the end of the meeting. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and conference ID number.

Member of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 55 W. Monroe St., Suite 410, Chicago, IL 60615. They may also be faxed to the Commission at (312) 353–8324, or emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://database.faca.gov/*

committee/meetings.aspx?cid=246. Click on the ''Meeting Details'' and ''Documents'' links to download. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's Web site, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

Welcome and Introductions
Review and Discussion of Civil Rights Project Proposal: Environmental Justice and Coal Ash Disposal in Illinois
Open Comment
Future plans and actions
Adjournment

DATES: The meeting will be held on Friday, January 22, 2016, at 1:00 p.m. CST.

Public Call Information

Dial: 888–481–2844.
Conference ID: 2949512.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski at *mwojnaroski@usccr.gov* or 312–353–8311.

Dated: December 23, 2015.

David Mussatt,

Chief, Regional Programs Unit.

[FR Doc. 2015–32834 Filed 12–29–15; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Michigan Advisory Committee for a Meeting To Discuss Preparations for a Public Hearing Regarding the Civil Rights Impact of Civil Forfeiture Practices in the State

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Michigan Advisory Committee (Committee) will hold a meeting on Tuesday, January 12, 2016, at 1:30 p.m. EST for the purpose of discussing preparations for a public hearing regarding the civil rights impact of civil forfeiture practices in the State.

This meeting is available to the public through the following toll-free call-in number: 888–576–4398, conference ID: 3486198. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement at the end of the meeting. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur charges for calls they initiate over wireless lines according to their regular wireless plans, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and conference ID number.

Member of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 55 W. Monroe St., Suite 410, Chicago, IL 60615. They may also be faxed to the Commission at (312) 353–8324, or emailed to Carolyn Allen at *callen@usccr.gov*. Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *http://facadatabase.gov/committee/meetings.aspx?cid=255.* Click on the ''Meeting Details'' and ''Documents'' links to download. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's Web site, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

Welcome and Introductions
Donna Budnick, Chair
Preparatory Discussion for Public Hearing:
Civil Rights Impact of Civil Forfeiture Practices in Michigan
Future plans and actions
Adjournment

DATES: The meeting will be held on Tuesday, January 12, 2016, at 1:30 p.m. EST.

Public Call Information

Dial: 888–576–4398.
Conference ID: 3486198.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski at *mwojnaroski@usccr.gov* or 312–353–8311.

Dated: December 23, 2015.

David Mussatt,

Chief, Regional Programs Unit.

[FR Doc. 2015–32835 Filed 12–29–15; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE376

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 will hold a public meeting of its Summer Flounder, Scup, and Black Sea Bass Advisory Panel (AP) and its Mackerel, Squid, and Butterfish AP.

DATES: The meeting will be held on Wednesday, January 20, 2016, from 1 p.m. to 5 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held at the Ocean Place Resort, 1 Ocean Boulevard, Long Branch, NJ 07740; telephone: (732) 571–4000.

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 Summer Flounder, Scup, and Black Sea Bass AP and Mackerel, Squid, and Butterfish AP will meet to provide input on a framework to modify the scup Gear Restricted Areas (GRAs). The scup GRAs are seasonally-effective areas where vessels fishing for or possessing black sea bass, longfin squid, or silver hake (also known as whiting) are

prohibited from using trawl nets with codend mesh smaller than 5.0-inches in diameter. The Council has developed a range of alternatives for potential modifications to the GRA boundaries. The APs will provide feedback on those alternatives and may propose additional alternatives. More information, including a detailed agenda can be found at: *www.mamfc.org.*

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 24, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–32866 Filed 12–29–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scientific & Statistical Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Wednesday, January 20, 2016 beginning at 9 a.m.

ADDRESSES: The meeting will be held at the Hilton Garden Inn, Boston Logan, 100 Boardman Street, Boston, MA 02128; phone: (617) 567–6789.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The SSC will meet to: Consider identifying an ABC for witch flounder that is not bound by 75% of FMSY; comment on draft terms of reference for a 2016 benchmark stock assessment for witch flounder; receive an update on groundfish catch advice project; receive an update on the Council risk policy working group including an overview of current control rules. They will discuss other business as needed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: December 24, 2015.

Tracey L. Thompson,

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

[FR Doc. 2015–32867 Filed 12–29–15; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Extension of Deep Seabed Exploration Licenses: Response to Comments

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Response to comments.

SUMMARY: Due to a clerical error, comments submitted by the Center for Biological Diversity on a requested extension of Deep Seabed Hard Mineral Resources Act exploration licenses were not considered until after the licenses were extended. After reviewing and considering those comments, NOAA has found that they provide no basis for reconsidering the requested license extensions or revising the now-extended licenses.

FOR FURTHER INFORMATION CONTACT: Contact Kerry Kehoe, Office for Coastal Management, National Ocean Service, 301–563–1151, *kerry.kehoe@noaa.gov.*

SUPPLEMENTARY INFORMATION: On February 28, 2012, the National Oceanic and Atmospheric Administration published a notice in the **Federal Register** advising the public of a request from Lockheed Martin Corporation (Lockheed Martin) to extend its two deep seabed mining exploration licenses (USA–1 and USA–4) issued under the Deep Seabed Hard Mineral Resources Act (DSHMRA). *See* 77 FR 12245. Comments on the proposed extensions were requested at that time. Following the February 28, 2012, Notice, NOAA published a second notice in the **Federal Register** announcing the extension of Licenses USA–1 and USA–4 through 2017, and discussing several comments received on the extensions. *See* 77 FR 40586 (July 10, 2012).

Comments submitted by the Center for Biological Diversity (CBD), however, were not discussed in the July 10, 2012, notice. The CBD comments were received by NOAA but, due to a clerical error, the comments were not routed to the license extension reviewers who were unaware of CBD's comments until after an inquiry was received from CBD following the July 10, 2012, publication of the extension notice. Upon review and consideration of CBD's comments, NOAA determined that the extension of the exploration licenses should stand without modification as CBD's comments were based on a misunderstanding of the nature and scope of the license extensions.

Following the discovery of CBD's comments, the relevant Staff from NOAA discussed the substance of the comments with CBD and described why CBD's concerns as articulated in the comments were not relevant to the USA–1 and USA–4 license extensions. In addition, NOAA is now publishing a response to the CBD comments to address any public misconceptions about the extension of the deep seabed mining exploration Licenses USA–1 and USA–4.

General Response to the CBD Comments

The CBD comments pertain to activities not presently authorized pursuant to the license extensions. Instead, the CBD comments are relevant to at-sea exploration activities that, if pursued, would first require additional NOAA approvals. *See* 77 FR 12246. As discussed below, the extension of the Lockheed Martin exploration licenses merely serves to preserve the legal status and any domestic and international priority of rights that

Licenses USA–1 and USA–4 may confer.

As part of Lockheed Martin's request to extend the USA–1 and USA–4 exploration licenses, it submitted a two-phase exploration plan. This two-phased plan is consistent with all the previous exploration plans submitted since the issuance of these licenses. Phase I is a preparatory stage which includes activities for which no license would be required. Phase II includes activities for which an exploration license may be required. The current exploration plan includes statements anticipating that actual exploration activities might be conducted under Phase II during the requested five-year extension; however, those statements are qualified. Lockheed Martin has stated that before it will conduct at-sea activities requiring an exploration license (*i.e.,* Phase II activities), international security of tenure must first be obtained.[1] In order for this to occur, the United States must first accede to the Law of the Sea Convention. The United States Department of State, in commenting on the requested license extension, stated its view that for Lockheed Martin to proceed with exploration activities without international recognition would be a violation of the terms, conditions and restrictions of its license. In the July 10, 2012, **Federal Register** notice for the issuance of the extension for the explorations licenses, NOAA acknowledged and accepted the Department of State's position. *See* 77 FR 12246.

Lockheed Martin also provided NOAA written confirmation that no at-sea exploration activities, which would require a license, would be conducted without additional authorization from NOAA. Such authorization would, at that time, be subject to all necessary environmental reviews. Although Lockheed Martin may ultimately conduct at-sea exploration activities pursuant to the USA–1 and USA–4 licenses, such activities would require additional environmental review and NOAA authorization before commencement of such exploration pursuant to these licenses.

Accordingly, upon review and consideration of the CBD comments, NOAA has found that the extension of the deep seabed mining exploration licenses should stand without modification. NOAA's specific responses to the CBD comments are provided below.

Response to CBD Comments

Comment 1: *NOAA cannot extend the licenses or approve the exploration plan unless it fully complies with the environmental review provisions of the National Environmental Policy Act (NEPA) through the preparation of an environmental assessment or environmental impact statement which includes a full analysis of the impact of direct, indirect and cumulative effects; alternatives; and mitigation measures for the action, along with an opportunity for public review and comment. It is inadequate for NOAA to rely on any prior NEPA analysis as there is significant new information about the impacts of offshore mineral exploration. While tiering to a previous environmental assessment (EA) or environmental impact statement (EIS) may be useful in complying with NEPA, it does not eliminate the need to analyze the impacts of site specific actions.*

Response: NOAA disagrees that the Agency has failed to fully comply with the requirements of NEPA.

NOAA has prepared a programmatic EIS in connection with potential deep ocean mining activities.[2] In addition, an EIS was prepared for USA–1 and USA–4 [3] at the time of issuance and an updated environmental assessment was prepared in 1989 for the licenses.[4] When USA–4 was transferred to Lockheed Martin Company in 1994, an additional environmental impact statement was prepared that noted that the EIS was only being prepared to meet the requirements of DSHMRA to prepare an EIS, and not those of NEPA as the transfer of the license would not have significant environmental impacts.[5]

With respect to the instant license extensions, NOAA considered its environmental compliance obligations and determined that, in order for the Agency to conduct an environmental review, there must first be a proposed activity to review. As discussed above, there is no action triggered or authorized pursuant to the USA–1 and USA–4 license extensions that has the potential to significantly affect the environment. The extensions merely preserve any domestic or international priority of rights the licenses may confer. Lockheed Martin's revised exploration plan associated with the license extensions, which like each other exploration plan submitted for these licenses, has two phases with the first being preparatory land-side activities that do not require any authorizations and the second including actual at-sea exploration activities. Lockheed Martin has noted that its Phase II activities are contingent upon a U.S. accession to the Law of the Sea Convention and a substantial increase in the market prices for metals; two events which have not occurred and are not likely to occur prior to the end of the current term of the licenses. Should Lockheed Martin decide to conduct any Phase II, at-sea exploration in connection with USA–1 or USA–4, the terms of the licenses require additional authorizations from NOAA and other federal reviewing agencies prior to the commencement of any such activities.

Given the phased nature of these licenses and the uncertainty associated with possible commencement of Phase II activities, NOAA believes it would be premature at this stage to conduct the types of environmental reviews suggested by commenter. Lockheed Martin has not detailed the specific location(s) within the licensed exploration areas where any future at-sea activities would be conducted. The company has also not detailed the specifics of any exploration techniques, equipment or intensity. Absent this type of information, any environmental review conducted by NOAA would be speculative at best. Instead, NOAA believes that environmental reviews, including those that may be required under NEPA, are appropriate once Lockheed Martin has decided to pursue NOAA authorization for Phase II activities. Such environmental review will be subject to public review and comment, and NOAA encourages CBD to participate in that process should Lockheed Martin seek approval for Phase II activities.

Comment 2: *The extension is an action that must comply with the Endangered Species Act, Marine*

[1] Lockheed Martin has also stated that the market price of metals would need to increase and stabilize to make the deep sea recovery of such materials commercial viable.

[2] The programmatic EIS was prepared in 1981 which described the results of the Deep Ocean Mining Environmental Study (DOMES), a five-year project designed to examine potential effects of nodule mining. The review covered both exploration and commercial recovery authorizations; however, it only assessed the environmental impacts from first generation mining activities with the belief that there would be a need for further assessments as the industry developed and evolved. The PEIS found that data collection activities for assessing resources and determining seafloor characteristics presented no threat of significant adverse effects on the environment. U.S. Dept. of Commerce, NOAA, Deep Seabed Mining: Final Programmatic Environmental Impact Statement, Sept. 1981.

[3] U.S. Dept. of Commerce, NOAA, Deep Seabed Mining: Final Environmental Impact Statement, July 1984.

[4] U.S. Department of Commerce, NOAA, Deep Seabed Mining: An Updated Environmental Assessment of NOAA Deep Seabed Mining Licensees' Exploration Plans, Jan. 1989.

[5] U.S. Dept. of Commerce, NOAA, Deep Seabed Mining: Final Environmental Impact Statement, November 1994.

Mammal Protection Act and Migratory Bird Treaty Act.

Response: NOAA disagrees. As described in the response to comment 1 above, no action is presently triggered or authorized pursuant to the USA–1 and USA–4 license extensions that has the potential to affect protected species under the cited statutes. As such, NOAA is unaware of, and commenter has not identified, any outstanding obligations with respect to these statutes.

Comment 3. *The initial phase of the application at issue here will be comprised of surveys and other activities in preparation for mining. These exploratory surveys have significant environmental impacts including acoustic impacts from the use of seismic survey airguns, mining and lighting impacts. Deepsea [sic] mining also generates waste, noise, fuel or other spills, vessel traffic, sediment plumes, habitat disturbance and destruction, and water quality problems. The license should be denied because it is untenable for NOAA to make a finding that the exploration proposed in the application cannot reasonably be expected to result in significant adverse effect [sic] on the quality of the environment as required for issuing a license under 15 CFR 970.506. Any license should be conditioned on measures that avoid these environmental impacts.*

Response: NOAA disagrees. Contrary to the assertion of the commenter, the current license extensions do not authorize the at-sea activities described in the comments. The requested license extensions only extend the term of the licenses and do not authorize the types of at-sea exploration activities cited by commenter. Indeed, conducting such activities may be unnecessary as Lockheed Martin stands in a unique position as a pre-enactment explorer (*i.e.,* the company conducted its exploration activities including the acquisition of manganese nodules from the seafloor for assay purposes prior to the enactment of the DSHMRA). When USA–4 was transferred to Lockheed Martin in 1994 following the relinquishment of the license from the consortium led by Kennecott Corporation, Lockheed Martin's request for the transfer of the license stated that the company had no plans to conduct at-sea exploration activities since it already had conducted sufficient exploration prior to the enactment of DSHMRA. As noted above, when and if Lockheed Martin decides to seek authorization to commence Phase II activities, such authorization will trigger appropriate review of the environmental impacts associated with the proposed at-sea exploration activities.

The CBD comments also contain an extensive discussion of the impacts of airguns used to conduct seismic surveys. No such activities have been proposed, let alone authorized.

Additionally, throughout the CBD comments the impacts of mining of the deep seabed are also discussed. Mining has not been authorized nor proposed. DSHMRA establishes a licensing requirement for exploration activities and a separate permit requirement for commercial recovery (*i.e.,* mining). Both exploration licenses expressly prohibit the licensee from even testing mining equipment without receiving further authorization from NOAA. To date, no such authorizations have ever been requested.

Federal Domestic Assistance Catalog 11.419

Coastal Zone Management Program Administration.

Dated: December 22, 2015.

Christopher C. Cartwright,

Associate Assistant Administrator for Management and CFO/CAO, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

[FR Doc. 2015–32889 Filed 12–29–15; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2015–OS–0142]

Proposed Collection; Comment Request

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Defense Logistics Agency announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 29, 2016.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate 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, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Logistics Agency, ATTN: Joint Contingency and Expeditionary Services (JCXS) Program Management Office (PMO), 4800 Mark Center Drive, Alexandria, VA 22350; or call (571) 372–3593.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Joint Contingency Contracting System (JCCS); OMB 0704–XXXX.

Needs and Uses: The information collection requirement is necessary to evaluate vendors for possible approval or acceptance to do business with and have access to U.S. military installations around the world. JCCS is a module of the Joint Contingency and Expeditionary Services (JCXS). JCXS is the DoD's agile, responsive, and global provider of Joint expeditionary acquisition business solutions that fulfill mission-critical requirements while supporting interagency collaboration—to include, but not limited to, contracting, finance, spend analysis, contract close-out, staffing, strategic sourcing, and reporting.

As an integral component of JCXS, JCCS was designed to register foreign vendors for work with the U.S.

Government. These vendors must provide certain information and identification documents, such as employee passports, in order to be vetted. If the requested information is not provided by vendors, proper verification of credentials and a security review cannot be properly completed. Vendor evaluation is essential for maintaining force protection.

Although there is no PRA requirement for the current foreign respondents, beginning January 1, 2016, a new mandate exists that will necessitate all vendors register in order to do business with the U.S. Military. This addition of U.S. vendors establishes a burden to members of the public under the PRA.

Affected Public: Business or other for profit; Not-for-profit institutions.

Annual Burden Hours: 500.

Number of Respondents: 1000.

Responses per Respondent: 1.

Average Burden per Response: 0.5 hours (30 minutes).

Frequency: On Occasion, Annually.

Respondents are businesses who are applying, on occasion, for authorization to be a vendor with the U.S. Military, including approval for the associated access, if appropriate, to bases worldwide. Based on changing mission requirements, the U.S. Government may also require vendors to be vetted annually for eligibility to bid on new contracts. The amount of vendors registering with JCCS is expected to increase when the new requirement for all vendors takes effect in January 2016.

Disclosure of PII and other needed information is voluntary to support the registration and vetting process. However, failure to provide the required information may result in a vendor being denied access to the JCCS business application, and subsequently prohibited from conducting business with the U.S. Military. The JCCS application is available through the Defense Logistics Agency (DLA) Web site.

Dated: December 23, 2015.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2015–32809 Filed 12–29–15; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0082; Docket 2015–0055; Sequence 30]

Information Collection; Economic Purchase Quantity—Supplies

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning Economic Purchase Quantity—Supplies.

DATES: Submit comments on or before February 29, 2016.

ADDRESSES: Submit comments identified by Information Collection 9000–0082, Economic Purchase Quantity—Supplies, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0082 Economic Purchase Quantity—Supplies''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0082 Economic Purchase Quantity—Supplies'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Ms. Flowers/IC 9000–0082, Economic Purchase Quantity—Supplies.

Instructions: Please submit comments only and cite Information Collection 9000–0082, Economic Purchase Quantity—Supplies, in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, Office of Governmentwide Acquisition Policy, 202–208–4949 or email *michaelo.jackson@gsa.gov*.

SUPPLEMENTARY INFORMATION:

A. Purpose

The provision at 52.207–4, Economic Purchase Quantity—Supplies, invites offerors to state an opinion on whether the quantity of supplies on which bids, proposals, or quotes are requested in solicitations is economically advantageous to the Government. Each offeror who believes that acquisitions in different quantities would be more advantageous is invited to (1) recommend an economic purchase quantity, showing a recommended unit and total price, and (2) identify the different quantity points where significant price breaks occur. This information is required by Public Law 98–577 and Public Law 98–525.

B. Annual Reporting Burden

Respondents: 3,000.

Responses per Respondent: 25.

Annual Responses: 75,000.

Hours per Response: 1.

Total Burden Hours: 75,000.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulation (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755.

Please cite OMB Control No. 9000–0082, Economic Purchase Quantity—Supplies, in all correspondence.

William Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2015–32775 Filed 12–29–15; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0071; Docket 2015–0055; Sequence 28]

Information Collection; Price Redetermination

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension of an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning Price Redetermination.

DATES: Submit comments on or before February 29, 2016.

ADDRESSES: Submit comments identified by Information Collection 9000–0071, Price Redetermination, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0071, Price Redetermination''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0071, Price Redetermination'' on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Ms. Flowers/IC 9000–0071, Price Redetermination.

Instructions: Please submit comments only and cite Information Collection 9000–0071, Price Redetermination, in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA, (202) 501–1448 or email *curtis.glover@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

FAR 16.205, Fixed-price contracts with prospective price redetermination, provides for firm fixed prices for an initial period of the contract with prospective redetermination at stated times during performance. FAR 16.206, Fixed price contracts with retroactive price redetermination, provides for a fixed ceiling price and retroactive price redetermination within the ceiling after completion of the contract. In order for the amounts of price adjustments to be determined, the firms performing under these contracts must provide information to the Government regarding their expenditures and anticipated costs.

B. Annual Reporting Burden

Respondents: 139.
Responses per Respondent: 9.
Annual Responses: 1,251.
Hours per Response: 8.
Total Burden Hours: 10,008.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755.

Please cite OMB Control No. 9000–0071, Price Redetermination, in all correspondence.

William Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2015–32774 Filed 12–29–15; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 20, 2016, 5:00 p.m.

ADDRESSES: Beatty Community Center, 100 A Avenue South, Beatty, Nevada 89003.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, Board Administrator, 232 Energy Way, M/S 505, North Las Vegas, Nevada 89030. Phone: (702) 630–0522; Fax (702) 295–5300 or Email: *NSSAB@nnsa.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

1. Briefing and Recommendation Development for Path to Closure for Rainier Mesa/Shoshone Mountain—Work Plan Item #6
2. Recommendation Development for Frenchman Flat Long-Term Monitoring Plan (Closure Report)—Work Plan Item #5
3. Update on Rain Impacts on Post-Closure Monitoring Sites at the Nevada National Security Site

Public Participation: The EM SSAB, Nevada, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Barbara

Ulmer at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Barbara Ulmer at the telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so during the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing to Barbara Ulmer at the address listed above or at the following Web site: *http://nv.energy.gov/nssab/MeetingMinutes.aspx*

Issued at Washington, DC, on December 23, 2015.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2015–32882 Filed 12–29–15; 8:45 am]

BILLING CODE 6450–01–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: ER14–2884–002.

Applicants: Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company.

Description: Compliance filing: Protocols Compliance Filing to be effective 3/1/2015.

Filed Date: 12/23/15.

Accession Number: 20151223–5163.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–631–000.

Applicants: PacifiCorp.

Description: Section 205(d) Rate Filing: BPA Construction Agmt (USBR Green Springs Rev 1) to be effective 2/22/2016.

Filed Date: 12/23/15.

Accession Number: 20151223–5151.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–632–000.

Applicants: Blythe Solar II, LLC.

Description: Baseline eTariff Filing: Blythe Solar II, LLC Application for Market-Based Rates to be effective 4/1/2016.

Filed Date: 12/23/15.

Accession Number: 20151223–5161.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–633–000.

Applicants: California Independent System Operator Corporation.

Description: Section 205(d) Rate Filing: 2015–12–23 ABAOA with CENACE–GCRBC, Termination of CFE ICAOA & Waiver Request to be effective 1/1/2016.

Filed Date: 12/23/15.

Accession Number: 20151223–5207.

Comments Due: 5 p.m. ET 1/13/16.

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 23, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–32828 Filed 12–29–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM15–14–000]

Revised Critical Infrastructure Protection Reliability Standards; Supplemental Notice of Agenda and Discussion Topics for Staff Technical Conference

This notice establishes the agenda and topics for discussion at the technical conference to be held on January 28, 2016, to discuss issues related to supply chain risk management. The technical conference will start at 10:00 a.m. and end at approximately 4:30 p.m. (Eastern Time) in the Commission Meeting Room at the Commission's Headquarters, 888 First Street NE., Washington, DC. The technical conference will be led by Commission staff, and FERC Commissioners may be in attendance. All interested parties are invited to attend, and registration is not required.

The topics and related questions to be discussed during this conference are provided as an attachment to this Notice. The purpose of the technical conference is to facilitate a structured dialogue on supply chain risk management issues identified by the Commission in the Revised Critical Infrastructure Protection Standards Notice of Proposed Rulemaking (NOPR) issued in this proceeding and raised in public comments to the NOPR. Prepared remarks will be presented by invited panelists.

This event will be webcast and transcribed. The free webcast allows listening only. Anyone with Internet access who desires to listen to this event can do so by navigating to the ''FERC Calendar'' at *www.ferc.gov,* and locating the technical conference in the Calendar of Events. Opening the technical conference in the Calendar of Events will reveal a link to its webcast. The Capitol Connection provides technical support for the webcast and offers the option of listening to the meeting via phone-bridge for a fee. If you have any questions, visit *www.CapitolConnection.org* or call 703–993–3100. The webcast will be available on the Calendar of Events at *www.ferc.gov* for three months after the conference. Transcripts of the conference will be immediately available for a fee from Ace-Federal Reporters, Inc. (202–347–3700).

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the requested accommodations.

There is no fee for attendance. However, members of the public are encouraged to preregister online at: *https://www.ferc.gov/whats-new/registration/01-28-16-form.asp.*

For more information about the technical conference, please contact: Sarah McKinley, Office of External Affairs, 202–502–8368, *sarah.mckinley@ferc.gov.*

Dated: December 23, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Critical Infrastructure Protection Supply Chain Risk Management RM15–14–000 January 28, 2016

Agenda

Welcome and Opening Remarks by Commission Staff

9:30–9:45 a.m.

Introduction

In a July 16, 2015 Notice of Proposed Rulemaking (NOPR) in the above-captioned docket, the Commission proposed to direct the North American Electric Reliability Corporation (NERC) to develop new or modified Critical Infrastructure Protection (CIP) Reliability Standards to provide security controls relating to supply chain risk management for industrial control system hardware, software, and services. The Commission sought and received comments on this proposal, including: (1) The NOPR proposal to direct that NERC develop a Reliability Standard to address supply chain risk management; (2) the anticipated features of, and requirements that should be included in, such a standard; and (3) a reasonable timeframe for development of a standard. The purpose of this conference is to clarify issues, share information, and determine the proper response to address security control and supply chain risk management concerns.

Staff Presentation: Supply Chain Efforts by Certain Other Federal Agencies

9:45 a.m.–10:05 a.m.

Break

10:05 p.m.–10:15 p.m.

Panel 1: Need for a New or Modified Reliability Standard

10:15 a.m.–11:45 a.m.

The Commission staff seeks information about the need for a new or modified Reliability Standard to manage supply chain risks for industrial control system hardware, software, and computing and networking services associated with bulk electric system operations. Panelists are encouraged to address:

- Identify challenges faced in managing supply chain risk.
- Describe how the current CIP Standards provide supply chain risk management controls.
- Describe how the current CIP Standards incentivize or inhibit the introduction of more secure technology.
- Identify possible other approaches that the Commission can take to mitigate supply chain risks.

Panelists

1. Nadya Bartol, Vice President, Industry Affairs and Cybersecurity Strategist, UTC
2. Jon Boyens, Project Manager, Information Communication Technology (ICT) Supply Chain Risk Management, National Institute of Standards & Technology (NIST)
3. John Galloway, Director, Cyber Security, ISO New England
4. John Goode, Chief Information Officer/Senior Vice President, Midcontinent Independent System Operator (MISO)
5. Barry Lawson, Associate Director, Power Delivery & Reliability, National Rural Electric Cooperative Association (NRECA)
6. Helen Nalley, Compliance Director, Southern Company
7. Jacob Olcott, Vice President of Business Development, Bitsight Tech
8. Marcus Sachs, Senior Vice President and Chief Security Officer, North American Electric Reliability Corporation (NERC)

Lunch

11:45 a.m.–1:00 p.m.

Panel 2: Scope and Implementation of a New or Modified Standard

1:00 p.m.–2:30 p.m.

The Commission staff seeks information about the scope and implementation of a new or modified Standard to manage supply chain risks for industrial control system hardware, software, and computing and networking services associated with bulk electric system operations. Panelists are encouraged to address:

- Identify types of assets that could be better protected with a new or modified Standard.
- Identify supply chain processes that could be better protected by a Standard.
- Identify controls or modifications that could be included in the Standard.
- Identify existing mandatory or voluntary standards or security guidelines that could form the basis of the Standard.
- Address how the verification of supply chain risk mitigation could be measured, benchmarked and/or audited.
- Present and justify a reasonable timeframe for development and implementation of a Standard.
- Discuss whether a Standard could be a catalyst for technical innovation and market competition.

Panelists

1. Mike Ahmadi, Global Director—Critical Systems Security, Synopsys
2. Jonathan Appelbaum, Director, NERC Compliance, The United Illuminating Company
3. Brent Castegnetto, Manager, Cyber Security Audits & Investigations, WECC
4. Art Conklin, Ph.D., Associate Professor and Director of the Center for Information Security Research and Education, University of Houston
5. Edna Conway, Chief Security Officer, Value Chain Security, Cisco
6. Bryan Owen, Principal Cyber Security Manager, OSIsoft
7. Albert Ruocco, Vice President and Chief Technology Officer, American Electric Power (AEP)
8. Doug Thomas, Vice President and Chief Information Officer, Ontario Independent Electricity System Operation (IESO)

Break

2:30 p.m.–2:45 p.m.

Panel 3: Current Supply Chain Risk Management Practices and Collaborative Efforts

2:45 p.m.–4:15 p.m.

The Commission staff seeks information about existing supply chain risk management efforts for information and communications technology and industrial control system hardware, software, and services in other critical infrastructure sectors and the government. Panelists are encouraged to address:

- Generally describe how registered entities and other organizations currently manage supply chain issues.
- Identify standards or guidelines that are used to establish supply chain risk management practices. Specifically, discuss experience under those standards or guidelines.
- Identify organizational roles involved in the development and implementation of supply chain risk management practices.
- Generally describe approaches for identifying, evaluating, mitigating, and monitoring supply chain risk.
- Generally discuss how supply chain risk is addressed in the contracting process with vendors and suppliers.

• Generally describe the capabilities that registered entities currently have to inspect third party information security practices.

• Generally describe the capabilities that registered entities currently have to negotiate for additional security in their hardware, software, and service contracts. Describe how this may vary based on the potential vendor or supplier and the type of service to be provided.

• Generally describe how vendors and suppliers are managing risk in their supply chain.

Panelists

1. Douglas Bauder, Vice President, Operational Services, and Chief Procurement Officer, Southern California Edison
2. Andrew Bochman, Senior Cyber & Energy Security Strategist, INL/DOE
3. Dennis Gammel, Director, Security Technology, Schweitzer Engineering
4. Andrew Ginter, Vice President, Industrial Security, Waterfall Security Solutions
5. Steve Griffith, Industry Director, National Electrical Manufacturers Association (NEMA)
6. Maria Jenks, Vice President, Supply Chain, Kansas City Power & Light (KCP&L)
7. Robert McClanahan, Vice President/ Chief Information Officer, Arkansas Electric Cooperative Corporation (AECC)
8. Thomas O'Brien, Chief Information Officer, PJM Interconnection, LLC

4:15 p.m.–4:30 p.m. Closing Remarks

[FR Doc. 2015–32833 Filed 12–29–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12690–015]

Public Utility District No. 1 of Snohomish County, Washington; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Surrender of License.

b. *Project No.:* 12690–015.

c. *Date Filed:* December 4, 2015.

d. *Applicant:* Public Utility District No. 1 of Snohomish County, Washington.

e. *Name of Project:* Admiralty Inlet Pilot Tidal Project.

f. *Location:* On the east side of Admiralty Inlet in Puget Sound, Washington, about 0.6 mile west of Whidbey Island, within Island County, Washington.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Craig W. Collar, CEO/General Manager of Snohomish County PUD #1, 2320 California Street, Everett, WA 98201, Phone: (425) 783–8473.

i. *FERC Contact:* Mr. Ashish Desai, (202) 502–8370, *Ashish.Desai@ferc.gov*.

j. Deadline for filing comments, motions to intervene and protests, is 30 days from the issuance date of this notice. The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, and recommendations, using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–12690–015.

k. *Description of Project Facilities:* The unconstructed Admiralty Inlet Pilot Tidal Project works would consist of two 300-kW OpenHydro tidal turbines each mounted on a triangular subsea base, two approximately 7,000-foot-long connecting cables extending onshore, and onshore supporting facilities.

l. *Description of Request:* The applicant has determined the unconstructed project is no longer economically feasible and proposes to surrender the license.

m. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208- 3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

o. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

p. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the license surrender. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in

accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 23, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–32832 Filed 12–29–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator Status

Green Mountain Storage, LLC	EG15–121–000;
Meyersdale Storage, LLC	EG15–122–000;
Moxie Freedom LLC	EG15–123–000;
Odell Wind Farm, LLC	EG15–124–000;
Colbeck's Corner, LLC	EG15–125–000;
Mesquite Solar 2, LLC	EG15–126–000;
Mesquite Solar 3, LLC	EG15–127–000;
Land of the Sky MT, LLC	EG15–128–000;
Eden Solar, LLC	EG15–129–000;
Saddleback Ridge Wind, LLC	EG15–130–000;
Desert Stateline LLC	EG15–131–000;
CED Alamo 5, LLC	EG15–132–000;
Wake Wind Energy LLC	EG15–133–000]

Take notice that during the month of November 2015, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a).

Dated: December 23, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–32830 Filed 12–29–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP15–513–000]

Texas Gas Transmission, LLC; Notice of Schedule for Environmental Review of the Northern Supply Access Project

On June 5, 2015, Texas Gas Transmission, LLC (Texas Gas) filed an application in Docket No. CP15–513 requesting a Certificate of Public Convenience and Necessity pursuant to section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the Northern Supply Access Project (Project), and would allow Texas Gas to provide an additional 384,000 million standard cubic feet per day of natural gas of north to south transportation capacity on Texas Gas's system while maintaining bi-directional flow capability on its system.

On June 17, 2015, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

SCHEDULE FOR ENVIRONMENTAL REVIEW

Issuance of EA	February 4, 2016.
90-day Federal Authorization Decision Deadline.	May 4, 2016.

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

Texas Gas proposes to construct, install, own, operate, and maintain the proposed Northern Supply Access Project, which would involve modifications at eight existing compressor stations in Morehouse Parish, Louisiana; Coahoma County, Mississippi; Tipton County, Tennessee; Webster, Breckinridge, and Jefferson Counties, Kentucky; and Lawrence and Dearborn Counties, Indiana. Texas Gas would also add one new 23,877 horsepower compressor station in Hamilton County, Ohio.

Background

On September 4, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Northern Supply Access Project and Request for Comments on Environmental Issues* (NOI). The NOI was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received consultation letters from U.S. Fish and Wildlife Service, Tennessee Department of Environment and Conservation, and Mississippi, Kentucky and Indiana State Historic Preservation Officer. The Commission also received comments from the City of Harrison, Great Parks of Hamilton County, and the Allegheny Defense Project/Center for Biological Diversity/Fresh Water Accountability Project/Heartwood/Ohio Valley Environmental Coalition. The primary issues raised by the commentors focused on the environmental impacts of operating the new Harrison Compressor Station near residences and the Miami Whitewater Forest and the indirect/cumulative impacts of shale gas development.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits

(*i.e.,* CP15–513), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: December 23, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–32829 Filed 12–29–15; 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: EC16–53–000.

Applicants: South Central MCN LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of South Central MCN LLC.

Filed Date: 12/22/15.

Accession Number: 20151222–5335.

Comments Due: 5 p.m. ET 1/12/16.

Docket Numbers: EC16–54–000.

Applicants: Goal Line L.P., KES Kingsburg, L.P., Colton Power L.P.

Description: Application for Authorization of Disposition of Jurisdictional Facilities and Requests for Waivers, Confidential Treatment and Expedited Consideration of Goal Line L.P., *et al.*

Filed Date: 12/23/15.

Accession Number: 20151223–5125.

Comments Due: 5 p.m. ET 1/13/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1484–013.

Applicants: Shell Energy North America (US), L.P.

Description: Updated Market Power Analysis for the Southwest Power Pool Region of Shell Energy North America (US), L.P.

Filed Date: 12/22/15.

Accession Number: 20151222–5331.

Comments Due: 5 p.m. ET 2/22/16.

Docket Numbers: ER12–569–010; ER15–1925–003; ER15–2676–001; ER13–712–010; ER10–1849–009; ER11–2037–009; ER12–2227–009; ER10–1887–009; ER10–1920–011; ER10–1928–011; ER10–1952–009; ER10–1961–009; ER12–1228–011; ER14–2707–006; ER12–895–009; ER10–2720–011; ER11–4428–011; ER12–1880–010; ER15–58–004; ER14–2710–006; ER15–30–004; ER14–2708–007; ER14–2709–006; ER13–2474–005; ER11–4462–015; ER10–1971–024.

Applicants: Blackwell Wind, LLC, Breckinridge Wind Project, LLC, Cedar Bluff Wind, LLC, Cimarron Wind Energy, LLC, Elk City Wind, LLC, Elk City II Wind, LLC, Ensign Wind, LLC, FPL Energy Cowboy Wind, LLC, FPL Energy Oklahoma Wind, LLC, FPL Energy Sooner Wind, LLC, Gray County Wind Energy, LLC, High Majestic Wind Energy Center, LLC, High Majestic Wind II, LLC, Mammoth Plains Wind Project, LLC, Minco Wind Interconnection Services, LLC, Minco Wind, LLC, Minco Wind II, LLC, Minco Wind III, LLC, Palo Duro Wind Interconnection Services, LLC, Palo Duro Wind Energy, LLC, Seiling Wind Interconnection Services, LLC, Seiling Wind, LLC, Seiling Wind II, LLC, Steele Flats Wind Project, LLC, NEPM II, LLC, NextEra Energy Power Marketing, LLC.

Description: Triennial Market Power Update for the Southwest Power Pool Region of the NextEra Companies.

Filed Date: 12/22/15.

Accession Number: 20151222–5332.

Comments Due: 5 p.m. ET 2/22/16.

Docket Numbers: ER13–1923–003.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing: 2015–12–23_SERTP Order 1000 Compliance Filing to be effective 1/1/2015.

Filed Date: 12/23/15.

Accession Number: 20151223–5084.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER14–2866–004.

Applicants: Louisville Gas and Electric Company.

Description: Compliance filing: Revisions to Formula Rate Protocols to Attachment O to be effective 1/1/2015.

Filed Date: 12/23/15.

Accession Number: 20151223–5074.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER14–2875–002.

Applicants: UNS Electric, Inc.

Description: Compliance filing: Formula Rate Protocols Compliance Filing to be effective 11/14/2014.

Filed Date: 12/23/15.

Accession Number: 20151223–5001.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER15–1733–001.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: 2nd Compliance Filing in ER15–1733 Revising Empire's Formula Rate Protocols to be effective 4/1/2015.

Filed Date: 12/22/15.

Accession Number: 20151222–5250.

Comments Due: 5 p.m. ET 1/12/16.

Docket Numbers: ER16–13–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: Deficiency Response in ER16–13–Revisions to Att AE re Annual ARR Allocation to be effective 1/28/2016.

Filed Date: 12/23/15.

Accession Number: 20151223–5089.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–288–001.

Applicants: Entergy Services, Inc.

Description: Tariff Amendment: Entergy Services, Inc., Correction to Amended Service Agreements to be effective 11/8/2015.

Filed Date: 12/22/15.

Accession Number: 20151222–5257.

Comments Due: 5 p.m. ET 1/12/16.

Docket Numbers: ER16–335–001.

Applicants: Startrans IO, LLC.

Description: Tariff Amendment: Errata to 2016 TRBAA Filing to be effective 1/1/2016.

Filed Date: 12/22/15.

Accession Number: 20151222–5269.

Comments Due: 5 p.m. ET 1/4/16.

Docket Numbers: ER16–619–000.

Applicants: PJM Interconnection, L.L.C., Public Service Electric and Gas Company.

Description: Section 205(d) Rate Filing: PSEG submits revisions to Attach. H–10A re: Abandonment Incentive Rate Treatment to be effective 2/21/2016.

Filed Date: 12/22/15.

Accession Number: 20151222–5266.

Comments Due: 5 p.m. ET 1/12/16.

Docket Numbers: ER16–620–000.

Applicants: Safe Harbor Water Power Corporation.

Description: Section 205(d) Rate Filing: Amendment to the Safe Harbor PPA to be effective 12/22/2015.

Filed Date: 12/22/15.

Accession Number: 20151222–5282.

Comments Due: 5 p.m. ET 1/12/16.

Docket Numbers: ER16–621–000.

Applicants: Southern California Edison Company.

Description: Section 205(d) Rate Filing: GIA & Distribution Service Agreement Sunray Energy, LLC SEGS I Project to be effective 1/1/2016.

Filed Date: 12/23/15.

Accession Number: 20151223–5000.

Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–622–000.

Applicants: Southern California Edison Company.

Description: Section 205(d) Rate Filing: GIA and Distribution Service Agmt New-Indy Ontario, LLC to be effective 1/1/2016.

Filed Date: 12/23/15.

Accession Number: 20151223–5002.
Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–623–000.
Applicants: New York State Reliability Council, L.L.C., Whiteman Osterman & Hanna LLP.
Description: Informational filing of Installed Capacity Requirement for the New York Control Area of the New York State Reliability Council, L.L.C.
Filed Date: 12/22/15.
Accession Number: 20151222–5320.
Comments Due: 5 p.m. ET 1/12/16.

Docket Numbers: ER16–624–000.
Applicants: Midcontinent Independent System Operator, Inc., ITC Midwest LLC.
Description: Section 205(d) Rate Filing: 2015–12–23_SA 2728 MidAmerican-ITCM 1st Rev FSA (H021) to be effective 2/21/2016.
Filed Date: 12/23/15.
Accession Number: 20151223–5053.
Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–625–000.
Applicants: Southwest Power Pool, Inc.
Description: Section 205(d) Rate Filing: 2829R2 Midwest Energy & Westar Energy Meter Agent Agreement to be effective 12/1/2015.
Filed Date: 12/23/15.
Accession Number: 20151223–5054.
Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–626–000.
Applicants: Southwest Power Pool, Inc.
Description: Section 205(d) Rate Filing: 2986R1 KCP&L GMO and Entergy Services, Inc. Attachment AO to be effective 12/1/2015.
Filed Date: 12/23/15.
Accession Number: 20151223–5073.
Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–627–000.
Applicants: PJM Interconnection, L.L.C.
Description: Section 205(d) Rate Filing: Original SA No. 4323 (ISA); and Revised SA No. 4241 (CSA); Queue AA1–067 to be effective 11/24/2015.
Filed Date: 12/23/15.
Accession Number: 20151223–5080.
Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–628–000.
Applicants: Florida Power & Light Company.
Description: Section 205(d) Rate Filing: Florida Power & Light Company Market-Based Rate Request to be effective 2/22/2016.
Filed Date: 12/23/15.
Accession Number: 20151223–5082.
Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–629–000.
Applicants: Public Service Company of New Hampshire.
Description: Notice of Cancellation of Service Agreement No. 95 of Public Service Company of New Hampshire.
Filed Date: 12/23/15.
Accession Number: 20151223–5097.
Comments Due: 5 p.m. ET 1/13/16.

Docket Numbers: ER16–630–000.
Applicants: Arizona Public Service Company.
Description: Section 205(d) Rate Filing: Amendments to Rate Schedule 217 Exhibit B.ADA and PRS to be effective 2/22/2016.
Filed Date: 12/23/15.
Accession Number: 20151223–5126.
Comments Due: 5 p.m. ET 1/13/16.

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 23, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–32827 Filed 12–29–15; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR16–10–000]

Breitburn Operating LP; Notice of Request for Temporary Waiver

Take notice that on December 22, 2015, pursuant to Rule 202 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.202 (2014), Breitburn Operating LP (Breitburn), filed a petition for temporary waiver of Interstate Commerce Act sections 6 and 20, and the Commission's related oil pipeline tariff and reporting requirements at 18 CFR parts 341 and 357, with respect to certain oil pipeline gathering facilities in Oklahoma which transport production from producing areas known as the Postle Field Units. Breitburn states it has 100 percent ownership and title to all throughput on the facilities which connect to Jayhawk pipeline for ultimate transportation to downstream markets.

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 and 385.214 (2014)) on or before 5:00 p.m. Eastern time on the specified comment date. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on Tapstone.

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 6, 2016.

Dated: December 23, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2015–32831 Filed 12–29–15; 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: RP16–315–000.
Applicants: Northern Natural Gas Company.
Description: Section 4(d) rate filing per 154.204: 20151221 Non Conforming to be effective 1/20/2016.
Filed Date: 12/21/15.
Accession Number: 20151221–5273.
Comments Due: 5 p.m. ET 1/4/16.

Docket Numbers: RP16–316–000.
Applicants: Paiute Pipeline Company.
Description: Compliance filing per 154.203: Compliance Filing: 12–14–15 Order on Rehearing in CP14–509 to be effective 12/15/2015.
Filed Date: 12/22/15.
Accession Number: 20151222–5092.
Comments Due: 5 p.m. ET 1/4/16.

Docket Numbers: RP16–317–000.
Applicants: Bluewater Gas Storage, LLC.
Description: Section 4(d) rate filing per 154.204: Bluewater Gas Storage, LLC—Revisions to FERC Gas Tairfff to be effective 1/22/2016.
Filed Date: 12/22/15.
Accession Number: 20151222–5099.
Comments Due: 5 p.m. ET 1/4/16.

Docket Numbers: RP16–318–000.
Applicants: Sea Robin Pipeline Company, LLC.
Description: Compliance filing per 154.203: Annual Flowthrough Crediting Mechanism filing on 12/22/15 to be effective N/A.
Filed Date: 12/22/15.
Accession Number: 20151222–5243.
Comments Due: 5 p.m. ET 1/4/16.

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.

Filings in Existing Proceedings

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.

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.

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 24, 2015.

Nathaniel J. Davis, Sr.,

Deputy Secretary

[FR Doc. 2015–32883 Filed 12–29–15; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2003–0026; FRL 9940–33–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; National Water Quality Inventory Reports (Reinstatement)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''National Water Quality Inventory Reports (Renewal)'' (EPA ICR No. 1560.11, OMB Control No. 2040–0071) 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 request for reinstatement of a previously discontinued collection. Public comments were previously requested via the **Federal Register** (80 FR 38684) on July 7, 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 29, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OW–2003–0026, to (1) EPA online using *www.regulations.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 *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

The 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: Charles Kovatch, Assessment and Watershed Protection Division, Office of Water, Mail Code: 4503T, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202–566–0399; email address: *Kovatch.charles@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 Clean Water Act Section 305(b) reports contain information on the water quality standards attainment status of assessed waters, and, when waters are impaired, the pollutants and potential sources affecting water quality. This information helps track State progress in addressing water pollution. Section 303(d) of the Clean Water Act requires States to identify and rank waters that cannot meet water quality standards (WQS) following the implementation of technology-based controls. Under Section 303(d), States are also required to establish total maximum daily loads (TMDLs) for listed waters not meeting standards as a result of pollutant discharges. In developing the Section 303(d) lists, States are required to consider various sources of water

quality related data and information, including the Section 305(b) State water quality reports. Section 106(e) requires that states annually update monitoring data and use it in their Section 305(b) report. Section 314(a) requires states to report on the condition of their publicly-owned lakes within the Section 305(b) report.

EPA's Assessment and Watershed Protection Division (AWPD) works with its Regional counterparts to review and approve or disapprove State Section 303(d) lists and TMDLs from 56 respondents (the 50 States, the District of Columbia, and the five Territories). Section 303(d) specifically requires States to develop lists and TMDLs ''from time to time,'' and EPA to review and approve or disapprove the lists and the TMDLs. EPA also collects State 305(b) reports from 59 respondents (the 50 States, the District of Columbia, five Territories, and 3 River Basin Commissions).

During the period covered by this ICR renewal, respondents will: Complete their 2016 Section 305(b) reports and 2016 Section 303(d) lists; complete their 2018 Section 305(b) reports and 2018 Section 303(d) lists; transmit annual electronic updates of ambient monitoring data via the Water Quality Exchange; and continue to develop TMDLs according to their established schedules. EPA will prepare biennial updates on assessed and impaired waters for Congress and the public for the 2016 reporting cycle and for the 2018 cycle, and EPA will review 303(d) list and TMDL submissions from respondents.

Form Numbers: None.

Respondents/affected entities: States and Territories.

Respondent's obligation to respond: Mandatory (Clean Water Act Sections 305(b), 303(d), 314(a), and 106(e)).

Estimated number of respondents: 59 (total).

Frequency of response: Biennial.

Total estimated burden: 3,740,017 (per year) hours. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $203,340,984 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is no change of hours in the total estimated respondent burden compared with the ICR previously approved by OMB. The EPA is currently designing the Water Quality Framework, which is a new way of integrating the EPA's data and information systems to more effectively support reporting and tracking water quality protection and restoration actions. The Framework will streamline water quality assessment and reporting by reducing transactions associated with paper copy reviews and increasing electronic data exchange. The Framework composts with the EPA's E-Enterprise Initiative, which seeks to assess and reformulate the EPA's business process to reduce burden through the improved use of technology. The EPA expects that the Framework will reduce reporting burden for integrated water quality inventory reports and will revise this ICR before the new information system is implemented for the 2018 reporting cycle.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2015–32860 Filed 12–29–15; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Request for Comments on Opening Balances for General Property, Plant, and Equipment

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules Of Procedure, as amended in October 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has issued an exposure draft, *Opening Balances for General Property, Plant, and Equipment.*

The Exposure Draft is available on the FASAB home page *http://www.fasab.gov/board-activities/documents-for-comment/exposure-drafts-and-documents-for-comment/.* Copies can be obtained by contacting FASAB at (202) 512–7350.

Respondents are encouraged to comment on any part of the exposure draft. Written comments are requested by February 4, 2016, and should be sent to *fasab@fasab.gov* or Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street NW., Suite 6814, Mail Stop 6H19, Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy M. Payne, Executive Director, 441 G St. NW., Mail Stop 6H20, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. 92–463.

Dated: December 22, 2015.

Wendy M. Payne,

Executive Director.

[FR Doc. 2015–32854 Filed 12–29–15; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0649]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 29, 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, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0649.

Title: Sections 76.1601, Deletion or Repositioning of Broadcast Signals; Section 76.1617, Initial Must-Carry Notice; 76.1607 and 76.1708 Principal Headend.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 3,300 respondents and 4,100 responses.

Estimated Hours per Response: 0.5 to 1 hour.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement; Recordkeeping requirement.

Total Annual Burden: 2,200 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 4(i) and 614(b)(9) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 76.1601 requires that effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

47 CFR 76.1607 states that cable operators shall provide written notice by certified mail to all stations carried on its system pursuant to the must-carry rules at least 60 days prior to any change in the designation of its principal headend.

47 CFR 76.1617(a) states within 60 days of activation of a cable system, a cable operator must notify all qualified NCE stations of its designated principal headend by certified mail.

47 CFR 76.1617(b) within 60 days of activation of a cable system, a cable operator must notify all local commercial and NCE stations that may not be entitled to carriage because they either:

(1) Fail to meet the standards for delivery of a good quality signal to the cable system's principal headend, or

(2) May cause an increased copyright liability to the cable system.

47 CFR 76.1617(c) states within 60 days of activation of a cable system, a cable operator must send by certified mail a copy of a list of all broadcast television stations carried by its system and their channel positions to all local commercial and noncommercial television stations, including those not designated as must-carry stations and those not carried on the system.

47 CFR 76.1708(a) states that the operator of every cable television system shall maintain for public inspection the designation and location of its principal headend. If an operator changes the designation of its principal headend, that new designation must be included in its public file.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, The Office of the Secretary.

[FR Doc. 2015–32901 Filed 12–29–15; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0546, 3060–0748, 3060–0980]

Information Collections Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before January 29, 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, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via email *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <*http://www.reginfo.gov/public/do/PRAMain*>, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0546.

Title: Section 76.59 Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business and other for-profit entities.

Number of Respondents and Responses: 180 respondents and 200 responses.

Estimated Time per Response: 0.5 to 40 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement; Recordkeeping requirement.

Total Annual Burden: 1,486 hours.

Total Annual Costs: $1,387,950.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 151, 154(i), 303(r), 338 and 534.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: On September 2, 2015, the Commission released a Report and Order (Order), FCC 15–111, in MB Docket No. 15–71, adopting satellite television market modification rules to implement Section 102 of the Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014 (STELAR). The STELAR amended the Communications Act and the Copyright Act to give the Commission authority to modify a commercial television broadcast station's local television market—defined by The Nielsen Company's Designated Market Area (DMA) in which it is located—to include additional communities or exclude communities for purposes of better effectuating satellite carriage rights. The Commission previously had the authority to modify a station's market only in the cable carriage context. Market modification allows the Commission to modify the local television market of a particular commercial television broadcast station to enable commercial television stations, cable operators and satellite carriers to better serve the interests of local communities. Market modification provides a means to avoid rigid adherence to DMA designations and to promote consumer access to in-state and other relevant television programming. Section 338(l) of the Communications Act (the satellite market modification provision) and Section 614(h)(1)(C) of the Communications Act (the corresponding cable provision) permit the Commission to add communities to or delete communities from a station's local television market following a written request. Furthermore, the Commission may determine that particular communities are part of more than one television market.

Section 76.59(a) of the Commission's Rules authorizes the filing of market modification petitions and governs who may file such a petition. With respect to cable market modification petitions, a commercial TV broadcast station and cable system operator may file a market modification petition to modify the local television market of a particular commercial television broadcast station for purposes of cable carriage rights. With respect to satellite market modification petitions, a commercial TV broadcast stations, satellite carrier and county governmental entity (such as a county board, council, commission or other equivalent subdivision) may file a market modification petition to modify the local television market of a particular commercial television broadcast station for purposes of satellite carriage rights. Section 76.59(b) of the Commission's Rules requires that market modification petitions and responsive pleadings (*e.g.,* oppositions, comments, reply comments) must be submitted in accordance with the procedures for filing Special Relief petitions in Section 76.7 of the rules. Section 76.59(b) of the Commission's Rules requires petitioners (*e.g.,* commercial TV broadcast stations, cable system operators, satellite carriers and county governments) to include the specific evidence in support of market modification petitions.

Section 338(l)(3) of the Communications Act provides that ''[a] market determination . . . shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.'' If a satellite carrier opposes a market modification petition because the resulting carriage would be technically or economically infeasible pursuant to Section 338(l)(3), the carrier must provide specific evidence in its opposition or response to a pre-filing coordination request (see below) to demonstrate its claim of infeasibility. If the satellite carrier is claiming infeasibility based on insufficient spot beam coverage, then the carrier may instead provide a detailed certification submitted under penalty of perjury. Although the Commission will not require satellite carriers to provide supporting documentation as part of their certification, the Commission may decide to look behind any certification and require supporting documentation when it deems it appropriate, such as when there is evidence that the certification may be inaccurate. In the event that the Commission requires supporting documentation, it will require a satellite carrier to provide its ''satellite link budget'' calculations that were created for the new community. Because the Commission may determine in a given case that supporting documentation should be provided to support a detailed certification, satellite carriers are required to retain such ''satellite link budget'' information in the event that the Commission determines further review by the Commission is necessary. Satellite carriers must retain such information throughout the pendency of Commission or judicial proceedings involving the certification and any related market modification petition. If satellite carriers have concerns about providing proprietary and confidential information underlying their analysis, they may request confidentiality.

The Report and Order establishes a ''pre-filing coordination'' process that will allow a prospective petitioner for market modification (*i.e.,* broadcaster or county government), at its option, to request/obtain a certification from a satellite carrier about whether or not (and to what extent) carriage resulting from a contemplated market modification is technically and economically feasible for such carrier before the prospective petitioner undertakes the time and expense of preparing and filing a satellite market modification petition. To initiate this process, a prospective petitioner may make a request in writing to a satellite carrier for the carrier to provide the certification about the feasibility or infeasibility of carriage. A satellite carrier must respond to this request within a reasonable amount of time by providing a feasibility certification to the prospective petitioner. A satellite carrier must also file a copy of the correspondence and feasibility certification it provides to the prospective petitioner in this docket electronically via ECFS so that the Media Bureau can track these certifications and monitor carrier response time. If the carrier is claiming spot beam coverage infeasibility, then the certification provided by the carrier must be the same type of detailed certification that would be required in response to a market modification petition. For any other claim of infeasibility, the carrier's feasibility certification must explain in detail the basis of such infeasibility and must be prepared to provide documentation in support of its claim, in the event the prospective petitioner decides to seek a Commission determination about the validity of the carrier's claim. If carriage is feasible, a statement to that effect

must be provided in the certification. To obtain a Commission determination about the validity of the carrier's claim of infeasibility, a prospective petitioner must either file a (separate) petition for special relief or its market modification petition.

OMB Control Number: 3060–0980.

Title: Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues, 47 CFR Section 76.66.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 10,300 respondents; 11,978 responses.

Estimated Time per Response: 1 hour to 5 hours.

Frequency of Response: Third party disclosure requirement; On occasion reporting requirement; Once every three years reporting requirement; Recordkeeping requirement.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 325, 338, 339 and 340.

Total Annual Burden: 12,186 hours.

Total Annual Cost: $24,000.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On September 2, 2015, the Commission released a Report and Order (Order), FCC 15–111, in MB Docket No. 15–71, adopting satellite television market modification rules to implement Section 102 of the Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014 (STELAR). With respect to this collection, the Order amended Section 76.66 of the Commission's Rules by adding a new paragraph (d)(6) that addresses satellite carriage after a market modification is granted by the Commission.

47 CFR Section 76.66(d)(6) addresses satellite carriage after a market modification is granted by the Commission. The rule states that television broadcast stations that become eligible for mandatory carriage with respect to a satellite carrier (pursuant to § 76.66) due to a change in the market definition (by operation of a market modification pursuant to § 76.59) may, within 30 days of the effective date of the new definition, elect retransmission consent or mandatory carriage with respect to such carrier. A satellite carrier shall commence carriage within 90 days of receiving the carriage election from the television broadcast station. The election must be made in accordance with the requirements of 47 CFR Section 76.66(d)(1).

OMB Control Number: 3060–0748.

Title: Section 64.104, 64.1509, 64.1510 Pay-Per-Call and Other Information Services.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 5,125 respondents; 5,175 responses.

Estimated Time per Response: 2 hours–260 hours.

Frequency of Response: Annual and on occasion reporting and recordkeeping requirements; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority(s) for the information collection are found at 47 U.S.C. 228(c)(7)–(10); Public Law 192–556, 106 stat. 4181 (1992), codified at 47 U.S.C. 228 (The Telephone Disclosure and Dispute Resolution Act of 1992).

Total Annual Burden: 47,750 hours.

Total Annual Cost: None.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 64.1504 of the Commission's rules incorporates the requirements of Sections 228(c)(7)–(10) of the Communications Act restricting the manner in which toll-free numbers may be used to charge telephone subscribers for information services. Common carriers may not charge a calling party for information conveyed on a toll-free number call, unless the calling party: (1) Has executed a written agreement that specifies the material terms and conditions under which the information is provided, or (2) pays for the information by means of a prepaid account, credit, debit, charge, or calling card and the information service provider gives the calling party an introductory message disclosing the cost and other terms and conditions for the service. The disclosure requirements are intended to ensure that consumers know when charges will be levied for calls to toll-free numbers and are able to obtain information necessary to make informed choices about whether to purchase toll-free information services.

47 CFR 64.1509 of the Commission rules incorporates the requirements of 47 U.S.C. (c)(2) and 228 (d)(2)–(3) of the Communications Act. Common carriers that assign telephone numbers to pay-per-call services must disclose to all interested parties, upon request, a list of all assigned pay-per-call numbers. For each assigned number, carriers must also make available: (1) A description of the pay-per-call services; (2) the total cost per minute or other fees associated with the service; and (3) the service provider's name, business address, and telephone number. In addition, carriers handling pay-per-call services must establish a toll-free number that consumers may call to receive information about pay-per-call services. Finally, the Commission requires carriers to provide statements of pay-per-call rights and responsibilities to new telephone subscribers at the time service is established and, although not required by statute, to all subscribers annually.

Under 47 CFR 64.1510 of the Commission's rules, telephone bills containing charges for interstate pay-per-call and other information services must include information detailing consumers' rights and responsibilities with respect to these charges. Specifically, telephone bills carrying pay-per-call charges must include a consumer notification stating that: (1) The charges are for non-communication services; (2) local and long distance telephone services may not be disconnected for failure to pay per-call charges; (3) pay-per-call (900 number) blocking is available upon request; and (4) access to pay-per-call services may be involuntarily blocked for failure to pay per-call charges. In addition, each call billed must show the type of services, the amount of the charge, and the date, time, and duration of the call. Finally, the bill must display a toll-free number which subscribers may call to obtain information about pay-per-call services. Similar billing disclosure requirements apply to charges for information services either billed to subscribers on a collect basis or accessed by subscribers through a toll-free number. The billing disclosure requirements are intended to ensure that telephone subscribers billed for pay-per-call or other information services can understand the charges levied and are informed of their rights and responsibilities with respect to payment of such charges.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer. Office of Secretary.

[FR Doc. 2015–32900 Filed 12–29–15; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 14–252, GN Docket No. 12–268, WT Docket No. 12–269; DA 15–1428]

Application Procedures for Broadcast Incentive Auction Scheduled To Begin on March 29, 2016; Updates and Other Supplemental Information

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document updates and supplements information on procedures for the Broadcast Incentive Auction.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* For general auction questions contact Linda Sanderson, at (717) 338–2868; for reverse auction legal questions contact Erin Griffith or Kathryn Hinton at (202) 418–0660; for forward auction legal questions contact Leslie Barnes or Valerie Barrish at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the *Broadcast Incentive Auction Supplemental Information Public Notice (PN),* AU Docket No. 14–252, GN Docket No. 12–268, WT Docket No. 12–269, DA 15–1428, released on December 21, 2015. The complete text of the *Broadcast Incentive Auction Supplemental Information PN,* including the attachments, is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. 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–A257, Washington, DC 20554. The complete text is also available on the Commission's Web site at *http://wireless.fcc.gov,* or by using the search function on the ECFS Web page at *http://www.fcc.gov/cgb/ecfs/.* Alternative formats are available to persons with disabilities by sending an email to *FCC504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

I. Introduction

1. The Wireless Telecommunications Bureau (Bureau) updates and supplements information provided in the *Auction 1000 Application Procedures Public Notice (PN),* 80 FR 66429, October 29, 2015. Specifically, the Bureau announces that the pre-auction process tutorial for the forward auction will be available by January 19, 2016; provides additional information concerning access to the Commission's bidding system (Auction System) for the reverse and forward auctions; provides additional details about the grouping of Partial Economic Areas (PEAs) in the assignment phase of the forward auction; and makes ministerial changes to two of the appendices released with the *Auction 1000 Application Procedures PN.* All other dates and deadlines, as well as other application procedures, instructions, and information, remain as previously announced.

II. Tutorial on Forward Auction Pre-Auction Process To Be Available by January 19, 2016

2. The Bureau will make available an interactive, online tutorial focusing on the pre-auction application process for the forward auction (Auction 1002) no later than January 19, 2016. The pre-auction application process tutorial will be accessible from the Commission's Auction 1002 Web page at *http://www.fcc.gov/auctions/1002* through a link under the ''Education'' tab. Once posted, the tutorial will remain available and accessible on the Auction 1002 Web page anytime for reference.

III. Access to the Auction System for Bidding

3. As previously described in the *Auction 1000 Application Procedures PN,* an applicant must have an FCC-provided SecurID® token to access the Auction System in order to place bids in the reverse or forward clock rounds, as well as to participate in any mock auction. SecurID® tokens will be distributed to applicants for the reverse auction prior to the deadline for initial commitments, and to forward auction applicants prior to the announcement of qualified bidders, to enable applicants with complete applications to practice with the Auction System. Each authorized bidder identified on an applicant's FCC Form 177 or 175 will be issued a unique SecurID® token tailored to that bidder. For security purposes, the SecurID® tokens, the telephonic bidding telephone number, and the relevant Auction System Bidder's Guide are mailed only to the applicant's contact person at the contact address listed on its auction application.

A. Reverse Auction Applicants

4. Each reverse auction (Auction 1001) applicant permitted to make an initial commitment must do so in the Auction System using a SecurID® token. The Bureau will therefore provide SecurID® tokens prior to the initial commitment deadline.

5. As explained in the *Auction 1000 Application Procedures PN,* an applicant will receive confidential notices concerning the status of its application and of each station selected on its application after the initial filing deadline (First Confidential Status Letter) and after the resubmission deadline (Second Confidential Status Letter), respectively. Each applicant whose application and at least one selected station have been deemed ''complete'' in the Second Confidential Status Letter will be permitted to make an initial commitment to a preferred relinquishment option for each complete station using a SecurID® token. Additional instructions for making an initial commitment will be provided to each applicant with one or more complete stations as an enclosure to its Second Confidential Status Letter.

6. Once the initial clearing target has been determined based on initial commitments, an applicant that was permitted to make an initial commitment will receive a third confidential status letter (Final Confidential Status Letter) notifying the applicant for each complete station whether or not the station is qualified to bid in the clock rounds of the reverse auction. An applicant with one or more qualified stations will be eligible to participate in a mock auction prior to bidding in the clock rounds of the reverse auction. Additional instructions for participating in the mock auction and for placing bids in the clock rounds of the reverse auction, using the applicant's previously received SecurID® tokens, will be provided to each applicant that has at least one station qualified to bid. Any applicant with a station that is not qualified to bid in the reverse auction clock rounds will not be able to place clock round bids for that station in the Auction System.

B. Forward Auction Applicants

7. As described in the *Auction 1000 Application Procedures PN,* an Auction 1002 applicant whose application has been deemed to be ''complete'' will be eligible to practice with the Auction System prior to the mock auction that will be offered to qualified bidders. Any applicant that is eligible to practice with the Auction System must have a SecurID® token to log in. SecurID® tokens along with instructions for practicing with the Auction System will therefore be distributed to each applicant whose application is listed as

complete in a public notice to be released after the deadline for resubmitting corrected applications and prior to the announcement of qualified bidders in the *Auction 1002 Qualified Bidders PN.*

8. Each applicant listed as a qualified bidder in the *Auction 1002 Qualified Bidders PN* will be provided with additional instructions for participating in the mock auction and for placing bids in the forward auction using the applicant's previously received SecurID® tokens. Any applicant whose application was listed as complete after the deadline for resubmitting corrected applications that does not become qualified to bid will not be permitted to access the Auction System for bidding.

IV. Grouping of PEAs for Forward Auction Assignment Phase Bidding

9. In the *Auction 1000 Bidding Procedures PN,* 80 FR 61918, October 14, 2015, the Commission adopted procedures for assignment phase bidding which depend in part upon the Regional Economic Area Grouping (REAG) in which a PEA is included. The public notice indicated that, for the grouping and sequencing of PEAs in the assignment rounds, the PEAs in the six least populous REAGs will be included with the PEAs in one of the six REAGs that cover the contiguous United States. Attachment 1 to the *Broadcast Incentive Auction Supplemental Information PN* lists each PEA and the REAG with which it will be associated for assignment phase bidding purposes.

V. Corrections and Notifications to Technical Appendices

10. The Bureau makes ministerial changes to two of the appendices released with the *Auction 1000 Application Procedures PN.* First, the Bureau corrects typographical errors in the text of APPENDIX D to the *Auction 1000 Application Procedures PN.* Specifically, in Section 5.5 of APPENDIX D, (a) the variable *u* and the variable *s* should be switched in much of the text in the section, including the examples, and (b) the variable *t* in Example 3 should be replaced by the variable *s.* The corrected text to Section 5.5 of APPENDIX D is shown in Attachment 2 of the *Broadcast Incentive Auction Supplemental Information PN.*

11. The Bureau also notes that in Section 3.2 of APPENDIX E to the *Auction 1000 Application Procedures PN,* includes those Mexican stations that cause pairwise interference less than 0.5 percent to U.S. stations when placed on their future channel as specified in the *Mexican Coordination.*

Federal Communications Commission.

Craig Bomberger,

Deputy Division Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2015–32864 Filed 12–29–15; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1131]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 29, 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, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1131.

Title: Implementation of the NET 911 Improvement Act of 2008: Location Information From Owners and Controllers of 911 and E911 Capabilities.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, and state, local and tribal government.

Number of Respondents and Responses: 60 respondents; 60 responses.

Estimated Time per Response: 0.833 hours (5 minutes).

Frequency of Response: One-time, on occasion, third party disclosure requirement, and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in the New and Emerging Technologies 911 Improvement Act of 2008 (NET 911 Act), Public Law 110–283, 122 Stat. 2620 (2008) (to be codified at 47 U.S.C. 615a–1), and section 222 of the Communications Act of 1934, as amended.

Total Annual Burden: 5 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No Impact.

Nature and Extent of Confidentiality: Respondents are not required to submit proprietary trade secrets or other confidential information. However, carriers that believe the only way to satisfy the requirements for information is to submit what it considers to be proprietary trade secrets or other confidential information, carriers are free to request that materials or information submitted to the Commission be withheld from public inspection and from the E911 Web site (see Section 0.459 of the Commission's rules).

Needs and Uses: The Commission is seeking an extension of this information collection from Office of Management and Budget (OMB) in order to obtain the full three-year approval. The information collection requirements contained in this collection guarantee continued cooperation between interconnected VoIP service providers and Public Safety Answering Points (PSAPs) in complying with the Commission's E911 requirements.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2015–32790 Filed 12–29–15; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0422]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 29, 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, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0422.

Title: Section 68.5, Waivers (Application for Waivers of Hearing Aid Compatibility Requirements).

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 2 respondents; 2 responses.

Estimated Time per Response: 3 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. 610.

Total Annual Burden: 6 hours.

Total Annual Cost: None.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Telephone manufacturers seeking a waiver of 47 CFR 68.4(a)(1), which requires that certain telephones be hearing aid compatible, must demonstrate that compliance with the rule is technologically infeasible or too costly. Information is used by FCC staff to determine whether to grant or dismiss the request.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2015–32791 Filed 12–29–15; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 14–252, GN Docket No. 12–268, WT Docket No. 12–269; DA 15–1435]

Guidance Regarding License Assignments and Transfers of Control During the Reverse Auction, Auction 1001

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document provides guidance regarding reverse auction participation by parties to pending transactions involving broadcast television licenses.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* For general reverse auction questions contact Erin Griffith or Kathryn Hinton at (202) 418–0660. Media Bureau licensing questions contact David Brown at (202) 418–1645 or Dorann Bunkin at (202) 418–1636.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 1001 Guidance on Broadcast Transactions Public Notice (PN),* AU Docket No. 14–252, GN Docket No. 12–268, WT Docket No. 12–269, DA15–1435, released on December 17, 2015. The complete text of the *Auction 1001 Guidance on Broadcast Transactions PN,* is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. 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–A257, Washington, DC 20554. The complete text is also available on the Commission's Web site at *http://wireless.fcc.gov,* or by using the search function on the ECFS Web page at *http://www.fcc.gov/cgb/ecfs/.* Alternative formats are available to persons with disabilities by sending an email to *FCC504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

1. The Wireless Telecommunications Bureau (Bureau) recently waived the bar on the assignment of a license in, or transfer of control of an applicant for, the reverse auction, provided that (1) the assignment or transfer application has been accepted for filing as of January 12, 2016, the reverse auction application filing deadline, and (2) the assignee or transferee agrees to be bound by the original applicant's actions in the auction with respect to the license(s). Subject to these two requirements and Commission approval, assignments and transfers involving participating licensees may be consummated during the reverse auction.

2. Reverse auction participants will utilize the FCC Registration Number (FRN) and related password associated with a station to access the application and bidding systems (collectively, the Auction System) with respect to that station. The Bureau has frozen the FRN data in the Auction System as of December 8, 2015, the opening date for the reverse auction filing window. An assignee/transferee in a pending transaction that is approved and consummated until the completion of

the auction will have two options if it wishes to participate in the reverse auction on behalf of a station covered by such a transaction. First, it may contractually designate the assignor/transferor as its bidding agent for the covered stations. Second, the parties to the transaction may agree that the assignee/transferee will use the FRN and password associated with assigned or transferred stations (the ''auction FRN'') to apply for and participate in the reverse auction. The parties must elect one of these options prior to the beginning of the prohibited communications period on January 12, 2016 and inform the Commission which option they have elected. Alternatively, the parties may wait until after the auction to seek approval and consummate the transaction.

3. With regard to the second option, the auction FRN and password will also provide access to the assignor/transferor's data in Commission licensing and other systems associated with that FRN. To prevent the assignee/transferee from accessing the information related to the stations the assignor/transferor may retain, the assignor/transferor may obtain a new FRN and password for those stations. Additionally, the auction FRN and password will provide access to the assignor/transferor's bidding information for any stations associated with the auction FRN. Thus, if a transaction involves fewer than all the licenses associated with the auction FRN, the assignee/transferee and the assignor/transferor would both have access to the same bidding information regarding all the licenses associated with that auction FRN that are in the reverse auction.

4. As a result, the parties to a pending transaction must acknowledge that the Commission is not liable for their use of any systems or information accessed as a result of a shared FRN and password under the second option. The parties may also want to contractually limit the assignee/transferee's right to access and/or use any such systems or information. Finally, the parties are subject to the rule prohibiting communication of an incentive auction applicant's bids and bidding strategies.

Federal Communications Commission.

Craig Bomberger,

Deputy Division Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2015–32840 Filed 12–29–15; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

The comment period for this application has been extended. Comments regarding this application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 31, 2016.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. *KeyCorp,* Cleveland, Ohio; to acquire First Niagara Financial Group, Inc., and thereby acquire control of its subsidiary bank, First Niagara Bank, National Association, both in Buffalo, New York.

Board of Governors of the Federal Reserve System, December 24, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–32838 Filed 12–29–15; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 13, 2016.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Andrew Charles Heaner,* Atlanta, Georgia; to retain voting shares of Heritage First Bancshares, Inc., and thereby indirectly retain voting shares of Heritage First Bank, both in Rome, Georgia.

B. Federal Reserve Bank of Minneapolis (Jacquelyn K. Brunmeier, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Richard Pedersen,* Everett, Washington; to retain voting shares of Flathead Lake Bancorporation, Inc., and thereby indirectly retain voting shares of First Citizens Bank of Polson, National Association, both in Polson, Montana.

Board of Governors of the Federal Reserve System, December 24, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–32837 Filed 12–29–15; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the

proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 22, 2016.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Southeast, LLC,* Atlanta, Georgia; to become a bank holding company by acquiring at least 50 percent of the voting shares of Barwick Banking Company, Barwick, Georgia.

Board of Governors of the Federal Reserve System, December 24, 2015.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2015–32839 Filed 12–29–15; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0184; Docket 2015–0055, Sequence 33]

Contractors Performing Private Security Functions Outside the United States

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding an extension of an information collection requirement for an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning Contractors Performing Private Security Functions Outside the United States.

DATES: Submit comments on or before February 29, 2016.

ADDRESSES: Submit comments identified by Information Collection 9000–0184, Contractors Performing Private Security Functions Outside the United States, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for Information Collection 9000–0184, Contractors Performing Private Security Functions Outside the United States. Select the link ''Comment Now'' that corresponds with ''Information Collection 9000–0184, Contractors Performing Private Security Functions Outside the United States''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0184, Contractors Performing Private Security Functions Outside the United States'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., Washington, DC 20405.

Instructions: Please submit comments only and cite Information Collection 9000–0184, Contractors Performing Private Security Functions Outside the United States in all correspondence related to this case. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, Governmentwide Acquisition Policy, at 202–208–4949 or email *michaelo.jackson@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, as amended by section 853 of the NDAA for FY 2009 and sections 831 and 832 of the NDAA for FY 2011, together with the required Governmentwide implementing regulations (32 CFR part 159, published at 76 FR 49650 on August 11, 2011), as amended, adds requirements and limitations for contractors performing private security functions in areas of combat operations, or other military operations as designated by the Secretary of Defense, upon agreement of the Secretaries of Defense and State.

These requirements are that contractors performing in areas such as Iraq and Afghanistan ensure that their personnel performing private security functions comply with 32 CFR part 159, including (1) accounting for Government-acquired and contractor-furnished property and (2) reporting incidents in which a weapon is discharged, personnel are attacked or killed or property is destroyed, or active, lethal countermeasures are employed.

B. Annual Reporting Burden

Respondents: 920.

Responses per Respondent: 5.

Total Response: 4,600.

Hours per Response: 0.167.

Total Burden Hours: 768.

C. Public Comments

Public comments are particularly invited upon; Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulations (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies Of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 9000–0184, Contractors Performing Private Security Functions Outside the United States, in all correspondence.

William Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2015–32776 Filed 12–29–15; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10415]

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 29, 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_submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' 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:* Generic Clearance for the Collection Customer Satisfaction Surveys; *Use:* This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Collecting voluntary customer feedback is the least burdensome, most effective way for the Agency to determine whether or not its public Web sites are useful to and used by its customers. Generic clearance is needed to ensure that the Agency can continuously improve its Web sites though regular surveys developed from these pre-defined questions. Surveying the Agency Web sites on a regular, ongoing basis will help ensure that users have an effective, efficient, and satisfying experience on any of the Web sites, maximizing the impact of the information and resulting in optimum benefit for the public. The surveys will ensure that this communication channel meets customer and partner priorities, builds the Agency's brands, and contributes to the Agency's health and human services impact goals. Note that the burden estimate for the collection has increased from the figure published in the 60-day notice (80 FR 66904). In the 60-day notice, we did not account for the currently approved burden that will be retained and then add it to the new burden for which we are seeking approval. The total is now 50,000 hours. *Form Number:* CMS–10415 (OMB control number: 0938–1185); *Frequency:* Occasionally; *Affected Public:* Individuals and Households, Business or other for-profits and Not-for-profit institutions, State, Local or Tribal Governments; *Number of Respondents:* 1,000,000; *Total Annual Responses:* 1,000,000; *Total Annual Hours:* 50,000. (For policy questions regarding this collection contact John Booth at 410–786–6577.)

Dated: December 22, 2015.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2015–32633 Filed 12–29–15; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0434]

Acidified Foods; Draft Guidance for Industry; Withdrawal of Draft Guidance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; withdrawal.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the withdrawal of a draft guidance for industry, entitled ''Draft Guidance for Industry: Acidified Foods.'' The draft guidance was intended to complement our regulations regarding acidified foods (including regulations for specific current good manufacturing practice, establishment registration, and process filing) by helping commercial food processors

determine whether their food products are subject to these regulations by providing for voluntary submission of process filings by processors of non-acidified foods (*e.g.,* some acid foods or fermented foods), and by helping processors of acidified foods in ensuring safe manufacturing, processing, and packing processes and in employing appropriate quality control procedures. We are withdrawing the draft guidance, in part, because many of the topics addressed in the draft guidance are now being addressed in other documents.

DATES: The withdrawal is effective December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Michael Mignogna, Center for Food Safety and Applied Nutrition (HFS–302), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–1565.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of September 27, 2010 (75 FR 59268), we announced the availability of a draft guidance entitled ''Draft Guidance for Industry: Acidified Foods'' and gave interested parties an opportunity to submit comments by December 27, 2010, for us to consider before beginning work on the final version of the guidance. The draft guidance was intended to complement our regulations regarding acidified foods (including regulations for specific current good manufacturing practice (21 CFR part 114), establishment registration (21 CFR 108.25(c)(1)), and process filing (21 CFR 108.25(c)(2)) by helping commercial food processors in determining whether their food products are subject to these regulations and by providing for voluntary submission of process filings by processors who conclude that their products are non-acidified foods (*e.g.,* acid foods or fermented foods). The draft guidance also was intended to help processors of acidified foods in ensuring safe manufacturing, processing, and packing processes and in employing appropriate quality control procedures.

We are withdrawing the draft guidance, in part, because the procedures for voluntary submission of process filings by processors of non-acidified foods are addressed by our recently issued guidance entitled ''Submitting Form FDA 2541 (Food Canning Establishment Registration) and Forms FDA 2541d, FDA 2541e, FDA 2541f, and FDA 2541g (Food Process Filing Forms) to FDA in Electronic or Paper Format'' (80 FR 60909, October 8, 2015). We also are withdrawing the draft guidance, in part, because we recently issued a final rule entitled ''Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food'' (80 FR 55908, September 17, 2015), and that rule, along with guidance documents we are developing as a companion to that rule, should help processors in ensuring safe manufacturing, processing, and packing processes and in employing appropriate quality control procedures.

Dated: December 23, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–32781 Filed 12–29–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Advisory Council on Alzheimer's Research, Care, and Services; Meeting

AGENCY: Assistant Secretary for Planning and Evaluation, HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces the public meeting of the Advisory Council on Alzheimer's Research, Care, and Services (Advisory Council). The Advisory Council on Alzheimer's Research, Care, and Services provides advice on how to prevent or reduce the burden of Alzheimer's disease and related dementias on people with the disease and their caregivers. During the January meeting, the Advisory Council will review the process for developing recommendations and developing the National Plan to Address Alzheimer's Disease, discuss updates to work on Goals 2 and 3 of the National Plan, and hear updates on a future summit on care.

DATES: The meeting will be held on January 25, 2016 from 9:30 a.m. to 5:00 p.m. EDT.

ADDRESSES: The meeting will be held in Room 6, Building 31 of the National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892.

Comments: Time is allocated in the afternoon on the agenda to hear public comments. The time for oral comments will be limited to two (2) minutes per individual. In lieu of oral comments, formal written comments may be submitted for the record to Rohini Khillan, ASPE, 200 Independence Avenue SW., Room 424E, Washington, DC 20201. Comments may also be sent to *napa@hhs.gov.* Those submitting written comments should identify themselves and any relevant organizational affiliations.

FOR FURTHER INFORMATION CONTACT: Rohini Khillan (202) 690–5932, *rohini.khillan@hhs.gov.* **Note:** Seating may be limited. Those wishing to attend the meeting must send an email to *napa@hhs.gov* and put ''January 25 Meeting Attendance'' in the Subject line by Friday, January 15, so that their names may be put on a list of expected attendees and forwarded to the security officers at the National Institutes of Health. Any interested member of the public who is a non-U.S. citizen should include this information at the time of registration to ensure that the appropriate security procedure to gain entry to the building is carried out. Although the meeting is open to the public, procedures governing security and the entrance to Federal buildings may change without notice. If you wish to make a public comment, you must note that within your email.

SUPPLEMENTARY INFORMATION: Notice of these meetings is given under the Federal Advisory Committee Act (5 U.S.C. App. 2, section 10(a)(1) and (a)(2)). Topics of the Meeting:

During the January meeting, the Advisory Council will review the process for developing recommendations and developing the National Plan to Address Alzheimer's Disease, discuss updates to work on Goals 2 and 3 of the National Plan, and hear updates on a future summit on care.

Procedure and Agenda: This meeting is open to the public. Please allow 45 minutes to go through security and walk to the meeting room. The meeting will also be webcast at *www.hhs.gov/live.*

Authority: 42 U.S.C. 11225; Section 2(e)(3) of the National Alzheimer's Project Act. The panel is governed by provisions of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

Dated: December 21, 2015.

Richard G. Frank,

Assistant Secretary for Planning and Evaluation.

[FR Doc. 2015–32890 Filed 12–29–15; 8:45 am]

BILLING CODE 4150–05–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 27, 2016.

Time: 11:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Room 8C100, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Thomas F. Conway, Ph.D., 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*.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Investigator Initiated Clinical Trials.

Date: January 27, 2016.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Raymond R. Schleef, Ph.D., Senior Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3E61, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892–9823, (240) 669–5019, *schleefrr@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 23, 2015.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32771 Filed 12–29–15; 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 22, 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, Ph.D., 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.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Clinical Trial Implementation Cooperative Agreement (U01).

Date: January 22, 2016.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Zhuqing (Charlie) Li, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room # 3G41B, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC9823, Bethesda, MD 20892–9823, (240) 669–5068, *zhuqing.li@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 23, 2015.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32767 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 Center for Advancing Translational Sciences Special Emphasis Panel; SBIR Review Meeting Topic 14.

Date: February 5, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: M. Lourdes Ponce, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democrary Blvd., Democracy 1, Room 1073, Bethesda, MD 20892, 301–594–9459, *lourdes.ponce@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 23, 2015.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32765 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing and Co-Development

AGENCY: National Institutes of Health.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing and/or co-development in the U.S. in accordance with 35 U.S.C. 209 and 37 CFR part 404 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing and/or co-development.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute, Technology Transfer Center on or before January 29, 2016 will be considered.

ADDRESSES: Invention Development and Marketing Unit, Technology Transfer Center, National Cancer Institute, 9609 Medical Center Drive, Mail Stop 9702, Rockville, MD, 20850–9702, Tel. 240–276–5515 or email *ncitechtransfer@mail.nih.gov.*

FOR FURTHER INFORMATION CONTACT: Information on licensing and co-development research collaborations, and copies of the U.S. patent applications listed below may be obtained by contacting: Attn. Invention Development and Marketing Unit, Technology Transfer Center, National Cancer Institute, 9609 Medical Center Drive, Mail Stop 9702, Rockville, MD 20850–9702, Tel. 240–276–5515 or email *ncitechtransfer@mail.nih.gov.* A signed Confidential Disclosure Agreement may be required to receive copies of the patent applications.

SUPPLEMENTARY INFORMATION: Technology description follows.

Title of invention: Monoclonal Antibodies Fibroblast Growth Factor Receptor 4 (FGFR4) and Methods for Their Use.

Description of Technology: Rhabdomyosarcoma (RMS) is the most common soft tissue sarcoma in children and adolescents. Although current treatments for primary disease are relatively successful, metastatic RMS is generally accompanied by a dismal prognosis. Thus, the development new therapies for metastatic RMS provides a strong benefit to the advancement of public health.

Fibroblast Growth Factor Receptor 4 (FGFR4) is a cell surface protein that is highly expressed in RMS, and other cancers (including liver, lung, pancreatic, ovarian, and prostate cancers). Researchers in the National Cancer Institute's Genetics-Branch found that in RMS patients, high FGFR4 expression is often associated with advanced-stage disease, rapid disease progression, and poor survival. The correlation between FGFR4 expression and highly aggressive RMS makes FGFR4 an attractive target for treatment of RMS. By targeting FGFR4 specifically, it may be possible to attack the cancer cells while leaving healthy, essential cells unaffected. This invention concerns the generation of several high-affinity monoclonal antibodies which can be used to treat FGFR4-related diseases. In particular, these antibodies have been used to generate antibody-drug conjugates (ADCs) and chimeric antigen receptors (CARs) which are capable of specifically targeting and killing diseased cells.

Potential Commercial Applications:

—Development of unconjugated antibody therapeutics
—Development of antibody-drug conjugates (ADCs) and recombinant immunotoxins (RITs)
—Development of chimeric antigen receptors (CARs) and T Cell Receptors (TCRs)
—Development of bispecific antibody therapeutics
—Development of Diagnostic Agents for detecting FGFR4-positive cancers

Value Proposition:

—High affinity and specificity of the antibodies allows more selective targeting of cancer cells, reducing the potential for side effects during therapy
—Multiple antibodies available

Development Stage:

In vitro/Discovery

Inventor(s):

Javed Khan, M.D. (NCI), S. Baskar (NCI), R.J. Orientas (Lentigen Technology, Inc.)

Publication(s):

—''Comprehensive genomic analysis of rhabdomyosarcoma reveals a landscape of alterations affecting a common genetic axis in fusion-positive and fusion-negative tumors.'' Cancer Discov. 2014 Feb;4(2):216–31. doi: 10.1158/2159–8290.CD–13–0639. Epub 2014 Jan 23.
—''Targeting wild-type and mutationally activated FGFR4 in rhabdomyosarcoma with the inhibitor ponatinib (AP24534)''. PLoS One. 2013 Oct 4;8(10):e76551. doi: 10.1371/journal.pone.0076551. eCollection 2013
—''Identification of FGFR4-activating mutations in human rhabdomyosarcomas that promote metastasis in xenotransplanted models.'' J Clin Invest. 2009 Nov;119(11):3395–407. doi: 10.1172/JCI39703. Epub 2009 Oct 5.
—''Identification of cell surface proteins as potential immunotherapy targets in 12 pediatric cancers.'' Front Oncol. 2012 Dec 17;2:194. doi: 10.3389/fonc.2012.00194. eCollection 2012.

Intellectual Property:

HHS Reference No. E–264–2015/0–US–01

U.S. Provisional Patent Application No. 62/221,045 filed September 20, 2015 entitled ''Monoclonal Antibodies Fibroblast Growth Factor Receptor 4 (FGFR4) and Methods for Their Use'' [HHS Reference E–264–2015/0–US–01]

Licensing and Collaborative/Co-Development Research Opportunity:

The National Cancer Institute seeks partners to license or co-develop the development new antibody-based therapies for metastatic Rhabdomyosarcoma (RMS).

Contact Information:

Requests for copies of the patent application or inquiries about licensing and/or research collaboration and co-development opportunities should be sent to John D. Hewes, Ph.D., email: *john.hewes@nih.gov.*

Dated: December 22, 2015.

Thomas M. Stackhouse,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2015–32878 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing and/or co-development in the U.S. in accordance with 35 U.S.C. 209 and 37 CFR part 404 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing and/or co-development.

DATES: Only written comments and/or applications for a license which are received by the NCI Technology Transfer Center on or before January 29, 2016 will be considered.

ADDRESSES: Technology Transfer Center, National Cancer Institute, 9609 Medical

Center Drive, Mail Stop 9702, Rockville, MD 20850–9702, Tel. 240–276–5515 or email *ncitechtransfer@mail.nih.gov.*

FOR FURTHER INFORMATION CONTACT: Information on licensing and co-development research collaborations, and copies of the U.S. patent applications listed below, may be obtained by contacting: Attn. Invention Development and Marketing Unit, Technology Transfer Center, National Cancer Institute, 9609 Medical Center Drive, Mail Stop 9702, Rockville, MD 20850–9702, Tel. 240–276–5515 or email *ncitechtransfer@mail.nih.gov.* A signed Confidential Disclosure Agreement may be required to receive copies of the patent applications.

SUPPLEMENTARY INFORMATION:

Title of invention: Thalidomide/lenolidomide/pomalidomide analogs that inhibit inflammation, angiogenesis.

Description of Technology: Thalidomide and its close analogs (lenalidomide and pomalidomide) are widely used to treat a variety of diseases, such as multiple myeloma and other cancers, as well as the symptoms of several inflammatory disorders. However, thalidomide is known for its teratogenic adverse effects when first introduced clinically in the 1950s, and is associated with drowsiness and peripheral neuropathy. Hence, there is intense interest to synthesize, identify and develop safer analogs. Researchers at the National Institute on Aging's Drug Design and Development Section synthesized novel thalidomide analogs that demonstrate clinical potential without being teratogenic, as initially evaluated in *in vivo* zebrafish and chicken embryo model systems and in cell culture. These new compounds differentially provide potent anti-angiogenesis and/or anti-inflammatory action. The agents have potential for development of new cancer therapies and treatment of a number of neurological and systemic disorders involving chronic inflammation and elevated TNF-alpha levels.

Potential Commercial Applications:

—Cancer therapeutics

—Inflammatory disorders such as Crohn's disease, sarcoidosis, graft-versus-host disease, and rheumatoid arthritis

—Neuroinflammatory disorders (acute: Traumatic brain injury and stroke; chronic: Parkinson's disease, Alzheimer's disease, multiple sclerosis)

Value Proposition:

—Non-teratogenic

—Potent

Development Stage:

In Vitro/Discovery

Inventor(s):

Nigel H. Greig (NIA), Weiming Luo (NIA), David Tweedie (NIA), William Douglas Figg, Sr. (NCI), Neil Vargesson (Univ. Aberdeen, Scotland), and Shaunna Beedie (NCI & Univ. Aberdeen, Scotland)

Intellectual Property:

HHS Reference No. E–208–2015/0–US–01

U.S. Provisional Patent Application No. 62/235, 105, filed September 30, 2015, entitled ''Thalidomide/lenolidomide/pomalidomide analogs that inhibit inflammation, angiogenesis''

Licensing and Collaborative/Co-Development Research Opportunity: The National Institute on Aging seeks collaborators to license or co-develop novel thalidomide analogs that demonstrate clinical potential without being teratogenic.

Contact Information: Requests for copies of the patent application or inquiries about licensing and/or research collaboration and co-development opportunities should be sent to John D. Hewes, Ph.D., email: *john.hewes@nih.gov.*

CFR Citation: 35 U.S.C. 209 and 37 CFR part 404

Dated: December 22, 2015.

Thomas M. Stackhouse,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2015–32877 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 on Aging Special Emphasis Panel; Rodent Tissue Bank.

Date: January 29, 2016.

Time: 12:30 p.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Kimberly Firth, Ph.D., National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7702 *firthkm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 23, 2015.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32772 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director; Amended Notice of Meeting

Notice is hereby given of a correction in the meeting notice of the Big Data to Knowledge Multi-Council Working Group (BD2K) that was published in the **Federal Register** on Friday, December 11, 2015, 80 FRN 76996.

The date of the meeting is January 11, 2016. The time and meeting access codes remain the same.

A portion of the meeting is open to the public, 11 a.m. to 12:00 p.m. and is being held by teleconference only. No physical meeting location is provided for any interested individuals to listen to committee discussions. Any individual interested in listening to the meeting discussions must call: 1–866–692–3158 and use Passcode 2956317 for access to the meeting.

Dated: December 23, 2015.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32768 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Center for Complex Tissues (2016/05).

Date: February 15, 2016.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, Suite 920, 6707 Democracy Boulevard, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John K. Hayes, Ph.D., Scientific Review Officer, 6707 Democracy Boulevard, Suite 959, Bethesda, MD 20892, (301)–451–3398, *hayesj@mail.nih.gov*.

Dated: December 23, 2015.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32769 Filed 12–29–15; 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 28, 2016.

Time: 10:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Zhuqing (Charlie) Li, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room # 3G41B, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC9823, Bethesda, MD 20892–9823, (240) 669–5068, *zhuqing.li@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Partnerships for the Development of Host-Targeted Therapeutics to Limit Antimicrobial Resistance (R01).

Date: January 28–29, 2016.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 2H 200 A/B, 3F100, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Susana Mendez, DVM, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G53B, National Institutes of Health, NIAID, 5601 Fishers Lane Dr., MSC 9823, Bethesda, MD 20892–9823, (240) 669–5077, *mendezs@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 23, 2015.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32766 Filed 12–29–15; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–14–092: Bioengineering Research Partnerships (BRP).

Date: January 21, 2016.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Mehrdad Mohseni, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7854, Bethesda, MD 20892, 301–435–0484, *mohsenim@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 23, 2015.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32770 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing and/or co-development in the U.S. in accordance with 35 U.S.C. 209 and 37 CFR part 404 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing and/or co-development.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute, Technology Transfer Center on or before January 29, 2016 will be considered.

ADDRESSES: Invention Development and Marketing Unit, Technology Transfer Center, National Cancer Institute, 9609 Medical Center Drive, Mail Stop 9702, Rockville, MD, 20850–9702.

FOR FURTHER INFORMATION CONTACT: Information on licensing and co-development research collaborations, and copies of the U.S. patent applications listed below may be

obtained by contacting: Attn. Invention Development and Marketing Unit, Technology Transfer Center, National Cancer Institute, 9609 Medical Center Drive, Mail Stop 9702, Rockville, MD, 20850–9702, Tel. 240–276–5515 or email *ncitechtransfer@mail.nih.gov*. A signed Confidential Disclosure Agreement may be required to receive copies of the patent applications.

SUPPLEMENTARY INFORMATION: Technology description follows.

Title of invention: A Novel Fully-Human Anti-CD30 Chimeric Antigen Receptor for Treatment of CD30+ Lymphoma.

Description of Technology: Chimeric antigen receptors (CARs) are hybrid proteins that consist of two major components: A targeting domain and a signaling domain. The targeting domain allows T cells which express the CAR to selectively recognize and bind to diseased cells that express a particular protein. Once the diseased cell is bound by the targeting domain of the CAR, the signaling domain of the CAR activates the T cell, thereby allowing it to kill the diseased cell. This is a promising new therapeutic approach known as adoptive cell therapy (ACT).

Researchers at the National Cancer Institute's Experimental Transplantation and Immunology Branch developed a CAR that recognizes human tumor necrosis factor receptor superfamily member 8 (TNFRSF8, also known as CD30). The expression of CD30 is deregulated in a variety of human cancers, including many lymphomas. By creating a CAR that recognizes CD30, it may be possible to treat these cancers using adoptive cell therapy.

Potential Commercial Applications

—Treatment of human cancers associated with expression of CD30 or variants thereof

—Specific cancers include: Non-Hodgkins Lymphomas, Hodgkin's Lymphomas, several solid malignancies

Value Proposition

—Human components are less likely to cause adverse or neutralizing immune response in patients

—Targeted therapies decrease non-specific killing of healthy cells and tissues, resulting in fewer off-target side-effects and healthier patients

Development Stage

In vivo/Lead Validation.

Inventor(s)

Jim N. Kochenderfer, M.D. (NCI).

Intellectual Property

HHS Reference No. E–001–2016/0–US–01

US Provisional Application 62/241,896 (HHS Reference No. E–001–2016/0–US–01) filed October 15, 2015 entitled ''A Novel Fully-Human Anti-CD30 Chimeric Antigen Receptor for Treatment of CD30+ Lymphoma''

Licensing Opportunity: Researchers at the NCI seek licensees for a chimeric antigen receptor (CAR) that recognizes human tumor necrosis factor receptor superfamily member 8 (TNFRSF8, also known as CD30) for use as a cancer therapeutic.

Contact Information

Requests for copies of the patent application or inquiries about licensing and/or research collaboration and co-development opportunities should be sent to John D. Hewes. Ph.D., email: *john.hewes@nih.gov*.

Dated: December 22, 2015.

Thomas M. Stackhouse,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2015–32879 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Alzheimer's Center.

Date: February 4, 2016.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Jeannette L. Johnson, Ph.D., National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2c212, Bethesda, MD 20892, 301–402–7705, *JOHNSONJ9@NIA.NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 23, 2015.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2015–32773 Filed 12–29–15; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0014]

Agency Information Collection Activities: Affidavit of Support, Form I–134; Extension, Without Change, of a Currently Approved Collection

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 29, 2016.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0014 in the subject box, the agency name and Docket ID USCIS–2006–0072. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2006–0072;

(2) *Email.* Submit comments to *USCISFRComment@uscis.dhs.gov*;

(3) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination

Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Laura Dawkins, Chief, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, telephone number 202–272–8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2006–0072 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Affidavit of Support.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–134; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. This information collection is necessary to determine if at the time of application into the United States, the applicant is likely to become a public charge.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–134 is 18,460 and the estimated hour burden per response is 1.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 27,960 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* There is no estimated total annual cost burden associated with this collection of information.

Dated: December 23, 2015.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2015–32876 Filed 12–29–15; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO–9230000–L1440000–ET0000; COC 013297]

Public Land Order No. 7847; Partial Revocation of a Public Land Order No. 1378; Colorado

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Public land order.

SUMMARY: This order partially revokes the withdrawal created by Public Land Order No. 1378 insofar as it affects 21.91 acres reserved for the use of the United States Forest Service as the Sunshine Campground. This order also opens the land to appropriation and use of all kinds under the public land laws, except for the United States mining laws.

DATES: *The effective date is:* December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Valerie Hunt, U.S. Forest Service, Rocky Mountain Region 2, 303–275–5071; or Steve Craddock, Bureau of Land Management, Colorado State Office, 303–239–3707; or write: Land Tenure Program Lead, BLM Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215–7093. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individuals. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The United States Forest Service determined that a portion of the land withdrawn and reserved for the Sunshine Campground is not needed for picnic or recreation use, and has requested a partial revocation of the withdrawal. The land will remain segregated from the United States mining laws due to a pending land exchange proposal.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

1. The withdrawal created by Public Land Order No. 1378 (22 FR 240 (1957)) is hereby revoked in part as to the following described land:

Uncompahgre National Forest

New Mexico Principal Meridian

T. 42 N., R. 9 W.,
Sec. 20, lot 11.

The area described contains 21.91 acres in San Miguel County.

2. At 9 a.m. on December 30, 2015, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law, the land described in Paragraph 1 is hereby opened to such forms of disposition as may be made of National Forest System

land, except for location and entry under the United States mining laws.

Dated: December 15, 2015.

Janice M. Schneider,

Assistant Secretary, Land and Minerals Management.

[FR Doc. 2015–32862 Filed 12–29–15; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[16X.LLID9570000.L14400000. BJ0000.241A.X.4500081115]

Idaho: Filing of Plats of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of surveys.

SUMMARY: The Bureau of Land Management (BLM) has officially filed the plats of survey of the lands described below in the BLM Idaho State Office, Boise, Idaho, effective 9:00 a.m., on the dates specified.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho 83709–1657.

SUPPLEMENTARY INFORMATION: These surveys were executed at the request of the Bureau of Land Management to meet their administrative needs. The lands surveyed are:

The plat representing the dependent resurvey of portions of the west boundary and subdivisional lines, and subdivision of sections 29 and 31, Township 26 North, Range 2 East, of the Boise Meridian, Idaho, Group Number 1393, was accepted October 8, 2015.

These surveys were executed at the request of the Bureau of Indian Affairs to meet certain administrative and management purposes. The lands surveyed are:

The plat representing the dependent resurvey of portions of the Boise Meridian (east boundary), subdivisional lines, subdivision of sections 12, 13, 24, and 25, and 1912 meanders of the Kootenai River in section 12, and the survey of the 2012–2014 meanders of the Kootenai River in sections 24 and 25, Township 63 North, Range 1 West, of the Boise Meridian, Idaho, Group Number 1380, was accepted October 22, 2015.

Stanley G. French,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 2015–32886 Filed 12–29–15; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[14XLLAK941000–L14400000–ET0000; AA–45553]

Public Land Order No. 7845; Extension of Public Land Order No. 7177; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order extends the duration of the withdrawal created by Public Land Order No. 7177 for an additional 20-year period, which would otherwise expire on December 20, 2015. The extension is necessary for continued protection of the investment of Federal funds in the United States Forest Service Glacier Loop Administrative Site near Juneau, Alaska.

DATES: *Effective Date:* December 21, 2015.

FOR FURTHER INFORMATION CONTACT: Renee Fencl, Bureau of Land Management Alaska State Office, 222 West 7th Avenue, No. 13, Anchorage, Alaska 99513–7504, 907–271–5067 or *rfencl@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The purpose for which the withdrawal was first made requires this extension to continue protection of the investment of Federal funds in the U.S. Forest Service Glacier Loop Administrative Site.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

Public Land Order No. 7177 (60 FR 66150 (1995)), which withdrew 22.51 acres of public land near Juneau, Alaska from settlement, sale, location, or entry under the general land laws, including the United States mining laws, to protect the U.S. Forest Service Glacier Loop Administrative Site, is hereby extended for an additional 20-year period. This withdrawal will expire on December 20, 2035, unless, as a result of a review conducted prior to the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be further extended.

Dated: December 12, 2015.

Janice M. Schneider,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 2015–32861 Filed 12–29–15; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–19892; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before November 28, 2015, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by January 14, 2016.

ADDRESSES: Comments may be sent via U.S. Postal Service to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before November 28, 2015. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

GEORGIA

DeKalb County

Villa MiraFlores, 1214 Villa Dr., Atlanta, 15000964

ILLINOIS

Kane County

Muirhead, Robert and Elizabeth, House, 42W814 Rohrson Rd., Plato Center, 15000965

Lake County

Van Hagen, George E., House, 12 W. County Line Rd., Barrington Hills, 15000966

MAINE

Cumberland County

Brunswick Commercial Historic District, 50–151 Maine St., Brunswick, 15000968
Falmouth High School, 192 Middle Rd., Falmouth, 15000967

Kennebec County

Hussey—Littlefield Farm, 63 Hussey Rd., Albion, 15000969

Lincoln County

Cottage on King's Row, 1400 ME 32, Bristol, 15000970

Washington County

Marsh Stream Farm, 38 Marsh Stream Ln., Machiasport, 15000971

PENNSYLVANIA

Montgomery County

Hatfield Borough Substation, Lock Up and Firehouse, Cherry at Diamond & Fretz Sts., Hatfield Borough, 15000972

Philadelphia County

Albion Carpet Mill, (Textile Industry in the Kensington Neighborhood of Philadelphia, Pennsylvania MPS) 1821–1845 E. Hagert St., Philadelphia, 15000973

Authority: 60.13 of 36 CFR part 60

Dated: December 3, 2015.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2015–32381 Filed 12–29–15; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On December 18, 2015, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of Kansas in the lawsuit entitled *United States* v. *Northcutt, Inc.,* Civil Action No. 6:15–cv–1396.

The United States filed this lawsuit under the Clean Air Act. The United States' complaint seeks injunctive relief and civil penalties for violations of the regulations that govern sales of substitutes for ozone-depleting substances at the defendant's facility in Wichita, Kansas. *See* 42 U.S.C. 7413, 7671k; 40 CFR 82.170 to 82.184. The consent decree requires the defendant to discontinue domestic marketing and sales of the substitutes at issue, send a warning letter to past domestic purchasers of the substitutes, and pay a $100,000 civil penalty.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Northcutt, Inc.,* D.J. Ref. No. 90–5–2–1–11181. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *http://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $6.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2015–32797 Filed 12–29–15; 8:45 am]

BILLING CODE 4410–15–P

NUCLEAR REGULATORY COMMISSION

[NRC–2015–0174]

Information Collection: NRC Form 398, Personal Qualification Statement—Licensee

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''NRC Form 398, Personal Qualification Statement—Licensee.''

DATES: Submit comments by January 29, 2016.

ADDRESSES: Submit comments directly to the OMB reviewer at: Vlad Dorjets, Desk Officer, Office of Information and Regulatory Affairs (3150–0018), NEOB–10202, Office of Management and Budget, Washington, DC 20503; telephone: 202–395–7315, email: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Tremaine Donnell, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6258; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2015–0174 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–2015–0174
- *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 Supporting Statement is available in ADAMS under Accession No. ML15344A157 and NRC Form 398 is available in ADAMS under Accession No. ML15344A198.
- *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.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, Tremaine Donnell, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6258; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *http://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''NRC Form 398, Personal Qualification Statement—Licensee.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on August 18, 2015 (80 FR 50050).

1. *The title of the information collection:* ''NRC Form 398, Personal Qualification Statement—Licensee.''

2. *OMB approval number:* 3150–0090.

3. *Type of submission:* Extension.

4. *The form number if applicable:* NRC Form 398.

5. *How often the collection is required or requested:* Upon application for an Initial or upgrade operator license, and every six years for the renewal of Operator or senior operator licenses.

6. *Who will be required or asked to respond:* Facility licensees who are tasked with Certifying that the applicants and renewal operators are qualified to be licensed as reactor operators and senior reactor operators.

7. *The estimated number of annual responses:* 1,500.

8. *The estimated number of annual respondents:* 1,500.

9. An estimate of the total number of hours needed annually to comply with the information collection requirement or request: 7,225.

10. *Abstract:* NRC Form 398 is used to transmit detailed information required to be submitted to the NRC by a facility licensee on each applicant applying for new and upgraded licenses or license renewals to operate the controls at a nuclear reactor facility. This information is used to determine that each applicant or renewal operator seeking a license or renewal of a license is qualified to be issued a license, and that the licensed operator would not be expected to cause operational errors and endanger public health and safety.

Dated at Rockville, Maryland, this 24th day of December 2015.

For the Nuclear Regulatory Commission.

Tremaine Donnell

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2015–32845 Filed 12–29–15; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2015–0136]

Information Collection: NRC Generic Letter 2016–XX, Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a proposed collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''NRC Generic Letter 2016–XX, Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools.''

DATES: Submit comments by January 29, 2016.

ADDRESSES: Submit comments directly to the OMB reviewer at: Vlad Dorjets, Desk Officer, Office of Information and Regulatory Affairs (3150–XXXX), NEOB–10202, Office of Management and Budget, Washington, DC 20503; telephone: 202–395–7315, email: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Tremaine Donnell, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6258; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2015–0136 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–2015–0136.

• *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 proposed information collection and the supporting statement are available in ADAMS under Accession Nos. ML15224A005 and ML15268A549, respectively.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, Tremaine Donnell, Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6258; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *http://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a proposed collection of information to OMB for review entitled, ''NRC Generic Letter 2016–XX, Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number.

The draft generic letter was published for public comment on March 11, 2014 (79 FR 13685), but without an express request for public comment on the proposed information collection as required by the Office of Management and Budget. Therefore, the NRC published a **Federal Register** notice with a 60-day comment period on these proposed information collection in the draft generic letter on June 4, 2015 (80 FR 31930).

1. *The title of the information collection:* NRC Generic Letter 2016–XX, Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools.

2. *OMB approval number:* An OMB control number has not yet been assigned to this proposed information collection.

3. *Type of submission:* New.

4. *The form number if applicable:* Not applicable.

5. *How often the collection is required or requested:* One-time.

6. *Who will be required or asked to respond:* All nuclear power reactors with a license issued under Title 10 of the *Code of Federal Regulations* (10 CFR) part 50, ''Domestic Licensing of Production and Utilization Facilities,'' except those that have permanently ceased operations with all reactor fuel removed from on-site spent fuel pool storage; all holders of an operating license for a non-power reactor (research reactor, test reactor, or critical assembly) under 10 CFR part 50 who have a reactor pool, fuel storage pool, or other wet locations designed for the purpose of fuel storage, except those who have permanently ceased operations with all reactor fuel removed from on-site wet storage.

7. *The estimated number of annual responses:* 112.

8. *The estimated number of annual respondents:* 112.

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 12,900 hours.

10. *Abstract:* Neutron-absorbing materials installed in the spent fuel pool that are credited for maintaining subcriticality must be able to perform their neutron-absorbing safety function during both normal operating conditions and design basis events. Monitoring of neutron-absorbing materials is intended to identify when degradation may affect the ability to perform the neutron-absorbing safety function, so that appropriate corrective action can be taken. The NRC is requesting information to determine if (1) addressees have adequate neutron-absorbing material monitoring programs in place to ensure compliance with the regulations, and (2) the agency should take additional regulatory action. The Atomic Energy Act of 1954, as amended (AEA) requires that licensees provide reasonable assurance of adequate protection to public health and safety. NRC verification of compliance with the NRC's regulations and license conditions with respect to spent fuel pool neutron absorbers provides reasonable assurance of such adequate protection with respect to those neutron absorbers. The NRC has authority to collect this type of information pursuant to Sections 161 and 182 of the AEA, and 10 CFR 50.54(f), to enable the NRC to determine if the license to operate a nuclear facility needs to be modified, revoked, or suspended. The NRC uses the information collected to verify that licensees meet the NRC regulations and requirements of their license.

Dated at Rockville, Maryland, this 22nd day of December, 2015.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2015–32836 Filed 12–29–15; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date* December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Valerie J. Pelton, 202–268–3049.

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 Priority Mail Contract 170 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2016–47, CP2016–62.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2015–32844 Filed 12–29–15; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 30, 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 Priority Mail Contract 173 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2016–50, CP2016–65.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2015–32841 Filed 12–29–15; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Valerie J. Pelton, 202–268–3049.

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 Priority Mail Contract 171 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2016–48, CP2016–63.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2015–32843 Filed 12–29–15; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 30, 2015.

FOR FURTHER INFORMATION CONTACT: Valerie J. Pelton, 202–268–3049.

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 Priority Mail Contract 172 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2016–49, CP2016–64.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2015–32842 Filed 12–29–15; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76760; File No. SR–NASDAQ–2015–154]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Participant Fee

December 23, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2015, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes [sic] amend the Exchange's transaction fees at Chapter XV, entitled ''Options Pricing,'' Section 10, entitled ''Participant Fee—Options.''

The Exchange purposes [sic] an increase to its Participant Fee to recoup costs incurred by the Exchange. The Exchange's Participant Fee is competitive with those of other options exchanges.[3] While the amendment proposed herein is effective upon filing, the Exchange has designated the amendment [sic] become operative on January 4, 2016.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* note 14 below.

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 increase the NOM Participant Fee, so the Exchange can allocate its costs to various options market participants. Today, the Exchange assesses all NOM Participants a $500 per month Participant Fee. This fee was initially assessed in 2012.[4] The Exchange proposes to increase this Participant Fee from $500 to $1,000 per month for all NOM Participants. The proposed Participant Fee is in addition to the trading rights fee of $1,000 per month to be an Exchange member.[5]

The Exchange believes this Participant Fee is competitive with fees at other options exchanges.[6]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, for example, the Commission indicated that

[4] *See* Securities and Exchange Act Release No. 68502 (December 20, 2012), 77 FR 76572 (December 28, 2012) (SR–NASDAQ–2012–139).

[5] *See* Exchange Rule 7001.

[6] *See* note 14 below.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4) and (5).

market forces should generally determine the price of non-core market data because national market system regulation ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [9] Likewise, in *NetCoalition* v. *NYSE Arca, Inc.*[10] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[11] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [12]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [13] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange's proposal to increase the NOM Participant Fee from $500 to $1,000 per month is reasonable because the Exchange is seeking to recoup costs related to membership administration. The proposed fee is competitive with fees at other options exchanges.[14]

The Exchange's proposal to increase the NOM Participant Fee from $500 to $1,000 per month is equitable and not unfairly discriminatory because the Participant Fee will be assessed uniformly to each NOM Participant.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In terms of intra-market competition, the Exchange's proposal to increase the NOM Participant Fee from $500 to $1,000 per month does not impose an undue burden on competition because the Exchange would uniformly assess the same Participant Fee to each NOM Participant. If the proposed amendment is unattractive to market participants, it is likely that the Exchange will lose Participants. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2015–154 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2015–154. 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.,

[9] Securities Exchange Act Release No. 51808 at 37499 (June 9, 2005) (''Regulation NMS Adopting Release'').

[10] *NetCoalition* v. *NYSE Arca, Inc.,* 615 F.3d 525 (D.C. Cir. 2010).

[11] *See NetCoalition,* at 534.

[12] *Id.* at 537.

[13] *Id.* at 539 (quoting ArcaBook Order, 73 FR at 74782–74783).

[14] *See* The Chicago Board Options Exchange, Incorporated's Fees Schedule. Per month a Market Maker Trading Permit is $5,500, an SPX Tier Appointment is $3,000, a VIX Tier Appointment is $2,000, and an Electronic Access Permit is $1,600. *See also* the International Securities Exchange LLC's Schedule of Fees. Per month an Electronic Access Member is assessed $500.00 for membership and a market maker is assessed from $2,000 to $4,000 per membership depending on the type of market maker. *See also* C2 Options Exchange, Incorporated's Fees Schedule. Per month, a market-maker is assessed a $5,000 permit fee, an Electronic Access Permit is assessed a $1,000 permit fee. *See also* NYSE Arca, Inc.'s Fee Schedule. Per month, a Clearing Firm is assessed a $1,000 per month fee for the first Options Trading Permit (''OTP'') and $250 thereafter, and a market maker is assessed a permit based on the maximum number of OTPs held by an OTP Firm or OTP Holder during a calendar month ranging from $1,000 to $6,000 a month.

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2015–154, and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Brent J. Fields,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76761; File No. SR–NYSEArca–2015–107]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the REX Gold Hedged S&P 500 ETF and the REX Gold Hedged FTSE Emerging Markets ETF Under NYSE Arca Equities Rule 8.600

December 23, 2015.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 10, 2015, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Equities Rule 8.600 (''Managed Fund Shares''): The REX Gold Hedged S&P 500 ETF and the REX Gold Hedged FTSE Emerging Markets ETF. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (the ''Shares'') of the following under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares[4]: The REX Gold Hedged S&P 500 ETF and the REX Gold Hedged FTSE Emerging Markets ETF (each a ''Fund'' and, collectively, the ''Funds'').[5]

The Shares will be offered by Exchange Traded Concepts Trust (the ''Trust''), a Delaware statutory trust. Exchange Traded Concepts, LLC will serve as the investment adviser to the Funds (''Adviser''). Vident Investment Advisory, LLC (the ''Sub-Adviser'') will serve as sub-adviser to the Funds.[6]

SEI Investments Distribution Co. (''SIDCO''), (the ''Distributor'') will be the principal underwriter and distributor of the Funds' Shares. SEI Investments Global Funds Services (the ''Administrator'') will serve as the administrator, custodian, transfer agent and fund accounting agent for the Funds.[7]

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio.[8] Commentary .06 to Rule

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (the ''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission has approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR–NYSEArca–2010–79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 70055 (July 29, 2013) (SR–NYSEArca–2013–52) (order approving proposed rule change relating to listing and trading of shares of the First Trust Morningstar Managed Futures Strategy Fund under NYSE Arca Equities Rule 8.600); and 71456 (January 31, 2014), 79 FR 7258 (February 6, 2014) (SR–NYSEArca–2013–116) (order approving proposed rule change relating to listing and trading of shares of the AdvisorShares International Gold ETF, AdvisorShares Gartman Gold/Yen ETF, AdvisorShares Gartman Gold/British Pound ETF, and AdvisorShares Gartman Gold/Euro ETF under NYSE Arca Equities Rule 8.600).

[6] The Trust is registered under the 1940 Act. On October 9, 2015, 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 under the 1940 Act relating to the Funds (File Nos. 333–156529 and 811–22263) (''Registration Statement''). The description of the operation of the Trust and the Funds herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 30445, April 2, 2013 (File No. 812–13969) (''Exemptive Order'').

[7] The Funds are subject to regulation under the Commodity Exchange Act (''CEA'') and Commodity Futures Trading Commission (''CFTC'') rules as commodity pools. The Adviser is registered as a commodity pool operator (''CPO''), and the Funds will be operated in accordance with CFTC rules.

[8] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser and Sub-Adviser and their related personnel will be subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and

8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a ''fire wall'' between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. Neither the Adviser nor the Sub-Adviser is a broker-dealer or affiliated with a broker-dealer.

In the event (a) the Adviser or Sub-Adviser becomes a registered broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer, or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

The REX Gold Hedged S&P 500 ETF—Principal Investments

According to the Registration Statement, the Fund will seek to outperform the total return performance of the S&P 500 Dynamic Gold Hedged Index (the ''S&P Benchmark'') by actively hedging the returns of the S&P 500® Index using gold futures.

The Fund will seek to achieve its investment objective of outperforming the S&P Benchmark by providing exposure to a gold-hedged U.S. large-cap portfolio using a quantitative, rules-based strategy. The Fund will invest at least 80% of its assets (plus the amount of any borrowings for investment purposes) in (i) U.S. exchange-listed large-cap U.S. stocks; (ii) gold futures, (iii) exchange-traded funds (''ETFs'') [9] and exchange-traded closed-end funds (together with ETFs, the ''Underlying Funds'') that provide exposure to large-cap U.S. stocks, (iv) ETFs or exchange-traded notes (''ETNs'') [10] that provide exposure to gold, and (v) futures that provide exposure to the S&P 500® Index. The Fund will not invest in non-U.S. stocks.

The Fund will seek to achieve a similar level of volatility as that of the S&P Benchmark, although there is no assurance it will do so.

According to the Registration Statement, the S&P Benchmark seeks to reflect the returns of a portfolio of S&P 500® stocks, hedged with a long gold futures overlay. Specifically, the S&P Benchmark measures the total return performance of a hypothetical portfolio consisting of securities that compose the S&P 500® Index, which measures the performance of the large-capitalization sector of the U.S. equity market, and a long position in gold futures contracts, the notional value of which is comparable to the value of the S&P Benchmark's equity component.

The Sub-Adviser will continuously monitor the Fund's holdings in order to enhance performance while still providing approximately equal notional exposure to equity securities and gold futures contracts.

According to the Registration Statement, futures contracts, by their terms, have stated expirations and, at a specified point in time prior to expiration, trading in a futures contract for the current delivery month will cease. Therefore, in order to maintain exposure to gold futures contracts, the S&P Benchmark must periodically migrate out of gold futures contracts nearing expiration and into gold futures contracts that have longer remaining until expiration, a process referred to as ''rolling.'' The impact from this continuous process of selling expiring contracts and buying longer-dated contracts is called roll yield. The S&P Benchmark rolls these futures contracts according to a predefined schedule, regardless of the liquidity or roll yield of the futures contract selected.

The Fund will look to minimize the impact of rolling futures contracts in a number of ways. For example, the Fund may roll positions in gold futures contracts before or after the scheduled roll dates for the S&P Benchmark, to the extent of favorable market prices and available liquidity. Additionally, the Fund may attempt to minimize roll costs (and maximize yields) by rolling into the gold futures contract with the largest positive or smallest negative roll yield. This strategy for taking long positions in and unwinding exposure to gold futures contracts may cause the Fund to have more or less exposure to gold futures contracts than the S&P Benchmark. Additionally, the Fund is not obligated to rebalance its exposures at the same time that the S&P Benchmark rebalances its exposures, and the Fund may rebalance more or less frequently than the S&P Benchmark in order to ensure that the Fund's exposure to equities remains comparable to the Fund's exposure to the price of gold.

The Fund will not directly hold gold futures contracts or other commodity-linked instruments (namely, commodity-related pooled vehicles (as described below) and options on commodity futures). Rather, the Fund expects to gain exposure to these instruments by investing up to 25% of its total assets, as measured at the end of every quarter of the Fund's taxable year, in a wholly-owned and controlled Cayman Islands subsidiary (the ''Subsidiary''). The Subsidiary will be advised by the Adviser and the Fund's investment in the Subsidiary will primarily be intended to provide the Fund primarily with exposure to the price of gold. The Fund's investment in the Subsidiary is expected to provide the Fund with an effective means of obtaining exposure to the commodities markets in a manner consistent with U.S. federal tax law requirements applicable to registered investment companies.

The REX Gold Hedged FTSE Emerging Markets ETF—Principal Investments

According to the Registration Statement, the REX Gold Hedged FTSE Emerging Markets ETF (the ''Fund'') will seek to outperform the total return performance of the FTSE Emerging Gold Overlay Index (the ''FTSE Benchmark'') by actively hedging a portfolio of emerging markets securities using gold futures.

The Fund will seek to achieve its investment objective of outperforming the FTSE Benchmark by providing exposure to a gold-hedged emerging markets portfolio using a quantitative, rules-based strategy. The Fund will invest at least 80% of its assets (plus the amount of any borrowings for investment purposes) in (i) equity securities of emerging markets companies, as such companies are classified by the FTSE Benchmark

implemented written policies and procedures reasonably designed to prevent violations, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[9] For purposes of this filing, ETFs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depository Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The Underlying Funds in which a Fund will invest all will be listed and traded on national securities exchanges. While the Funds may invest in inverse ETFs, the Funds will not invest in leveraged (*e.g.,* 2X, -2X, 3X or -3X) ETFs.

[10] ETNs, which will be listed on a national securities exchange, are securities such as those described in NYSE Arca Equities Rule 5.2(j)(6). While the Funds may invest in inverse ETNs, the Funds will not invest in leveraged (*e.g.,* 2X, -2X, 3X or -3X) ETNs.

(''Emerging Markets Securities'') [11], (ii) gold futures, (iii) ETFs and exchange-traded closed-end funds (together with ETFs, the ''Underlying Funds''), American Depository Receipts (''ADRs'') [12], Global Depository Receipts (''GDRs'', American Depositary Shares (''ADS''), European Depositary Receipts (''EDRs''), International Depository Receipts (''IDRs'', and together with ADRs, GDRs and ADS, ''Depositary Receipts'') that provide exposure to Emerging Markets Securities, (iv) ETFs [13] or ETNs [14] that provide exposure to gold, and (v) futures that provide exposure to Emerging Markets Securities. The Fund will seek to achieve a similar level of volatility as that of the FTSE Benchmark, although there is no assurance it will do so. The FTSE Benchmark classifies a market as an emerging market based on a number of considerations related to the strength of the economy and the strength of capital market systems. The FTSE Benchmark classifies a company as being an emerging markets company based on a number of factors related to incorporation, listing, governance and operations of the company.

The FTSE Benchmark seeks to reflect the returns of a portfolio of Emerging Markets Securities, hedged with a long gold futures overlay. Specifically, the FTSE Benchmark measures the total return performance of a hypothetical portfolio consisting of Emerging Markets Securities and a long position in gold futures, the notional value of which is comparable to the value of the FTSE Benchmark's equity component.

The Sub-Adviser will continuously monitor the Fund's holdings in order to enhance performance while still providing approximately equal notional exposure to equity securities and gold futures contracts.

According to the Registration Statement, futures contracts, by their terms, have stated expirations and, at a specified point in time prior to expiration, trading in a futures contract for the current delivery month will cease. Therefore, in order to maintain exposure to gold futures contracts, the FTSE Benchmark must periodically migrate out of gold futures contracts nearing expiration and into gold futures contracts that have longer remaining until expiration, a process referred to as ''rolling.'' The impact from this continuous process of selling expiring contracts and buying longer-dated contracts is called roll yield. The FTSE Benchmark rolls these futures contracts according to a predefined schedule, regardless of the liquidity or roll yield of the futures contract selected.

The Fund will look to minimize the impact of rolling futures contracts in a number of ways. For example, the Fund may roll positions in gold futures contracts before or after the scheduled roll dates for the FTSE Benchmark, to the extent of favorable market prices and available liquidity. Additionally, the Fund may attempt to minimize roll costs (and maximize yields) by rolling into the gold futures contract with the largest positive or smallest negative roll yield. This strategy for taking long positions in and unwinding exposure to gold futures contracts may cause the Fund to have more or less exposure to gold futures contracts than the FTSE Benchmark. Additionally, the Fund is not obligated to rebalance its exposures at the same time that the FTSE Benchmark rebalances its exposures, and the Fund may rebalance more or less frequently than the FTSE Benchmark in order to ensure that the Fund's exposure to equities remains comparable to the Fund's exposure to the price of gold.

The Fund will not directly hold gold futures contracts or other commodity-linked instruments (namely, commodity-related pooled vehicles (as described below) and options on commodity futures). Rather, the Fund expects to gain exposure to these instruments by investing up to 25% of its total assets, as measured at the end of every quarter of the Fund's taxable year, in a wholly-owned and controlled Cayman Islands subsidiary (the ''Subsidiary''). The Subsidiary will be advised by the Adviser and the Fund's investment in the Subsidiary will primarily be intended to provide the Fund with exposure to the price of gold. The Fund's investment in the Subsidiary is expected to provide the Fund with an effective means of obtaining exposure to the commodities markets in a manner consistent with U.S. federal tax law requirements applicable to registered investment companies.

Other Investments

While each Fund will invest at least 80% of its net assets in the securities and financial instruments described above, a Fund may invest its remaining assets in the securities and financial instruments described below.

In addition to the exchange-traded equity securities described above for the Funds, the Funds may invest in the following exchange-traded equity securities: exchange-traded common stock (other than large-cap U.S. stocks or Emerging Markets Securities, respectively, for the respective Funds); exchange-traded preferred stock (other than preferred stock referred to above with respect to the REX Gold Hedged S&P 500 ETF), warrants, MLPs, rights, and convertible securities.

The Funds may invest in restricted (Rule 144A) securities.

In addition to the futures transactions described above under ''Principal Investments'' of a Fund, the Funds may engage in other index, commodity and currency futures transactions and may engage in exchange-traded options transactions on such futures. The Funds may use futures contracts and related options for *bona fide* hedging; attempting to offset changes in the value of securities held or expected to be acquired or be disposed of; attempting to gain exposure to a particular market, index, or instrument; or other risk management purposes.

The Funds may purchase and write (sell) exchange-traded and OTC put and call options on securities, securities indices and currencies. A Fund may

[11] The non-U.S. equity securities in the Fund's portfolio will meet the following criteria at time of purchase: (1) Non-U.S. equity securities each shall have a minimum market value of at least $100 million; (2) non-U.S. equity securities each shall have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of $25,000,000, averaged over the last six months; (3) the most heavily weighted non-U.S. equity security shall not exceed 25% of the weight of the Fund's entire portfolio, and, to the extent applicable, the five most heavily weighted non-U.S. equity securities shall not exceed 60% of the weight of the Fund's entire portfolio; and (4) each non-U.S. equity security shall be listed and traded on an exchange that has last-sale reporting. For purposes of this filing, the term ''non-U.S. equity securities'' includes the following (each as referenced below): common stocks and preferred securities of foreign corporations; warrants; convertible securities; master limited partnerships (''MLPs''); rights; and ''Depositary Receipts'' (as defined below, excluding Depositary Receipts that are registered under the Act).

[12] According to the Registration Statement, ADRs are receipts typically issued by United States banks and trust companies which evidence ownership of underlying securities issued by a foreign corporation. Generally, ADRs in registered form are designed for use in domestic securities markets and are traded on exchanges or over-the-counter in the United States. American Depositary Shares (ADSs) are U.S. dollar-denominated equity shares of a foreign-based company available for purchase on an American stock exchange. ADSs are issued by depository banks in the United States under an agreement with the foreign issuer, and the entire issuance is called an ADR and the individual shares are referred to as ADSs. GDRs, EDRs, and IDRs are similar to ADRs in that they are certificates evidencing ownership of shares of a foreign issuer, however, GDRs, EDRs, and IDRs may be issued in bearer form and denominated in other currencies, and are generally designed for use in specific or multiple securities markets outside the U.S. EDRs, for example, are designed for use in European securities markets while GDRs are designed for use throughout the world. ADRs, GDRs, EDRs, and IDRs will not necessarily be denominated in the same currency as their underlying securities. Non-exchange-listed ADRs will not exceed 10% of the Fund's net assets.

[13] *See* note 9, *supra.*

[14] *See* note 10, *supra.*

purchase put and call options on securities to protect against a decline in the market value of the securities in its portfolio or to anticipate an increase in the market value of securities that a Fund may seek to purchase in the future.

Each Fund will also invest in money market mutual funds, cash and cash equivalents [15] to collateralize its exposure to futures contracts and for investment purposes.

In addition to the securities and financial instruments described under ''Principal Investments'' above for each Fund, each Fund may invest in the securities of pooled vehicles that are not investment companies and, thus, not required to comply with the provisions of the 1940 Act. These pooled vehicles typically hold currency or commodities, such as gold or oil, or other property that is itself not a security.[16]

Each Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans.

Each Fund may enter into reverse repurchase agreements as part of a Fund's investment strategy.

In addition, the Funds may invest in the following fixed income instruments (''Fixed Income Instruments''): U.S. government securities, namely, U.S. Treasury obligations [17], U.S. government agency securities and U.S. Treasury zero-coupon bonds.

The Funds will invest in the securities of other investment companies, including the Underlying Funds, to the extent that such an investment would be consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof.

Investment in the Subsidiaries

According to the Registration Statement, each Fund will achieve commodities exposure through investment in a Subsidiary. Such investment may not exceed 25% of a Fund's total assets, as measured at the end of every quarter of a Fund's taxable year. Each Subsidiary will invest in derivatives, including commodity and equity futures contracts and commodity-linked instruments, and other investments (cash, cash equivalents and Fixed Income Instruments with less than one year to maturity) intended to serve as margin or collateral or otherwise support the Subsidiary's derivatives positions. Unlike a Fund, the Subsidiary may invest without limitation in commodity futures and may use leveraged investment techniques. The Subsidiaries otherwise are subject to the same general investment policies and restrictions as the Funds.

According to the Registration Statement, the Subsidiaries are not registered under the 1940 Act. As an investor in its Subsidiary, each Fund, as the Subsidiary's sole shareholder, would not have the protections offered to investors in registered investment companies. However, because a Fund would wholly own and control the Subsidiary, and a Fund and Subsidiary would be managed by the Adviser, it is unlikely that the Subsidiary would take action contrary to the interests of a Fund or a Fund's shareholders. A Fund's Board of Trustees has oversight responsibility for the investment activities of the Funds, including their investments in its respective Subsidiary, and each Fund's role as the sole shareholder of its Subsidiary. Also, in managing a Subsidiary's portfolio, the Adviser and Sub-Adviser would be subject to the same investment restrictions and operational guidelines that apply to the management of a Fund.

Investment Restrictions

Each Fund will concentrate its investments (*i.e.,* hold 25% or more of its total assets) in a particular industry or group of industries to approximately the same extent that the respective benchmark concentrates in an industry or group of industries.[18]

Each Fund will be classified as a non-diversified investment company under the 1940 Act. A ''non-diversified'' classification means that a Fund is not limited by the 1940 Act with regard to the percentage of their assets that may be invested in the securities of a single issuer.[19]

The Adviser will not take defensive positions in the Funds' portfolios during periods of adverse market, economic, political, or other conditions as the Adviser intends for each Fund to remain fully invested consistent with its investment strategy under all market conditions.

Each Fund may invest up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser,[20] consistent with Commission guidance. Each 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 a Fund's net assets are invested 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.[21]

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[15] For purposes of this filing, cash equivalents include short-term instruments (instruments with maturities of less than 3 months) of the following types: (i) U.S. Government securities, including bills, notes and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. Government agencies or instrumentalities; (ii) certificates of deposit issued against funds deposited in a bank or savings and loan association; (iii) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (iv) repurchase agreements and reverse repurchase agreements; (v) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; (vi) commercial paper, which are short-term unsecured promissory notes; and (vii) money market funds.

[16] For purposes of the filing, pooled vehicles will mean: 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); 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).

[17] U.S. Treasury obligations consist of bills, notes and bonds issued by the U.S. Treasury and separately traded interest and principal component parts of such obligations that are transferable through the federal book-entry system known as Separately Traded Registered Interest and Principal Securities (''STRIPS'') and Treasury Receipts.

[18] The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975.

[19] The diversification standard is set forth in Section 5(b)(1) of the 1940 Act.

[20] In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing 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).

[21] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also,* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

According to the Registration Statement, each Fund will seek to qualify for treatment as a Regulated Investment Company (''RIC'') under the Internal Revenue Code.[22]

With respect to the REX Gold Hedged FTSE Emerging Markets ETF, the non-U.S. equity securities in such Fund's portfolio will meet the following criteria at time of purchase[23]: (1) Non-U.S. equity securities each shall have a minimum market value of at least $100 million; (2) non-U.S. equity securities each shall have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of $25,000,000, averaged over the last six months; (3) the most heavily weighted non-U.S. equity security shall not exceed 25% of the weight of the Fund's entire portfolio, and, to the extent applicable, the five most heavily weighted non-U.S. equity securities shall not exceed 60% of the weight of the Fund's entire portfolio; and (4) each non-U.S. equity security shall be listed and traded on an exchange that has last-sale reporting.

According to the Registration Statement, the Funds are subject to regulation under the Commodity Exchange Act and CFTC rules as commodity pools. The Adviser is registered as a commodity pool operator, and the Funds will be operated in accordance with CFTC rules.

Each Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While a Fund may invest in inverse ETFs and ETNs, a Fund will not invest in leveraged (*e.g.,* 2X, −2X, 3X or −3X) ETFs and ETNs.

Creation of Shares

According to the Registration Statement, the Trust will issue and sell shares of each Fund only in Creation Units of at least 50,000 Shares each on a continuous basis through the Distributor, at their NAV next determined after receipt, on any business day of an order received in proper form.

The consideration for purchase of a Creation Unit of a Fund generally will consist of an in-kind deposit of a designated portfolio of securities—the ''Deposit Securities''—per each Creation Unit constituting a substantial replication, or a representation, of the securities included in a Fund's portfolio and an amount of cash—the Cash Component—computed as described below. Together, the Deposit Securities and the Cash Component constitute the ''Fund Deposit,'' which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund. The Cash Component is an amount equal to the difference between the NAV of the Shares (per Creation Unit) and the market value of the Deposit Securities. If the Cash Component is a positive number (*i.e.,* the NAV per Creation Unit exceeds the market value of the Deposit Securities), the Cash Component shall be such positive amount. If the Cash Component is a negative number (*i.e.,* the NAV per Creation Unit is less than the market value of the Deposit Securities), the Cash Component shall be such negative amount and the creator will be entitled to receive cash from a Fund in an amount equal to the Cash Component. The Cash Component serves the function of compensating for any differences between the NAV per Creation Unit and the market value of the Deposit Securities.

The Administrator, through the National Securities Clearing Corporation (''NSCC''), will make available on each business day, immediately prior to the opening of business on the Exchange (currently 9:30 a.m., Eastern Time), the list of the names and the required number of shares of each Deposit Security to be included in the current Fund Deposit (based on information at the end of the previous business day) for each Fund.

The Trust reserves the right to permit or require the substitution of an amount of cash—*i.e.,* a ''cash in lieu'' amount—to be added to the Cash Component to replace any Deposit Security which may not be available in sufficient quantity for delivery or which may not be eligible for transfer, or which may not be eligible for trading by an Authorized Participant (as defined below) or the investor for which it is acting. The Trust also reserves the right to offer an ''all cash'' option for creations of Creation Units for each Fund.[24]

In addition to the list of names and numbers of securities constituting the current Deposit Securities of a Fund Deposit, the Administrator, through the NSCC, also will make available on each business day, the estimated Cash Component, effective through and including the previous business day, per outstanding Creation Unit of each Fund.

To be eligible to place orders with the Distributor to create a Creation Unit of a Fund, an entity must be (i) a ''Participating Party,'' *i.e.,* a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC, a clearing agency that is registered with the Commission; or (ii) a Depository Trust Company (''DTC'') Participant, and, in each case, must have executed an agreement with the Trust, the Distributor and the Administrator with respect to creations and redemptions of Creation Units (''Participant Agreement''). A Participating Party and DTC Participant are collectively referred to as an ''Authorized Participant.''

All orders to create or redeem Creation Units must be placed for one or more Creation Unit size aggregations of at least 50,000 Shares and must be received by the Distributor no later than 3:00 p.m., Eastern Time, an hour earlier than the close of the regular trading session on the Exchange (ordinarily 4:00 p.m., Eastern Time) (''Closing Time''), in each case on the date such order is placed in order for the creation of Creation Units to be effected based on the NAV of Shares of each Fund as next determined on such date after receipt of the order in proper form.

If permitted by the Adviser or Sub-Adviser in its sole discretion with respect to a Fund, an Authorized Participant may also agree to enter into or arrange for an exchange of a futures contract for a related position (''EFCRP'') or block trade with the relevant Fund or its Subsidiary whereby the Authorized Participant would also transfer to such Fund a number and type of exchange-traded futures contracts at or near the closing settlement price for such contracts on the purchase order date. Similarly, the Sub-Adviser in its sole discretion may agree with an Authorized Participant to use an EFCRP or block trade to effect an order to redeem Creation Units.[25]

[22] 26 U.S.C. 851.

[23] These criteria are similar to certain ''generic'' listing criteria in NYSE Arca Equities Rule 5.2(j)(3), Commentary .01(a)(B), which relate to criteria applicable to an index or portfolio of U.S. and non-U.S. stocks underlying a series of Investment Company Units to be listed and traded on the Exchange pursuant to Rule 19b–4(e) under the Act.

[24] The Adviser represents that, to the extent the Trust effects the creation or redemption of Shares in cash, such transactions will be effected in the same manner for all Authorized Participants.

[25] According to the Registration Statement, an EFCRP is a technique permitted by the rules of certain futures exchanges that, as utilized by a Fund in the Sub-Adviser's discretion, would allow such Fund or its Subsidiary to take a position in a futures contract from an Authorized Participant, or give futures contracts to an Authorized Participant, in the case of a redemption, rather than to enter the futures exchange markets to obtain such a position. An EFCRP by itself will not change either party's net risk position materially. Because the futures position that a Fund would otherwise need to take in order to meet its investment objective can be obtained without unnecessarily impacting the financial or futures markets or their pricing, EFCRPs can generally be viewed as transactions beneficial to a Fund. A block trade is a technique

Redemption of Shares

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by a Fund through the Administrator and only on a business day. The Trust will not redeem Shares in amounts less than Creation Units. Beneficial owners must accumulate enough Shares in the secondary market to constitute a Creation Unit in order to have such Shares redeemed by the Trust.

With respect to the Funds, the Administrator, through the NSCC, will make available immediately prior to the opening of business on the Exchange (currently 9:30 a.m., Eastern Time) on each business day, the ''Fund Securities'' that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day. Fund Securities received on redemption may not be identical to Deposit Securities which are applicable to creations of Creation Units.

Unless cash redemptions are available or specified for a Fund, the redemption proceeds for a Creation Unit generally will consist of Fund Securities, as announced by the Administrator on the business day of the request for redemption received in proper form, plus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after receipt of a request in proper form, and the value of the Fund Securities (the ''Cash Redemption Amount''), less a redemption transaction fee. In the event that the Fund Securities have a value greater than the NAV of the Shares, a compensating cash payment equal to the differential will be required to be made by or through an Authorized Participant by the redeeming shareholder.

If it is not possible to effect deliveries of the Fund Securities, the Trust may in its discretion exercise its option to redeem such shares in cash, and the redeeming ''Beneficial Owner'' will be required to receive its redemption proceeds in cash. In addition, an investor may request a redemption in cash which a Fund may, in its sole discretion, permit. In either case, the investor will receive a cash payment equal to the NAV of its Shares based on the NAV of Shares of a Fund next determined after the redemption request is received in proper form (minus a redemption transaction fee and additional charge for requested cash redemptions, to offset the Trust's brokerage and other transaction costs associated with the disposition of Fund Securities). Each Fund may also, in its sole discretion, upon request of a shareholder, provide such redeemer a portfolio of securities which differs from the exact composition of the Fund Securities but does not differ in NAV.

The right of redemption may be suspended or the date of payment postponed with respect to a Fund (1) for any period during which the Exchange is closed (other than customary weekend and holiday closings); (2) for any period during which trading on the Exchange is suspended or restricted; (3) for any period during which an emergency exists as a result of which disposal of the Shares of a Fund or determination of the Shares' NAV is not reasonably practicable; or (4) in such other circumstance as is permitted by the Commission.

Net Asset Value

The NAV per Share of each Fund will be computed by dividing the value of the net assets of a Fund (*i.e.,* the value of its total assets less total liabilities) by the total number of Shares of a Fund outstanding, rounded to the nearest cent. Expenses and fees, including without limitation, the management, administration and distribution fees, will be accrued daily and taken into account for purposes of determining NAV per Share. The NAV per Share for each Fund will be calculated by the Administrator and determined as of the close of the regular trading session on the Exchange (ordinarily 4:00 p.m., Eastern Time) on each day that such exchange is open.

In computing a Fund's NAV, a Fund's securities holdings will be valued based on their last readily available market price. Price information on exchange-listed securities, including common stocks, preferred stocks, warrants, convertible securities, MLPs, rights, commodity-linked instruments (as described above), Underlying Funds, ETNs, Depositary Receipts and pooled vehicles in which a Fund invests, will be taken from the exchange where the security is primarily traded. Other portfolio securities and assets for which market quotations are not readily available or determined to not represent the current fair value will be valued based on fair value as determined in good faith by the Sub-Adviser in accordance with procedures adopted by the Board.

Futures contracts and exchange-traded options on futures will be valued at the settlement or closing price determined by the applicable exchange. Exchange-traded options contracts will be valued at their most recent sale price. OTC options normally will be valued on the basis of quotes obtained from a third-party broker-dealer who makes markets in such securities or on the basis of quotes obtained from a third-party pricing service.

Cash and cash equivalents may be valued at market values, as furnished by recognized dealers in such securities or assets. Cash equivalents also may be valued on the basis of information furnished by an independent pricing service that uses a valuation matrix which incorporates both dealer-supplied valuations and electronic data processing techniques.

Fixed Income Instruments, Rule 144A securities, repurchase agreements and reverse repurchase agreements will generally be valued at bid prices received from independent pricing services as of the announced closing time for trading in fixed-income instruments in the respective market. Shares of money market mutual funds held by each Fund will be valued at their respective NAVs.

Availability of Information

The Funds' Web site, which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Funds that may be downloaded. The Funds' Web site will include additional quantitative information updated on a daily basis, including, for each Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[26] and a calculation of the premium or discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Funds' Web site will disclose the Disclosed Portfolio that will form the basis for each Fund's calculation of NAV at the end of the business day.[27]

that permits certain funds to obtain a futures position without going through the market auction system and can generally be viewed as a transaction beneficial to such funds.

[26] The Bid/Ask Price of Shares of each Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of a Fund's NAV. The records relating to Bid/Ask Prices will be retained by a Fund and its service providers.

[27] Under accounting procedures followed by the Funds, trades made on the prior business day (''T'')

Continued

On a daily basis, the Funds will disclose on the Funds' Web site the following information regarding each portfolio holding of a Fund and its respective Subsidiary, 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); 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 a Fund's portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file (*i.e.,* the Deposit Securities), which includes the security names and share quantities (as applicable) required to be delivered in exchange for Fund 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 NSCC. The basket will represent one Creation Unit of a Fund.

Investors will also be able to obtain the Trust's Statement of Additional Information (''SAI''), a Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports will be available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov*. Information regarding market price and trading volume of 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. Quotation and last sale information for the Shares, Underlying Funds, ETNs and other U.S. exchange-traded equities, will be available via the Consolidated Tape Association (''CTA'') high-speed line, and, for equity securities that are U.S. exchange-listed, will be available from the national securities exchange on which they are listed. With respect to non-U.S. exchange-listed equity securities, intra-day, closing and settlement prices of common stocks and other equity securities (including shares of preferred securities, and non-U.S. Depositary Receipts), will be available from the foreign exchanges on which such securities trade as well as from major market data vendors. Price information for money market funds will be available from the investment company's Web site and from market data vendors. Price information relating to money market mutual funds, cash, cash equivalents, futures, options, options on futures, Depositary Receipts, Rule 144A securities, repurchase agreements, reverse repurchase agreements, the S&P Benchmark and the FTSE Benchmark will be available from major market data vendors. Information relating to futures and exchange-traded options on futures also will be available from the exchange on which such instruments are traded. Information relating to U.S. exchange-traded options will be available via the Options Price Reporting Authority. Pricing information regarding each asset class in which a Fund will invest will generally be available through nationally recognized data service providers through subscription agreements.

In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.[28] The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of each Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Funds.[29] Trading in Shares of the Funds 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. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Funds; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Funds may be halted.

Trading Rules

The Exchange 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. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00, for which the MPV for order entry is $0.0001.

The Shares of each Fund will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. Consistent with NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the Adviser, as the ''Reporting Authority'', will 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 a Fund's portfolio. The Exchange represents that, for initial and/or continued listing, each Fund will be in compliance with Rule 10A–3 [30] under the Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares of each Fund that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2) will be made available to all market participants at the same time.

Surveillance

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

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.

[28] 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.

[29] *See* NYSE Arca Equities Rule 7.12.

[30] 17 CFR 240.10A–3.

behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[31] The Exchange represents that 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 applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The regulatory staff of the Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, certain exchange-listed equity securities, certain futures, certain options on futures, and certain exchange-traded options with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG''), and FINRA, on behalf of the Exchange, may obtain trading information regarding trading such securities and financial instruments from such markets and other entities. In addition, the regulatory staff of the Exchange may obtain information regarding trading in such securities and financial instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[32] FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by a Fund reported to FINRA's Trade Reporting and Compliance Engine (''TRACE'').

Not more than 10% of the net assets of a Fund in the aggregate invested in futures contracts or options contracts shall consist of futures contracts or 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.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) 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; (4) how information regarding the Portfolio Indicative Value and the Disclosed Portfolio is disseminated; (5) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Funds will be subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern Time each trading day.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[33] that an exchange have rules that are 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, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. Trading in the Shares will be subject to the existing trading surveillances, administered by the 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. The regulatory staff of the Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, certain exchange-listed equity securities, certain futures, certain options on futures, and certain exchange-traded options with other markets and other entities that are members of the ISG, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading such securities and financial instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in such securities and financial instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

With respect to the Rex Gold Hedged FTSE Emerging Markets ETF, the non-U.S. equity securities in the Fund's portfolio will meet the following criteria at time of purchase: (1) Non-U.S. equity securities each shall have a minimum market value of at least $100 million; (2) non-U.S. equity securities each shall have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of $25,000,000, averaged over the last six months; (3) the most heavily weighted non-U.S. equity security shall not exceed 25% of the weight of the Fund's entire portfolio, and, to the extent applicable, the five most heavily weighted non-U.S. equity securities shall not exceed 60% of the weight of the Fund's entire portfolio; and (4) each non-U.S. equity security shall be listed and traded on an exchange that has last-sale reporting.

Not more than 10% of the net assets of a Fund in the aggregate invested in futures contracts or options contracts shall consist of futures contracts or 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. Each Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While a Fund may invest in inverse ETFs and ETNs, a Fund will not invest in leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETFs and ETNs.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the

[31] FINRA surveils certain trading activity on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[32] For a list of the current members of ISG, see *www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for a Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[33] 15 U.S.C. 78f(b)(5).

public interest in 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. In addition, a large amount of information will be publicly available regarding the Funds and the Shares, thereby promoting market transparency.

Information regarding market price and trading volume of 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. Quotation and last sale information for the Shares, Underlying Funds and other U.S. exchange-traded equities, will be available via the CTA high-speed line, and, for equity securities that are U.S. exchange-listed, will be available from the national securities exchange on which they are listed. Price information for money market funds will be available from the investment company's Web site and from market data vendors. Price information relating to money market mutual funds, cash, cash equivalents, futures, options, options on futures, Depositary Receipts, Rule 144A securities, repurchase agreements, reverse repurchase agreements, the S&P Benchmark and the FTSE Benchmark will be available from major market data vendors. Information relating to futures and exchange-traded options on futures also will be available from the exchange on which such instruments are traded. Information relating to U.S. exchange-traded options will be available via the Options Price Reporting Authority. Pricing information regarding each asset class in which a Fund will invest will generally be available through nationally recognized data service providers through subscription agreements.

In addition, the Portfolio Indicative Value will be widely disseminated by the Exchange at least every 15 seconds during the Core Trading Session. The Funds' Web site will include a form of the prospectus for the Funds that may be downloaded, as well as additional quantitative information updated on a daily basis. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Funds' Web site will disclose the Disclosed Portfolio that will form the basis for each Fund's calculation of NAV at the end of the business day.

On a daily basis, the Funds will disclose on the Funds' 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); 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 a Fund's portfolio. Moreover, prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Funds will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Funds' holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of additional types of actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, as noted above, investors will have ready access to information regarding the Funds' holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

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 purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of additional types of actively-managed exchange-traded products based on the price of gold and other financial instruments that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2015–107 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–2015–107. 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–2015–107 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32821 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76731; File No. SR–NASDAQ–2015–144]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change To Amend Rules 5810(4), 5810(c), 5815(c) and 5820(d) To Provide Staff With Limited Discretion To Grant a Listed Company That Failed To Hold Its Annual Meeting of Shareholders an Extension of Time To Comply With the Requirement

December 22, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2015, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, 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

NASDAQ proposes to amend Rule 5810(c) to provide NASDAQ staff with limited discretion to grant a listed company additional time to solicit proxies and hold an annual meeting of shareholders. The text of the proposed rule change is available from NASDAQ's Web site at *http://nasdaq.cchwallstreet.com/Filings/,* at NASDAQ'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, NASDAQ 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. NASDAQ 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

Each company listing common stock or voting preferred stock, and their equivalents, must hold an annual meeting of shareholders no later than one year after the end of the company's fiscal year and solicit proxies for that meeting.[3] An annual meeting allows the equity owners of the company the opportunity to elect directors and meet with management to discuss company affairs. Currently, should a company fail to hold its annual meeting as required by Rule 5620, staff of the Listing Qualifications Department (''Staff'') has no discretion to allow additional time for the company to regain compliance. Rather, Staff is required by Rule 5810(c)(1) to issue a delisting determination, subjecting the company to immediate suspension and delisting unless the company appeals to a Hearings Panel.[4] NASDAQ proposes to amend Rule 5810(4), 5810(c), 5815(c) and 5820(d) to provide Staff with limited discretion to grant a listed company that failed to hold its annual meeting of shareholders an extension of time to comply with the requirement.[5]

NASDAQ notes that the only other rule where a company is subject to immediate suspension and delisting, besides when it fails to solicit proxies and hold an annual meeting, is when Staff makes a determination pursuant to the Rule 5100 Series that the company's continued listing raises a public interest concern. This determination generally is made only following discussion and review of the facts and circumstances with the company. For all other deficiencies under the Rule 5000 Series, a listed company is provided with either a fixed compliance period within which to regain compliance,[6] or given the opportunity to submit a plan to regain compliance, which Staff reviews to determine whether to grant the company a limited time to implement.[7] Generally, a company is allowed 45 days to submit the plan of compliance [8] and, upon review of the plan, Staff may grant the company up to 180 days from the date of Staff's initial notification of the company's non-compliance to regain compliance. If upon review of the company's plan Staff determines that an extension is not warranted, Staff will issue a Delisting Determination, which triggers the company's right to request review by a Hearings Panel.

There are a variety of reasons a company may fail to timely hold an annual meeting. In many of these cases, the circumstances that precipitated the delay may arise just before a planned meeting. For example, NASDAQ has

[34] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Rules 5620(a) and (b), respectively. Rule 5615(a)(4)(D) also requires a limited partnership to hold an annual meeting of limited partners if required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. Rule 5615(a)(4)(F) requires the limited partnership to distribute information statements or proxies when a meeting of limited partners is required. The proposed process described herein would apply in the identical manner to limited partnerships required to hold a meeting as it does to other companies. *See also* Rules 5615(a)(4)(E) and (F) (partner meetings and proxy solicitation of limited partnerships).

[4] A listed company may request review of a Staff Delisting Determination by a Hearings Panel. A timely request for a hearing will stay the suspension and delisting pending the issuance of a written Panel Decision. *See* Rule 5815.

[5] The Exchange notes that companies and certain limited partnerships are also required to solicit proxies and provide proxy statements for all meetings of shareholders or partners. *See* Rules 5620(b) and 5615(a)(4)(F), respectively. A company or limited partnership that has not timely held an annual meeting has not violated the proxy solicitation rule because no meeting has been held.

[6] *See* Rule 5810(c)(3).

[7] *See* Rule 5810(c)(2).

[8] Companies deficient with the filing requirement for periodic reports are provided up to 60 days to submit a plan of compliance. *See* Rule 5810(c)(2)(F). Staff can shorten these deadlines where deemed appropriate.

observed cases where a company has attempted to hold an annual meeting before the deadline, but was required to adjourn and reschedule the meeting to allow its shareholders more time to review proxy materials in connection with a shareholder proxy contest. NASDAQ has also encountered companies that could not hold an annual meeting because they were delinquent in filing periodic reports and therefore could not include required financial information in a proxy statement. In that case, under the current rules, the company could receive an extension of the time to regain compliance with the filing requirement. However, if during any such compliance period the company subsequently fails to hold an annual meeting of shareholders for any reason, Staff would issue a delist determination at that time for both the filing delinquency and the annual meeting deficiency, notwithstanding that the compliance period for the filing delinquency has not expired.[9]. [sic] Under these circumstances, as required by the Listing Rules, Staff will notify the company in writing of the annual meeting deficiency [10] and the company must publicly disclose such notification.[11] The deficiency will then be considered at the same time and together with the filing delinquency in any subsequent delisting proceeding.[12]

For these reasons, NASDAQ is proposing to amend Rules 5810(c), 5815(c) and 5820(d) to afford those companies and limited partnerships that fail to hold an annual meeting in accordance with the listing rules an opportunity to submit a plan of compliance for Staff's review.[13] Accordingly, we are also proposing to modify Rule 5810(4) to make clear that a Public Reprimand Letter is not an available notification type for unresolved deficiencies from the standards of Rules 5250(c) (obligation to file periodic financial reports), 5615(a)(4)(D) (partner meetings of limited partnerships), and 5620(a) (meetings of shareholders). Under proposed Rule 5810(c)(2)(G), Staff's written deficiency notice shall provide the Company with 45 calendar days to submit a plan to regain compliance. A non-compliant company will have to publicly disclose, under both Commission and NASDAQ rules, that it has received notification of non-compliance with the annual meeting rule.[14] In addition, we are proposing to modify Rule 5810(c)(2)(B) to make clear that annual meeting deficiencies are governed by proposed Rule 5810(c)(2)(G).

In determining whether to grant the Company an extension to comply with the annual meeting requirement, Staff will consider the likelihood that the Company would be able to hold an annual meeting within the exception period, the Company's past compliance history, the reasons for the failure to timely hold an annual meeting, corporate events that may occur within the exception period, the Company's general financial status, and the Company's disclosures to the market. This review will be based on information provided by a variety of sources, which may include the Company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body. The proposed rule change will limit the length of an extension granted by Staff, upon review of the plan, to no more than 180 calendar days from the deadline to hold the annual meeting (*i.e.,* one year after the end of the Company's fiscal year).[15] The proposed rule change will also limit the maximum length of an extension that a NASDAQ Hearings Panel or the NASDAQ Listing and Hearing Review Council [16] may grant for such a deficiency to no more than 360 calendar days from the date of non-compliance with the rule. In doing so, the total time that a company may be granted to regain compliance with the annual meeting requirement is unchanged from the existing rule.[17] The proposed rule change merely vests Staff with the limited discretion to grant an extension to regain compliance for a prescribed portion of this time. NASDAQ believes that the proposed rule change provides consistency with the administration of other continued listing standards where companies are provided a cure period or opportunity to submit a plan to regain compliance after they become deficient, without undermining the requirement that NASDAQ-listed companies hold annual meetings.

Lastly, in accordance with Rule 5810(c)(2) a company or limited partnership not subject to the all-inclusive annual fee program that submits such a plan is subject to the $5,000 compliance plan review fee. Effective January 2018, all companies will be subject to the all-inclusive annual fee program and this fee will no longer be applicable to any company. Further, all companies, regardless of whether they participate in the all-inclusive annual fee program or not, are subject to the $10,000 fee for each of a Panel hearing and appeal to the Listing and Hearing Review Council set forth in Listing Rules 5815(a)(3) and 5820(a), respectively. Accordingly, under the proposed rule as compared to the current rule, companies and limited partnerships may be subject to these fees at different times, if at all, depending on whether and when they regain compliance. Notwithstanding, a company that elects not to participate in the all-inclusive annual fee program prior to January 2018 will incur the $5,000 compliance plan review fee whereas a company that has opted-in to the all-inclusive fee will not. This fee would be in addition to any fees incurred in the appellate process.

2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[18] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[19] in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect

[9] *See* Rule 5810(c)(2)(A).

[10] *See* Rule 5810(a).

[11] *See* Rule 5810(b).

[12] *See* Rule 5810(d).

[13] As noted above, the company or limited partnership generally would have 45 days to submit a plan to regain compliance, although Staff could shorten that period where it believes appropriate.

[14] *See* Rule 5810(b) and IM–5810–1. *See also* Item 3.01 of SEC Form 8–K.

[15] NASDAQ has observed that a substantial majority of companies that received delisting notices for failing to solicit proxies and hold their annual meetings regain compliance within a six month period.

[16] The Hearings Panel reviews staff delisting determinations and the Listing and Hearing Review Council reviews Panel Decisions.

[17] Under the current rule, the 360 calendar day limit on extensions starts on the date of Staff's written notification to a company of the deficiency, which is typically the first business day of a calendar year for companies with calendar year fiscal years. Under the proposed rule, the 360 calendar day period would start on the deadline to hold the annual meeting, which is one year after the end of a company's fiscal year. Thus, while the proposal does not change the total length of an extension a company may be granted, the starting date for an extension period under the proposed rule would be a day or two earlier than under the current rule.

[18] 15 U.S.C. 78f.

[19] 15 U.S.C. 78f(b)(4) and (5).

investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the proposed changes are consistent with these requirements because they permit Staff to grant additional time to a company to comply with the annual meeting requirement in limited situations after Staff review of a compliance plan. The proposed changes, however, do not change the total length of an extension a company may be granted—as is the case under the current rule, such maximum time period would remain 360 calendar days. Furthermore, as is the case under the current rule, a company notified that it is deficient in the annual meeting requirement is required to publicly disclose such notice and the rules basis for it. NASDAQ also separately publicly discloses a list of noncompliant companies and the listing standards with which they do not comply. For these reasons, the proposed rule protects investors and the public interest.

As noted above, there are various reasons why a company may not be able to hold an annual meeting and for which immediate delisting is an inappropriate outcome under the circumstances. In lieu of the current requirement that Staff send an immediate Delisting Determination, the proposal vests Staff with discretion to determine whether the reason for the deficiency and the plan to regain compliance merit an extension. The Rules allow Staff such discretion for other deficiencies, and the only case where Staff sends an immediate Delisting Determination is where Staff has concluded, after review of the facts and circumstances, that continued listing is contrary to the public interest. NASDAQ believes that it is consistent with the Act to provide Staff with discretion to grant an extension for an annual meeting deficiency based on a plan of compliance, consistent with the process currently used for the majority of deficiencies under NASDAQ's rules. The Exchange is not extending the total time that a company may remain listed on NASDAQ while deficient; rather, the proposed rule change will allow Staff limited discretion to grant an extension to regain compliance with the listing standard for a prescribed portion of this time, which, to the extent exercised, will limit the length of time a Hearings Panel and Listing and Hearing Review Council may subsequently grant. Accordingly, the Exchange believes that the proposal promotes the requirements of the Act by providing Staff with limited discretion to allow additional time where the circumstances do not support immediate delisting, while maintaining Staff's authority to delist a company when warranted.

The Exchange also believes that assessing the $5,000 compliance plan review fee on companies that have not opted-in to the all-inclusive annual fee program prior to January 2018 is reasonable because NASDAQ is changing the process in an effort to make it more consistent with how other deficiencies are handled. The Exchange notes that companies that do not resolve their annual meeting deficiencies during an extension period provided by Staff under the proposed changes may subsequently be subject to the $10,000 fee for each of a Panel Hearing and an appeal to the Listing and Hearing Review Council. However, because most companies resolve annual meeting deficiencies within six months, under the proposed rules, they would likely not incur these fees. Further, the Exchange believes that the proposed rule change is equitably allocated because the fees assessed to companies as a result of the changes will be allocated uniformly among similarly-situated companies. Moreover, the Exchange believes that assessing different fees between companies that opt-in to the all-inclusive annual fee program and those that do not is an equitable allocation because participation in the program is elective and available to all listed companies. As a consequence, companies are able to weigh the benefits of the program against the relative risk of incurring additional fees and choose whether opting-in to the program at this juncture is appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change will not burden competition as it provides discretion to Staff to provide a limited time to regain compliance when immediate delisting is not warranted, thereby potentially reducing the time and costs associated with appealing a delisting determination. Moreover, the proposed rule change is intended to promote consistent and fair regulation, and is not being adopted for competitive purposes. To the extent a competitor marketplace believes that the proposed rule change places them at a competitive disadvantage, it may file with the Commission a proposed rule change to adopt the same or similar rule.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2015–144 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2015–144. 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–NASDAQ–2015–144, and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32647 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–10000; 34–76762; File No. 265–28]

Investor Advisory Committee Meeting

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Meeting of Securities and Exchange Commission Dodd-Frank Investor Advisory Committee.

SUMMARY: The Securities and Exchange Commission Investor Advisory Committee, established pursuant to Section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, is providing notice that it will hold a public meeting. The public is invited to submit written statements to the Committee.

DATES: The meeting will be held on Thursday, January 21, 2016 from 10:00 a.m. until 4:00 p.m. (ET). Written statements should be received on or before January 21, 2016.

ADDRESSES: The meeting will be held in Multi-Purpose Room LL–006 at the Commission's headquarters, 100 F Street NE., Washington, DC 20549. The meeting will be webcast on the Commission's Web site at *www.sec.gov.* Written statements may be submitted by any of the following methods:

Electronic Statements

- Use the Commission's Internet submission form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email message to *rules-comments@sec.gov.* Please include File No. 265–28 on the subject line; or

Paper Statements

- Send paper statements to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. 265–28. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method.

Statements also will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All statements received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Marc Oorloff Sharma, Senior Special Counsel, Office of the Investor Advocate, at (202) 551–3302, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public, except during that portion of the meeting reserved for an administrative work session during lunch. Persons needing special accommodations to take part because of a disability should notify the contact person listed in **FOR FURTHER INFORMATION CONTACT**.

The agenda for the meeting includes: Remarks from Commissioners; a discussion of fixed income market structure and pre-trade price transparency; a discussion of a draft letter from the Investor as Owner subcommittee regarding Financial Accounting Standards Board proposed amendments to the Statement of Financial Accounting Concepts and Notes to Financial Statements concerning disclosure materiality; an update on crowdfunding rules; a discussion of NASDAQ listing standards—shareholder approval rules; subcommittee reports; and a nonpublic administrative work session during lunch.

Dated: December 23, 2015.

Brent J. Fields,

Secretary.

[FR Doc. 2015–32806 Filed 12–29–15; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76770; File No. SR–Phlx–2015–110]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding NASDAQ Last Sale Plus

December 24, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2015, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter VIII of NASDAQ OMX PSX Fees (''PSX Chapter VIII''), in the section entitled PSX Last Sale Data Feeds and NASDAQ Last Sale Plus Data Feeds (''Last Sale''), with language regarding NASDAQ Last Sale (''NLS'') Plus (''NLS Plus''), a comprehensive data feed offered by NASDAQ OMX Information LLC[3] that allows data distributors to access the three last sale products offered by each of Nasdaq, Inc.'s three U.S. equity markets.[4]

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASDAQ OMX Information LLC is a subsidiary of Nasdaq, Inc. (formerly, The NASDAQ OMX Group, Inc.), separate and apart from The NASDAQ Stock Market LLC. The primary purpose of NASDAQ OMX Information LLC is to combine publicly available data from the three filed last sale products of the exchange subsidiaries of Nasdaq, Inc. and from the network processors for the ease and convenience of market data users and vendors, and ultimately the investing public. In that role, the function of NASDAQ OMX Information LLC is analogous to that of other market data vendors, and it has no competitive advantage over other market data vendors; NASDAQ OMX Information LLC performs precisely the same functions as Bloomberg, Thomson Reuters, and other market data vendors.

[4] The Nasdaq, Inc. U.S. equity markets include the Exchange, The NASDAQ Stock Market LLC

Specifically, this proposal would allow NLS Plus to reflect cumulative consolidated volume (''consolidated volume'') of real-time trading activity for Tape A securities and Tape B securities. Currently, consolidated volume on NLS Plus is real-time only for Tape C securities and is 15 minute delayed for Tape A securities and Tape B securities.[5] The Exchange also proposes to remove two duplicative terms in the rule.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposal is to amend PSX Chapter VIII, Last Sale (b). Specifically, this proposal would allow NLS Plus to reflect consolidated volume of real-time trading activity for Tape A securities and Tape B securities. Now, consolidated volume on NLS Plus is real-time only for Tape C securities. The Exchange also proposes to remove two duplicative terms in the rule.

NLS Plus, which is reflected in PSX Chapter VIII, Last Sale (b),[6] allows data distributors to access last sale products offered by each of Nasdaq, Inc.'s three equity exchanges. Thus, NLS Plus includes all transactions from all of Nasdaq, Inc.'s equity markets, as well as FINRA/NASDAQ TRF data that is included in the current NLS product. In addition, NLS Plus features total cross-market volume information at the issue level, thereby providing redistribution of consolidated volume information from the securities information processors (''SIPs'') for Tape A, B, and C securities, currently real-time for Tape C securities and 15-minute delayed for Tape A and Tape B securities. Thus, NLS Plus covers all securities listed on NASDAQ and New York Stock Exchange (''NYSE'') (now under the Intercontinental Exchange (''ICE'') umbrella), as well as US ''regional'' exchanges such as NYSE MKT, NYSE Arca, and BATS (also known as BATS/Direct Edge).

NLS Plus offers data for all U.S. equities via two separate data channels: The first data channel reflects NASDAQ, BX, and PSX trades with real-time consolidated volume for NASDAQ-listed securities; and the second data channel reflects NASDAQ, BX, and PSX trades with delayed consolidated volume for NYSE, NYSE MKT, NYSE Arca and BATS-listed securities. The Exchange believes that market data distributors may use the NLS Plus data feed to feed stock tickers, portfolio trackers, trade alert programs, time and sale graphs, and other display systems. The provision of multiple options for investors to receive market data was a primary goal of the market data amendments adopted by Regulation NMS. Finally, NLS Plus provides investors with options for receiving market data that parallel products currently offered by BATS and BATS Y, EDGA, and EDGX and NYSE equity exchanges.[7]

Consolidated volume reflects the consolidated volume at the time that the NLS Plus trade message is generated, and includes the volume for the issue symbol as reported on the consolidated market data feed. The consolidated volume is based on the real-time trades reported via the UTP Trade Data Feed (''UTDF'') and delayed trades reported via CTA. NASDAQ calculates the real-time trading volume for its trading venues, and then adds the real-time trading volume for the other (non-NASDAQ) trading venues as reported via the UTDF data feed. For non-NASDAQ-listed issues, the consolidated volume is based on trades reported via SIAC's Consolidated Tape System (''CTS'') for the issue symbol. The Exchange calculates the real-time trading volume for its trading venues, and then adds the 15-minute delayed trading volume for the other (non-NASDAQ) trading venues as reported via the CTS data feed.

NLS Plus is currently codified in PSX Chapter VIII, Last Sale (b) as follows:

(b) NASDAQ Last Sale Plus (''NLS Plus''). NLS Plus is a comprehensive data feed produced by NASDAQ OMX Information LLC. It provides last sale data as well as consolidated volume of NASDAQ U.S. equity markets (PSX, The NASDAQ Stock Market (''NASDAQ''), and NASDAQ OMX BX (''BX'')) and the NASDAQ/FINRA Trade Reporting Facility (''TRF''). NLS Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities and 15-minute delayed information for Tape A and B securities. NLS Plus also contains: Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Reg SHO Short Sale Price Test Restricted Indicator, Trading Action, Symbol Directory, Adjusted Closing Price, and End of Day Trade Summary are

(''NASDAQ''), and NASDAQ OMX BX (''BX'') (together known as the ''Nasdaq, Inc. equity markets''). NASDAQ and BX are filing companion proposals similar to this one. NASDAQ's last sale product, NASDAQ Last Sale, includes last sale information from the FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF''), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority (''FINRA''). *See* Securities Exchange Act Release No. 71350 (January 17, 2014), 79 FR 4218 (January 24, 2014) (SR–FINRA–2014–002). For proposed rule changes submitted with respect to NASDAQ Last Sale, BX Last Sale, and PSX Last Sale, *see, e.g.,* Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178, (June 20, 2008) (SR–NASDAQ–2006–060) (order approving NASDAQ Last Sale data feeds pilot); 61112 (December 4, 2009), 74 FR 65569, (December 10, 2009) (SR–BX–2009–077) (notice of filing and immediate effectiveness regarding BX Last Sale data feeds); and 62876 (September 9, 2010), 75 FR 56624, (September 16, 2010) (SR–Phlx–2010–120) (notice of filing and immediate effectiveness regarding PSX Last Sale data feeds).

[5] Tape A and Tape B securities are disseminated pursuant to the Security Industry Automation Corporation's (''SIAC'') Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS (''CTA''). Tape C securities are disseminated pursuant to the NASDAQ Unlisted Trading Privileges (''UTP'') Plan.

[6] *See* Securities Exchange Act Release Nos. 75763 (August 26, 2015), 80 FR 52817 (September 1, 2015) (SR–Phlx–2015–72) (notice of filing and immediate effectiveness regarding NLS Plus on PSX); and 75890 (September 10, 2015), 80 FR 55692 (September 16, 2015) (SR–Phlx–2015–76) (notice of filing and immediate effectiveness regarding fees for NLS Plus on PSX).

Other exchanges have data feeds that are similar to NLS Plus. *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25) (order approving market data product called BATS One Feed being offered by four affiliated exchanges); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29) (notice of filing and immediate effectiveness to include consolidated volume in BATS One). *See also* Securities Exchange Act Release No. 73553 (November 6, 2014), 79 FR 67491 (November 13, 2014) (SR–NYSE–2014–40) (order granting approval to establish the NYSE Best Quote & Trades (''BQT'') Data Feed).

[7] *Id.*

included. NLS Plus may be received by itself or in combination with NASDAQ Basic.

This proposal essentially reflects one change to NLS Plus as it currently exists. Whereas now consolidated volume on NLS Plus is real-time only for Tape C securities and is 15 minute delayed for Tape A and Tape B securities, this proposal would allow NLS Plus to reflect consolidated volume of real-time trading activity as reported to all of the Tapes. As proposed to be amended, PSX Chapter VIII, Last Sale (b) would state:

(b) NASDAQ Last Sale Plus (''NLS Plus''). NLS Plus is a comprehensive data feed produced by NASDAQ OMX Information LLC. It provides last sale data as well as consolidated volume of NASDAQ U.S. equity markets (PSX, The NASDAQ Stock Market (''NASDAQ''), and NASDAQ OMX BX (''BX'')) and the NASDAQ/FINRA Trade Reporting Facility (''TRF''). NLS Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities. NLS Plus also contains: Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Reg SHO Short Sale Price Test Restricted Indicator, Trading Action, and Symbol Directory are included. NLS Plus may be received by itself or in combination with NASDAQ Basic. Additionally, NLS Plus reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape A securities and Tape B securities.

Thus, with this proposal consolidated volume would reflect real-time trading for all Tape A, Tape B, and Tape C securities. Market participants have requested that the Exchange provide NLS Plus consolidated volume that in fact reflects real-time trading for all Tape A, Tape B, and Tape C securities. The Exchange believes that this proposal would be of great benefit to market participants, who could now get similar, real-time data across all U.S. markets that are reported to Tapes A, B, and C. The Exchange believes that its proposal allowing real-time volume on the NLS Plus feed is similar to the BATS One feed, which transmits real-time data.[8]

The Exchange proposes one housekeeping change. This is a technical change to remove two terms that are indicated twice in PSX Chapter VIII, Last Sale (b): ''Adjusted Closing Price'' and ''End of Day Trade Summary''.

With respect to latency, as discussed in previous NLS Plus filings,[9] the path for distribution of NLS Plus is not faster than the path for distribution that would be used by a market data vendor to distribute an independently created NLS Plus-like product. As such, the NLS Plus data feed is a data product that a competing market data vendor could create and sell without being in a disadvantaged position relative to the Exchange. In recognition that the Exchange is the source of its own market data and with NASDAQ and BX being equity markets owned by Nasdaq, Inc., the Exchange represents that the source of the market data it would use to create proposed NLS Plus is available to other vendors. In fact, the overwhelming majority of the data elements and messages in NLS Plus are exactly the same as, and in fact are sourced from, NLS, BX Last Sale, and PSX Last Sale, each of which is available to other market data vendors. The Exchange, BX, and NASDAQ will continue to make available these individual underlying data elements, and thus, the source of the market data that would be used to create the proposed NLS Plus is the same as what is available to other market data vendors.[10]

The Exchange believes that its proposal would greatly benefit the public and investors, and is consistent with the Act.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[11] in general, and with Section 6(b)(5) of the Act,[12] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The purpose of the proposed rule change is to add language to PSX Chapter VIII, Last Sale (b) regarding real-time data across all U.S. markets that are reported to Tapes A, B, and C and are offered on NLS Plus; and to remove two duplicative terms from the rule. The Exchange believes that the proposal facilitates transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by making available additional means by which investors may access real-time volume information about securities transactions, thereby providing investors with additional options for accessing information that may help to inform their trading decisions.

The Exchange notes that the Commission has recently approved a data product on several exchanges that is similar to NLS Plus and is real-time, and specifically determined that the approved data product was consistent with the Act.[13] NLS Plus simply provides market participants with an additional option for receiving real-time market data that has already been the subject of a proposed rule change and

[8] *See* 73918 at 78921: ''[T]he BATS One Feed . . . disseminates, on a real-time basis, the aggregate best bid and offer . . . of all displayed orders for securities traded on the Exchanges and for which the Exchanges report quotes under the Consolidated Tape Association . . . Plan or the Nasdaq/UTP Plan.'' *See also http://cdn.batstrading.com/resources/release_notes/2015/SIP-Volume-in-BATS-One.pdf:* ''The BATS One Feed provides affordable, comprehensive and accurate real-time quote and trade data at a fraction of the cost of competitive products. Retail brokers, investment banks, media outlets and other firms will have an opportunity to use the BATS One Feed to build displays that include real-time SIP Consolidated Volume reflecting the total trading volume occurring on all market centers for Tape A, B, and C listed securities [footnote excluded].''

[9] *See* Securities Exchange Act Release No. 75763 (August 26, 2015), 80 FR 52817 (September 1, 2015) (SR–Phlx–2015–72) (notice of filing and immediate effectiveness).

[10] In order to create NLS Plus, the system creating and supporting NLS Plus receives the individual data feeds from each of the Nasdaq, Inc. equity markets and, in turn, aggregates and summarizes that data to create NLS Plus and then distribute it to end users. This is the same process that a competing market data vendor would undergo should it want to create a market data product similar to NLS Plus to distribute to its end users. A competing market data vendor could receive the individual data feeds from each of the Nasdaq, Inc. equity markets at the same time the system creating and supporting NLS Plus would for it to create NLS Plus. Therefore, a competing market data vendor could, as discussed, obtain the underlying data elements from the Nasdaq, Inc. equity markets on the same latency basis as the system that would be performing the aggregation and consolidation of proposed NLS Plus, and provide a similar product to its customers with the same latency they could achieve by purchasing NLS Plus from the Exchange. As such, the Exchange would not have any unfair advantage over competing market data vendors with respect to NLS Plus. Moreover, in terms of NLS itself, the Exchange would access the underlying feed from the same point as would a market data vendor; as discussed, the Exchange would not have a speed advantage.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

[13] *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29) (notice of filing and immediate effectiveness to include consolidated volume in BATS One).

that is available from myriad market data vendors.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that its NLS Plus market data product is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[14]

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

Moreover, data products such as NLS Plus are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The Exchange believes that, for the reasons given, the proposal is 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, as amended. As is true of all NASDAQ's non-core data products, NASDAQ's ability to offer NLS Plus through NASDAQ OMX Information LLC and price NLS Plus is constrained by: (1) Competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data. The Exchange believes that its proposal is pro-competitive in that it will allow the Exchange to distribute consolidated volume for Tapes A, B, and C on a real-time basis, similarly to a data product on several exchanges that is similar to NLS Plus. The Exchange believes that this would be of great benefit to market participants, who could now get similar, real-time data across all U.S. markets that are reported to Tapes A, B, and C.

In addition, as discussed, NLS Plus competes directly with a myriad of similar products and potential products of market data vendors. This proposal allows offering on NLS Plus, on a real-time basis, U.S. market data that is reported to Tapes A, B, and C. NLS Plus joins the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/NASDAQ TRF data that is a component of NLS and NLS Plus, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the internet after being purchased).[15] In NASDAQ's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, NASDAQ would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,[16] and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. The Exchange pays rebates to attract orders, charges relatively low prices for market information and charges relatively high

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[15] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' *Antitrust Law Journal,* Vol. 70, No. 3 (2003).

[16] It should be noted that the costs of operating the FINRA/NASDAQ TRF borne by NASDAQ include regulatory charges paid by NASDAQ to FINRA.

prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The competitive nature of the market for products such as NLS Plus is borne out by the performance of the market. In May 2008, the internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an ''enterprise cap'' of $100,000 for customers receiving only one of the NLS products, and $150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (*i.e.,* a reduction of $100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's product, several other major content providers, including MSN and Morningstar, use the BATS product. Moreover, further evidence of competition can be observed in the recently-developed BATS One Feed and BQT feed.[17]

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce'.'' *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010) (''*NetCoalition I*''). The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NLS Plus would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NLS Plus data revenues, the value of NLS Plus as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and the value of its other data products.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[20] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[21] 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 NLS Plus may as soon as possible offer real-time data across all U.S. markets that are reported to Tapes A, B, and C, in a manner similar to other markets.[22] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[23]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2015–110 on the subject line.

[17] *See* supra note 6.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 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.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29).

[23] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2015–110. 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–Phlx–2015–110 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32897 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76774; File No. SR–BYX–2015–51]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Y-Exchange, Inc.

December 24, 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 22, 2015, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The 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 Act [3] 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 [sic], 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 BYX 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]

BYX Depth Fees

BYX 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 BYX Depth. The cost of BYX Depth for

[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 (''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 the definition of Trading Platform under Nasdaq Rule 7023(a)(7).

[8] *See* Exchange Rule 11.22(a) and (c).

an Internal Distributor [9] is currently $500 per month. The Exchange also separately charges an External Distributor [10] of BYX Depth a flat fee of $2,500 per month. The Exchange does not charge Internal and External Distributors separate display User [11] 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 proposes 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 BYX Depth would pay a fee of $2,000 per month for Non-Display Usage of BYX 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 $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 BYX 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.

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 Act [15] 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. BYX 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 BYX 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 BYX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, BYX 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]

[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/byx/*. 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 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] U.S.C. 78k–1.

[16] *See* 17 CFR 242.603.

[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

The proposed amendment to the Internal Distributor fee for BYX 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 BYX Depth is equitable and reasonable as the fees proposed is less than similar fees currently charged by Nasdaq for its depth-of-book data. In addition, 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 BYX 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 BYX 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 BYX 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, BYX Depth competes with a number of alternative products. For instance, BYX 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 BYX 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 BYX 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 BYX 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 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.

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)

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] Nasdaq Rules 7023(a)(2)(B) and (a)(7).

[20] *See supra* note 18.

[21] *See supra* note 19.

of the Act [22] 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–BYX–2015–51 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–BYX–2015–51. 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–BYX–2015–51, and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Brent J. Fields,

Secretary.

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[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76769; File No. SR–NASDAQ–2015–150]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding NASDAQ Last Sale Plus

December 24, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 14, 2015, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7039 (NASDAQ Last Sale and Last Sale Plus Data Feed) with language regarding NASDAQ Last Sale (''NLS'') Plus (''NLS Plus''), a comprehensive data feed offered by NASDAQ OMX Information LLC [3] that allows data distributors to access the three last sale products offered by each of Nasdaq, Inc.'s three U.S. equity markets.[4] Specifically, this proposal would allow NLS Plus to reflect cumulative consolidated volume (''consolidated volume'') of real-time trading activity for Tape A securities and Tape B securities. Currently, consolidated volume on NLS Plus is real-time only for Tape C securities and is 15 minute delayed for Tape A securities and Tape B securities.[5] The Exchange also proposes to remove two duplicative terms in the rule.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASDAQ OMX Information LLC is a subsidiary of Nasdaq, Inc. (formerly, The NASDAQ OMX Group, Inc.), separate and apart from The NASDAQ Stock Market LLC. The primary purpose of NASDAQ OMX Information LLC is to combine publicly available data from the three filed last sale products of the exchange subsidiaries of Nasdaq, Inc. and from the network processors for the ease and convenience of market data users and vendors, and ultimately the investing public. In that role, the function of NASDAQ OMX Information LLC is analogous to that of other market data vendors, and it has no competitive advantage over other market data vendors; NASDAQ OMX Information LLC performs precisely the same functions as Bloomberg, Thomson Reuters, and other market data vendors.

[4] The Nasdaq, Inc. U.S. equity markets include the Exchange, NASDAQ OMX BX (''BX''), and NASDAQ OMX PSX (''PSX'') (together known as the ''NASDAQ OMX equity markets''). PSX and BX are filing companion proposals similar to this one. NASDAQ's last sale product, NASDAQ Last Sale, includes last sale information from the FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF''), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority (''FINRA''). *See* Securities Exchange Act Release No. 71350 (January 17, 2014), 79 FR 4218 (January 24, 2014) (SR–FINRA–2014–002). For proposed rule changes submitted with respect to NASDAQ Last Sale, BX Last Sale, and PSX Last Sale, *see, e.g.,* Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178, (June 20, 2008) (SR–NASDAQ–2006–060) (order approving NASDAQ Last Sale data feeds pilot); 61112 (December 4, 2009), 74 FR 65569, (December 10, 2009) (SR–BX–2009–077) (notice of filing and immediate effectiveness regarding BX Last Sale data feeds); and 62876 (September 9, 2010), 75 FR 56624, (September 16, 2010) (SR–Phlx–2010–120) (notice of filing and immediate effectiveness regarding PSX Last Sale data feeds).

[5] Tape A and Tape B securities are disseminated pursuant to the Security Industry Automation Corporation's (''SIAC'') Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS (''CTA''). Tape C securities are disseminated pursuant to the NASDAQ Unlisted Trading Privileges (''UTP'') Plan.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposal is to amend Rule 7039(d). Specifically, this proposal would allow NLS Plus to reflect consolidated volume of real-time trading activity for Tape A securities and Tape B securities. Now, consolidated volume on NLS Plus is real-time only for Tape C securities. The Exchange also proposes to remove two duplicative terms in the rule.

NLS Plus, which is reflected in Rule 7039(d),[6] allows data distributors to access last sale products offered by each of Nasdaq, Inc.'s three equity exchanges. Thus, NLS Plus includes all transactions from all of Nasdaq, Inc.'s equity markets, as well as FINRA/NASDAQ TRF data that is included in the current NLS product. In addition, NLS Plus features total cross-market volume information at the issue level, thereby providing redistribution of consolidated volume information from the securities information processors (''SIPs'') for Tape A, B, and C securities, currently real-time for Tape C securities and 15-minute delayed for Tape A and Tape B securities. Thus, NLS Plus covers all securities listed on NASDAQ and New York Stock Exchange (''NYSE'') (now under the Intercontinental Exchange (''ICE'') umbrella), as well as US ''regional'' exchanges such as NYSE MKT, NYSE Arca, and BATS (also known as BATS/Direct Edge).

NLS Plus offers data for all U.S. equities via two separate data channels: The first data channel reflects NASDAQ, BX, and PSX trades with real-time consolidated volume for NASDAQ-listed securities; and the second data channel reflects NASDAQ, BX, and PSX trades with delayed consolidated volume for NYSE, NYSE MKT, NYSE Arca and BATS-listed securities. The Exchange believes that market data distributors may use the NLS Plus data feed to feed stock tickers, portfolio trackers, trade alert programs, time and sale graphs, and other display systems. The provision of multiple options for investors to receive market data was a primary goal of the market data amendments adopted by Regulation NMS. Finally, NLS Plus provides investors with options for receiving market data that parallel products currently offered by BATS and BATS Y, EDGA, and EDGX and NYSE equity exchanges.[7]

Consolidated volume reflects the consolidated volume at the time that the NLS Plus trade message is generated, and includes the volume for the issue symbol as reported on the consolidated market data feed. The consolidated volume is based on the real-time trades reported via the UTP Trade Data Feed (''UTDF'') and delayed trades reported via CTA. NASDAQ calculates the real-time trading volume for its trading venues, and then adds the real-time trading volume for the other (non-NASDAQ) trading venues as reported via the UTDF data feed. For non-NASDAQ-listed issues, the consolidated volume is based on trades reported via SIAC's Consolidated Tape System (''CTS'') for the issue symbol. The Exchange calculates the real-time trading volume for its trading venues, and then adds the 15-minute delayed trading volume for the other (non-NASDAQ) trading venues as reported via the CTS data feed.

NLS Plus is currently codified in NASDAQ Rule 7039(d) as follows:

(d) NASDAQ Last Sale Plus. NASDAQ Last Sale Plus is a comprehensive data feed produced by NASDAQ OMX Information LLC. It provides last sale data as well as consolidated volume of NASDAQ U.S. equity markets (The NASDAQ Stock Market (''NASDAQ''), NASDAQ OMX BX (''BX''), and NASDAQ OMX PSX (''PSX'')) and the NASDAQ/FINRA Trade Reporting Facility (''TRF''). NASDAQ Last Sale Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities and 15-minute delayed information for Tape A and Tape B securities. NASDAQ Last Sale Plus also contains: Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Reg SHO Short Sale Price Test Restricted Indicator, Trading Action, Symbol Directory, Adjusted Closing Price, and End of Day Trade Summary are included. NLS Plus may be received by itself or in combination with NASDAQ Basic.

This proposal essentially reflects one change to NLS Plus as it currently exists. Whereas now consolidated volume on NLS Plus is real-time only for Tape C securities and is 15 minute delayed for Tape A and Tape B securities, this proposal would allow NLS Plus to reflect consolidated volume of real-time trading activity as reported to all of the Tapes. As proposed to be amended, NASDAQ Rule 7039(d)(1) [sic] would state:

(d) NASDAQ Last Sale Plus. NASDAQ Last Sale Plus is a comprehensive data feed produced by NASDAQ OMX Information LLC. It provides last sale data as well as consolidated volume of NASDAQ U.S. equity markets (The NASDAQ Stock Market (''NASDAQ''), NASDAQ OMX BX (''BX''), and NASDAQ OMX PSX (''PSX'')) and the NASDAQ/FINRA Trade Reporting Facility (''TRF''). NASDAQ Last Sale Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities. NASDAQ Last Sale Plus also contains: Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Reg SHO Short Sale Price Test Restricted Indicator, Trading Action, and Symbol Directory are included. NLS Plus may be received by itself or in combination with NASDAQ Basic. Additionally, NASDAQ Last Sale Plus reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape A securities and Tape B securities.

Thus, with this proposal consolidated volume would reflect real-time trading for all Tape A, Tape B, and Tape C securities. Market participants have requested that the Exchange provide NLS Plus consolidated volume that in fact reflects real-time trading for all Tape A, Tape B, and Tape C securities. The Exchange believes that this proposal would be of great benefit to market participants, who could now get similar, real-time data across all U.S. markets that are reported to Tapes A, B, and C. The Exchange believes that its proposal allowing real-time volume on the NLS Plus feed is similar to the BATS One feed, which transmits real-time data.[8]

[6] *See* Securities Exchange Act Release Nos. 75257 (June 22, 2015), 80 FR 36862 (June 26, 2015)(SR–NASDAQ–2015–055) (order approving proposed rule change regarding NASDAQ Last Sale Plus in NASDAQ Rule 7039(d)) (the ''NLS Plus Approval Order''); 74972 (May 15, 2015), 80 FR 29370 (May 21, 2015)(SR–NASDAQ–2015–055) (notice of filing of proposed rule change regarding NASDAQ Last Sale Plus) (the ''NLS Plus notice''); and 75660 (August 4, 2015), 80 FR 47968 (August 10, 2015) (SR–NASDAQ–2015–088) (notice of filing and immediate effectiveness regarding NASDAQ Last Sale Plus fees).

Other exchanges have data feeds that are similar to NLS Plus. *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25) (order approving market data product called BATS One Feed being offered by four affiliated exchanges); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29) (notice of filing and immediate effectiveness to include consolidated volume in BATS One). *See also* Securities Exchange Act Release No. 73553 (November 6, 2014), 79 FR 67491 (November 13, 2014) (SR–NYSE–2014–40) (order granting approval to establish the NYSE Best Quote & Trades (''BQT'') Data Feed).

[7] *Id.*

[8] *See* 73918 at 78921: ''[T]he BATS One Feed . . . disseminates, on a real-time basis, the aggregate best bid and offer . . . of all displayed orders for securities traded on the Exchanges and for which

Continued

The Exchange proposes one housekeeping change. This is a technical change to remove two terms that are indicated twice in Rule 7039(d): ''Adjusted Closing Price'' and ''End of Day Trade Summary''.

With respect to latency, as discussed in previous NLS Plus filings,[9] the path for distribution of NLS Plus is not faster than the path for distribution that would be used by a market data vendor to distribute an independently created NLS Plus-like product. As such, the NLS Plus data feed is a data product that a competing market data vendor could create and sell without being in a disadvantaged position relative to the Exchange. In recognition that the Exchange is the source of its own market data and with being [sic] equity markets owned by Nasdaq, Inc., the Exchange represents that the source of the market data it would use to create proposed NLS Plus is available to other vendors. In fact, the overwhelming majority of the data elements and messages in NLS Plus are exactly the same as, and in fact are sourced from, NLS, BX Last Sale, and PSX Last Sale, each of which is available to other market data vendors. The will [sic] continue to make available these individual underlying data elements, and thus, the source of the market data that would be used to create the proposed NLS Plus is the same as what is available to other market data vendors.[10]

The Exchange believes that its proposal would greatly benefit the public and investors, and is consistent with the Act.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[11] in general, and with Section 6(b)(5) of the Act,[12] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The purpose of the proposed rule change is to add language to section (d) of Rule 7039 regarding real-time data across all U.S. markets that are reported to Tapes A, B, and C and are offered on NLS Plus; and to remove two duplicative terms from the rule. The Exchange believes that the proposal facilitates transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by making available additional means by which investors may access real-time volume information about securities transactions, thereby providing investors with additional options for accessing information that may help to inform their trading decisions.

The Exchange notes that the Commission has recently approved a data product on several exchanges that is similar to NLS Plus and is real-time, and specifically determined that the approved data product was consistent with the Act.[13] NLS Plus simply provides market participants with an additional option for receiving real-time market data that has already been the subject of a proposed rule change and that is available from myriad market data vendors.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that its NLS Plus market data product is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[14]

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well. Moreover, data products such as NLS Plus are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The Exchange believes that, for the reasons given, the proposal is consistent with the Act.

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the Exchanges report quotes under the Consolidated Tape Association . . . Plan or the Nasdaq/UTP Plan.'' *See also http://cdn.batstrading.com/resources/release_notes/2015/SIP-Volume-in-BATS-One.pdf:* ''The BATS One Feed provides affordable, comprehensive and accurate real-time quote and trade data at a fraction of the cost of competitive products. Retail brokers, investment banks, media outlets and other firms will have an opportunity to use the BATS One Feed to build displays that include real-time SIP Consolidated Volume reflecting the total trading volume occurring on all market centers for Tape A, B, and C listed securities [footnote excluded].''

[9] *See* Securities Exchange Act Release No. 75763 (August 26, 2015), 80 FR 52817 (September 1, 2015) (SR–Phlx–2015–72) (notice of filing and immediate effectiveness).

[10] In order to create NLS Plus, the system creating and supporting NLS Plus receives the individual data feeds from each of the Nasdaq, Inc. equity markets and, in turn, aggregates and summarizes that data to create NLS Plus and then distribute it to end users. This is the same process that a competing market data vendor would undergo should it want to create a market data product similar to NLS Plus to distribute to its end users. A competing market data vendor could receive the individual data feeds from each of the Nasdaq, Inc. equity markets at the same time the system creating and supporting NLS Plus would for it to create NLS Plus. Therefore, a competing market data vendor could, as discussed, obtain the underlying data elements from the Nasdaq, Inc. equity markets on the same latency basis as the system that would be performing the aggregation and consolidation of proposed NLS Plus, and provide a similar product to its customers with the same latency they could achieve by purchasing NLS Plus from the Exchange. As such, the Exchange would not have any unfair advantage over competing market data vendors with respect to NLS Plus. Moreover, in terms of NLS itself, the Exchange would access the underlying feed from the same point as would a market data vendor; as discussed, the Exchange would not have a speed advantage.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

[13] *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29) (notice of filing and immediate effectiveness to include consolidated volume in BATS One).

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

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. As is true of all NASDAQ's non-core data products, NASDAQ's ability to offer NLS Plus through NASDAQ OMX Information LLC and price NLS Plus is constrained by: (1) Competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data. The Exchange believes that its proposal is pro-competitive in that it will allow the Exchange to distribute consolidated volume for Tapes A, B, and C on a real-time basis, similarly to a data product on several exchanges that is similar to NLS Plus. The Exchange believes that this would be of great benefit to market participants, who could now get similar, real-time data across all U.S. markets that are reported to Tapes A, B, and C.

In addition, as discussed, NLS Plus competes directly with a myriad of similar products and potential products of market data vendors. This proposal allows offering on NLS Plus, on a real-time basis, U.S. market data that is reported to Tapes A, B, and C. NLS Plus joins the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/NASDAQ TRF data that is a component of NLS and NLS Plus, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the internet after being purchased).[15] In NASDAQ's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, NASDAQ would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,[16] and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. NASDAQ pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The competitive nature of the market for products such as NLS Plus is borne out by the performance of the market. In May 2008, the Internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an ''enterprise cap'' of $100,000 for customers receiving only one of the NLS products, and $150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (*i.e.,* a reduction of $100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be

[15] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' *Antitrust Law Journal,* Vol. 70, No. 3 (2003).

[16] It should be noted that the costs of operating the FINRA/NASDAQ TRF borne by NASDAQ include regulatory charges paid by NASDAQ to FINRA.

obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's product, several other major content providers, including MSN and Morningstar, use the BATS product. Moreover, further evidence of competition can be observed in the recently-developed BATS One Feed and BQT feed.[17]

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce'.'' *NetCoalition I* at 539. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NLS Plus would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NLS Plus data revenues, the value of NLS Plus as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and the value of its other data products.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[20] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[21] 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 NLS Plus may as soon as possible offer real-time data across all U.S. markets that are reported to Tapes A, B, and C, in a manner similar to other markets.[22] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[23]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings 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–NASDAQ–2015–150 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2015–150. 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–NASDAQ–2015–150 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32896 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[17] *See* supra note 6.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 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.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29).

[23] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76754; File No. SR–BX–2015–083]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Participant Fee

December 23, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2015, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees to adopt a new Participant Fee at Chapter XV, entitled, ''Options Pricing,'' Section 10 entitled ''Participant Fee—Options.''

The Exchange purposes [sic] to adopt a Participant Fee, applicable to BX Options Participants, to recoup costs incurred by the Exchange. The Exchange's Participant Fee is competitive with those of other options exchanges.[3] While the amendment proposed herein is effective upon filing, the Exchange has designated the amendment [sic] become operative on January 4, 2016.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt a Participant Fee, applicable to BX Options Participants, so the Exchange can allocate its costs to various options market participants. Today, the Exchange does not assess BX Options Participants a fee to access the options market. The Exchange proposes to assess all BX Options Participants a $500 per month Participant Fee. The NASDAQ Options Market LLC (''NOM'') initially assessed a Participant Fee in 2012 to its Options Participants.[4] BX is a smaller market, as compared to NOM, and, to date, the Exchange determined not to assess BX members an Options Participant Fee. Now, the Exchange is proposing such a fee, which would be assessed as of January 4, 2016, to all BX Options Participants. The proposed Participant Fee is in addition to the trading rights fee of $1,000 per month to be an Exchange member.[5]

The Exchange believes this Participant Fee is competitive with fees at other options exchanges.[6]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, for example, the Commission indicated that market forces should generally determine the price of non-core market data because national market system regulation ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [9] Likewise, in *NetCoalition* v. *NYSE Arca, Inc.*[10] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[11] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [12]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [13] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange's proposal to adopt a BX Options Participant Fee of $500 per month is reasonable because the Exchange is seeking to recoup costs related to membership administration. The proposed fee is lower than similar fees at other options exchanges.[14] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* note 14 below.

[4] *See* Securities and Exchange Act Release No. 68502 (December 20, 2012), 77 FR 76572 (December 28, 2012) (SR–NASDAQ–2012–139).

[5] *See* Exchange Rule 7001.

[6] *See* note 14 below.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] Securities Exchange Act Release No. 51808 at 37499 (June 9, 2005) (''Regulation NMS Adopting Release'').

[10] *NetCoalition* v. *NYSE Arca, Inc.,* 615 F.3d 525 (D.C. Cir. 2010).

[11] *See NetCoalition,* at 534.

[12] *Id.* at 537.

[13] *Id.* at 539 (quoting ArcaBook Order, 73 FR at 74782–74783).

[14] *See* The Chicago Board Options Exchange, Incorporated's Fees Schedule. Per month a Market Maker Trading Permit is $5,500, an SPX Tier Appointment is $3,000, a VIX Tier Appointment is $2,000, and an Electronic Access Permit is $1,600. *See also* the International Securities Exchange LLC's Schedule of Fees. Per month an Electronic Access Member is assessed $500.00 for membership and a market maker is assessed from $2,000 to $4,000 per membership depending on the type of market maker. *See also* C2 Options Exchange, Incorporated's Fees Schedule. Per month, a market-maker is assessed a $5,000 permit fee, an Electronic Access Permit is assessed a $1,000 permit fee. *See also* NYSE Arca, Inc.'s Fee Schedule. Per month, a Clearing Firm is assessed a $1,000 per month fee for the first Options Trading Permit (''OTP'') and $250 thereafter, and a market maker is assessed a permit based on the maximum number of OTPs held by an OTP Firm or OTP Holder during a

Continued

Exchange's proposal to adopt a BX Options Participant Fee of $500 is equitable and not unfairly discriminatory because the Participant Fee will be assessed uniformly to each BX Options Participant.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In terms of intra-market competition, the Exchange's proposal to adopt a BX Options Participant Fee of $500 per month does not impose an undue burden on competition because the Exchange would uniformly assess the same Participant Fee to each BX Options Participant. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose Participants. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

calendar month ranging from $1,000 to $6,000 a month.

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.[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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BX–2015–083 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2015–083. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2015–083, and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32813 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76757; File No. SR–FINRA–2015–057]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt FINRA Rule 2273 (Educational Communication Related to Recruitment Practices and Account Transfers)

December 23, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 16, 2015, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. 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

FINRA is proposing to adopt FINRA Rule 2273, which would establish an obligation for a member to deliver an educational communication in connection with member recruitment practices and account transfers. The text of the proposed rule change is available on FINRA's Web site at *http://*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

www.finra.org, at the principal office of FINRA, 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, FINRA 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. FINRA 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

Background

Representatives who leave their member firm often contact former customers and emphasize the benefits the former customers would experience by transferring their assets to the firm that recruited the registered representative (''recruiting firm'') and maintaining their relationship with the representative. In this situation, the former customer's confidence in and prior experience with the representative may be one of the customer's most important considerations in determining whether to transfer assets to the recruiting firm. However, FINRA is concerned that former customers may not be aware of other important factors to consider in making a decision whether to transfer assets to the recruiting firm, including directs costs that may be incurred. Therefore, to provide former customers with a more complete picture of the potential implications of a decision to transfer assets, the proposed rule change would require delivery of an educational communication by the recruiting firm that highlights key considerations in transferring assets to the recruiting firm, and the direct and indirect impacts of such a transfer on those assets.

FINRA believes that former customers would benefit from receiving a concise, plain-English document that highlights the potential implications of transferring assets. The proposed educational communication is intended to encourage former customers to make further inquiries of the transferring representative (and, if necessary, the customer's current firm), to the extent that the customer considers the information important to his or her decision making.

The details of proposed FINRA Rule 2273 (Educational Communication Related to Recruitment Practices and Account Transfers) are set forth below.

Educational Communication

The proposed rule change would require a member that hires or associates with a registered representative to provide to a former customer of the representative, individually, in paper or electronic form, an educational communication prepared by FINRA. The proposed rule change would require delivery of the educational communication when: (1) The member, directly or through a representative, individually contacts a former customer of that representative to transfer assets; or (2) a former customer of the representative, absent individual contact, transfers assets to an account assigned, or to be assigned, to the representative at the member.[3]

The proposed rule change would define a ''former customer'' as any customer that had a securities account assigned to a registered person at the representative's previous firm. The term ''former customer'' would not include a customer account that meets the definition of an ''institutional account'' pursuant to FINRA Rule 4512(c); provided, however, accounts held by a natural person would not qualify for the institutional account exception.[4]

The proposed educational communication focuses on important considerations for a former customer who is contemplating transferring assets to an account assigned to his or her former representative at the recruiting firm. The educational communication would highlight the following potential implications of transferring assets to the recruiting firm: (1) Whether financial incentives received by the representative may create a conflict of interest; (2) that some assets may not be directly transferrable to the recruiting firm and as a result the customer may incur costs to liquidate and move those assets or account maintenance fees to leave them with his or her current firm; (3) potential costs related to transferring assets to the recruiting firm, including differences in the pricing structure and fees imposed by the customer's current firm and the recruiting firm; and (4) differences in products and services between the customer's current firm and the recruiting firm.

The educational communication is intended to prompt a former customer to make further inquiries of the transferring representative (and, if necessary, the customer's current firm), to the extent that the customer considers the information important to his or her decision making.

Requirement To Deliver Educational Communication

FINRA believes that a broad range of communications by a recruiting firm or its registered representative would constitute individualized contact that would trigger the delivery requirement under the proposal. These communications may include, but are not limited to, oral or written communications by the transferring representative: (1) Informing the former customer that he or she is now associated with the recruiting firm, which would include customer communications permitted under the Protocol for Broker Recruiting (''Protocol'');[5] (2) suggesting that the former customer consider transferring his or her assets or account to the recruiting firm; (3) informing the former customer that the recruiting firm may offer better or different products or services; or (4) discussing with the former customer the fee or pricing structure of the recruiting firm.

Furthermore, FINRA would consider oral or written communications to a group of former customers to similarly trigger the requirement to deliver the educational communication under the proposed rule change. These types of oral or written communications by a member, directly or through the representative, to a group of former customers may include, but are not limited to: (1) Mass mailing of information; (2) sending copies of information via email; or (3) automated phone calls or voicemails.

[3] *See* proposed FINRA Rule 2273(a).

[4] *See* proposed FINRA Rule 2273.01 (Definition). FINRA Rule 4512(c) defines the term institutional account to mean the account of: (1) A bank, savings and loan association, insurance company, or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (3) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.

[5] The Protocol was created in 2004 and permits departing representatives to take certain limited customer information with them to a new firm, and solicit those customers at the new firm, without the fear of legal action by their former employer. The Protocol provides that representatives of firms that have signed the Protocol can take client names, addresses, phone numbers, email addresses, and account title information when they change firms, provided they leave a copy of this information, including account numbers, with their branch manager when they resign.

Timing and Means of Delivery of Educational Communication

The proposed rule change would require a member to deliver the educational communication at the time of first individualized contact with a former customer by the member, directly or through the representative, regarding the former customer transferring assets to the member.[6] If such contact is in writing, the proposed rule change would require the educational communication to accompany the written communication. If the contact is by electronic communication, the proposed rule change would permit the member to hyperlink directly to the educational communication.[7]

If the first individualized contact with the former customer is oral, the proposed rule change would require the member or representative to notify the former customer orally that an educational communication that includes important considerations in deciding whether to transfer assets to the member will be provided not later than three business days after the contact. The proposed rule change would require the educational communication be sent within three business days from such oral contact or with any other documentation sent to the former customer related to transferring assets to the member, whichever is earlier.[8]

If the former customer seeks to transfer assets to an account assigned, or to be assigned, to the representative at the member, but no individualized contact with the former customer by the representative or member occurs before the former customer seeks to transfer assets, the proposed rule change would mandate that the member deliver the educational communication to the former customer with the account transfer approval documentation.[9] The educational communication requirement in the proposed rule change would apply for a period of three months following the date that the representative begins employment or associates with the member.[10]

Pursuant to the proposed rule change, the educational communication requirement would not apply when the former customer expressly states that he or she is not interested in transferring assets to the member. If the former customer subsequently decides to transfer assets to the member without further individualized contact within the period of three months following the date that the representative begins employment or associates with the member, then the educational communication would be required to be provided with the account transfer approval documentation.[11]

Format of Educational Communication

To facilitate uniform communication under the proposed rule change and to assist members in providing the proposed communication to former customers of a representative, the proposed rule change would require a member to deliver the proposed educational communication prepared by FINRA to the former customer, individually, in paper or electronic form.[12] The proposed rule change would require members to provide the FINRA-created communication and would not permit members to use an alternative format.[13] FINRA believes that the FINRA-created uniform educational communication will allow members to provide the required communication at a relatively low cost and without significant administrative burdens.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 180 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[14] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will promote investor protection by highlighting important conflict and cost considerations of transferring assets and encouraging customers to make further inquiries to reach an informed decision about whether to transfer assets to the recruiting firm. This belief is supported by FINRA's test of the educational communication with a diverse group of retail investors. The investors tested indicated that the educational communication effectively conveyed important and useful information. The investors also indicated that the communication identified issues to consider that they had previously been unaware of and that would be meaningful in making a decision whether to transfer assets to the representative's new firm.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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. All members would be subject to the proposed rule change, so they would be affected in the same manner, and FINRA has narrowly tailored the rule requirements to minimize the impacts on firms.

FINRA believes that the proposed rule change would protect investors by highlighting the potential implications of transferring assets to the recruiting firm. The proposed educational communication is intended to prompt a former customer to make further inquiries of the transferring representative (and, if necessary, the customer's current firm), to the extent that the customer considers the information important to his or her decision making.

FINRA recognizes that a member that hires or associates with a registered person would incur costs to comply with the proposed rule change on an initial and ongoing basis. Members would need to establish and maintain written policies and procedures reasonably designed to ensure compliance with the proposed rule change, including monitoring communications by the transferring representative and other associated persons of the recruiting firm with former retail customers of the representative. The compliance costs would likely vary across members based on a number of factors such as the size of a firm, the extent to which a member hires registered representatives from other firms, and the effectiveness and application of existing procedures to the types of communications that must be monitored under the proposed rule change.

FINRA does not believe that the proposed rule change will impose undue operational costs on members to comply with the educational communication. While FINRA recognizes that there will be some small operational costs to members in complying with the proposed

[6] *See* proposed FINRA Rule 2273(b)(1).

[7] *See* proposed FINRA Rule 2273(b)(1)(A).

[8] *See* proposed FINRA Rule 2273(b)(1)(B).

[9] *See* proposed FINRA Rule 2273(b)(2).

[10] *See* proposed FINRA Rule 2273(b)(3).

[11] *See* proposed FINRA Rule 2273.02 (Express Rejection by Former Customer).

[12] *See* proposed FINRA Rule 2273(a) and Exhibit 3.

[13] *See* proposed FINRA Rule 2273(a).

[14] 15 U.S.C. 78*o*–3(b)(6).

educational communication requirement, FINRA has lessened the cost of compliance by developing a standardized educational communication for use by members that does not require members to make any threshold determinations or provide any additional or customized information to complete the communication. Furthermore, the proposed rule change would permit a member to deliver the educational communication in paper or electronic form thereby giving the member alternative methods of complying with the requirement.

In developing the proposed rule change, FINRA considered several alternatives to the proposed rule change, to ensure that it is narrowly tailored to achieve its purposes described previously without imposing unnecessary costs and burdens on members or resulting in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[15] The proposed rule change addresses many of the concerns noted by commenters in response to the *Notice* 13–02 Proposal and Rule 2243 Proposal.

First, the *Notice* 13–02 Proposal would have required a member that provides, or has agreed to provide, to a representative enhanced compensation in connection with the transfer of securities employment of the representative from another financial services firm to disclose the details, including specific amounts, of such enhanced compensation [16] to any former customer of the representative at the previous firm that is contacted regarding the transfer of the securities employment (or association) of the representative to the recruiting firm, or who seeks to transfer assets, to a broker-dealer account assigned to the representative with the recruiting firm. The revised approach in the Rule 2243 Proposal would have required disclosure of ranges of compensation of $100,000 or more as applied separately to aggregate upfront payments and aggregate potential future payments and affirmative cost and portability statements. In the proposed rule change FINRA has removed the requirement to disclose to former customers the magnitude of recruitment compensation paid to a transferring representative due to the privacy and operational concerns expressed by commenters to the Rule 2243 Proposal. Furthermore, removing the requirement to disclose ranges of compensation also obviates members' need to calculate recruitment compensation to be paid to a transferring representative so as to determine whether the threshold of $100,000 or more in compensation has been reached.

Second, the Rule 2243 Proposal would have required members to report to FINRA information related to significant increases in total compensation over the representative's prior year compensation that would be paid to the representative during the first year at the recruiting firm so that FINRA could assess the impact of these arrangements on a member's and representative's obligations to customers and detect potential sales practices abuses. Consistent with the removal of the requirement to disclose ranges of recruitment compensation paid to a transferring representative, the proposed rule change does not include a reporting obligation. However, FINRA will include potential customer harm resulting from recruitment compensation as part of its broader conflicts management review.

Third, the disclosure requirements in the *Notice* 13–02 Proposal and Rule 2243 Proposal would have applied for a period of one year following the date the representative began employment or associated with the member. The *Notice* 15–19 Proposal proposed that the delivery of the educational communication would apply for six months following the date the representative began employment or associated with the member. In recognition of the typical time frame for communicating with former customers and to lessen any associated operational and supervisory burdens, the proposed rule change provides that the delivery of the educational communication shall apply for three months following the date the representative begins employment or associates with the member.

Fourth, in response to concerns from commenters to the Rule 2243 Proposal about the proposal's competitive implications, operational aspects and the effectiveness of the proposed compensation disclosures, FINRA has instead proposed requiring delivery of an educational communication that highlights key considerations in transferring assets to the recruiting firm, and the direct and indirect impacts of such a transfer on those assets. Moreover, to ensure that former customers receive uniform information and to ease implementation of the proposed rule change, FINRA has created an educational communication for members to use in satisfying the proposed requirements. FINRA believes this approach is more effective than a general disclosure requirement of the fact of additional compensation paid to the representative because the educational communication allows for more context and explanation and is more likely to prompt a discussion with the transferring representative and the customer's current firm.

For these reasons, FINRA believes that the proposed rule change would not burden competition, but, instead, would strengthen FINRA's regulatory structure and provide additional protection to investors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Rule 2243 Proposal

In March 2014, FINRA filed a proposal to adopt Rule 2243 to establish disclosure and reporting obligations related to member recruitment practices.[17] The Rule 2243 Proposal imposed two obligations on members: (1) A disclosure obligation to former customers who the recruiting firm attempts to induce to follow a transferring representative; and (2) a reporting obligation to FINRA where a transferring representative receives a significant increase in compensation from the recruiting firm. Under the Rule 2243 Proposal, the disclosure obligation would have required a recruiting firm to disclose to a former customer ranges of recruitment compensation that the representative had received or would receive in connection with transferring to the recruiting firm and the basis for that compensation (*e.g.,* asset-based or production-based). The requirement would have applied separately to $100,000 or more of aggregated ''upfront payments'' or aggregated ''potential future payments.'' In addition, the Rule 2243 Proposal would have required disclosure if a former customer would

[15] *See* Item II.C., which references *Regulatory Notice* 13–02 (Jan. 2013) (''*Notice* 13–02 Proposal''), Exchange Act Release No. 71786 (Mar. 24, 2014), 79 FR 17592 (Mar. 28, 2014) (Notice of Filing of File No. SR–FINRA–2014–010) (''Rule 2243 Proposal''), and *Regulatory Notice* 15–19 (May 2015) (''*Notice* 15–19 Proposal'').

[16] In the *Notice* 13–02 Proposal, the term ''enhanced compensation'' was defined as compensation paid in connection with the transfer of securities employment (or association) to the recruiting firm other than the compensation normally paid by the recruiting firm to its established registered persons. Enhanced compensation included but was not limited to signing bonuses, upfront or back-end bonuses, loans, accelerated payouts, transition assistance, and similar arrangements, paid in connection with the transfer of securities employment (or association) to the recruiting firm.

[17] *See* Rule 2243 Proposal. FINRA considered and responded to the comments to the *Notice* 13–02 Proposal in the proposed rule change for the Rule 2243 Proposal.

incur costs to transfer assets to the recruiting firm (*e.g.,* account termination, transfer or account opening fees) that would not be reimbursed by the recruiting firm and if any of the former customer's assets were not transferrable to the recruiting firm (and associated costs, including taxes, to liquidate and transfer those assets or leave them at the customer's current firm).

FINRA developed a one-page disclosure template for the Rule 2243 Proposal, but allowed members to use an alternative form if it contained substantially similar content. The Rule 2243 Proposal would have required delivery of the disclosures at the time of first individualized contact with a former customer by the transferring representative or recruiting firm. The Rule 2243 Proposal would have required disclosure for one year following the date the representative began employment or associated with the recruiting firm.

With respect to the reporting obligation, the Rule 2243 Proposal would have required a member to report to FINRA if the member reasonably expected the total compensation paid to the transferring representative during the representative's first year of association with the member to result in an increase over the representative's prior year compensation by the greater of 25% or $100,000. FINRA intended to use the information received as a data point in its risk-based examination program.

The SEC received 184 comments on the Rule 2243 Proposal, including 33 unique comments. Commenters to the Rule 2243 Proposal conveyed concerns about the proposal's competitive implications and operational aspects, as well as the effectiveness of the proposed compensation disclosures. On June 20, 2014, FINRA withdrew SR–FINRA–2014–010 to further consider the comments to the Rule 2243 Proposal.[18]

Notice 15–19 Proposal

A revised proposal was published for public comment in *Regulatory Notice* 15–19. FINRA received 27 comment letters in response to the *Notice* 15–19 Proposal. A copy of *Regulatory Notice* 15–19 is attached as Exhibit 2a. Copies of the comment letters received in response to the *Notice* 15–19 Proposal are attached as Exhibit 2c.[19] The comments and FINRA's responses are set forth in detail below.

General Support and Opposition to the Proposal

Eight commenters stated that the *Notice* 15–19 Proposal is an improvement from the Rule 2243 Proposal.[20] Five additional commenters expressed support for a regulatory effort to provide investors with meaningful information upon which to base a decision but did not support all aspects of the *Notice* 15–19 Proposal.[21] Three commenters opposed the *Notice* 15–19 Proposal and instead supported a return to the Rule 2243 Proposal's requirement to provide specific information about any financial incentives received by the representative and costs associated with the former customer transferring assets.[22] One commenter supported requiring disclosure to former customers of enhanced compensation if the representative has been or will be paid for bringing client assets to the recruiting firm or generating new commissions or fee income.[23]

FINRA believes that the proposed rule change (reflected, in part, in the *Notice* 15–19 Proposal) is an effective and efficient alternative to the previous proposal. The proposed rule change eliminates or reduces the privacy and operational concerns raised to the previous proposal, while educating former customers about important considerations to make an informed decision whether to transfer assets to the recruiting firm. Included among those considerations is that the recruiting firm may pay financial incentives to the representative, such as bonuses based on customer assets the representative brings in, incentives for selling proprietary products, and higher commission payouts.

Triggers To Provide the Educational Communication

As proposed in the *Notice* 15–19 Proposal, the requirement to provide the educational communication would have been triggered when: (1) The member, directly or through the recruited registered person, attempted to induce the former customer of that registered person to transfer assets; or (2) the former customer of that registered person, absent inducement, transferred assets to an account assigned, or to be assigned, to the registered person at the member. Commenters opposed basing the requirement to provide the educational communication on any attempt to ''induce'' a former customer to transfer assets to the recruiting firm because they viewed the term as undefined and imprecise, resulting in operational and supervisory challenges for members.[24]

As discussed in greater detail in Item II.A., FINRA believes that a broad range of communications by a recruiting firm, directly or through a representative, with former customers may reasonably be seen as individually contacting the former customer to transfer assets to the recruiting firm and, as such, would trigger the delivery of the educational communication under the proposed rule change. To lessen any potential confusion regarding whether a communication by a member, directly or through the representative, with a former customer was an inducement to transfer assets, FINRA has revised the proposal to remove the reference to ''inducement'' of former customers. FINRA instead proposes to trigger delivery of the educational communication when: (1) The member, directly or through a representative, individually contacts a former customer of that representative to transfer assets; or (2) a former customer of the representative, absent individual contact, transfers assets to an account assigned, or to be assigned, to the representative at the member.

Some commenters stated that the requirement to provide the communication following the first individualized contact with a former customer would be unworkable as members would need to rely on representatives to report the contacts with former customers.[25] One commenter also stated that the different delivery requirements based on whether there was individualized contact would be unworkable as members would have difficulty delineating between transfers of assets following individualized contact and those occurring absent individualized contact.[26]

The proposed rule change retains the delivery triggers in the *Notice* 15–19 Proposal. FINRA believes that a representative reasonably should know whether an individual had an account assigned to him or her at the representative's prior firm and whether the representative has individually contacted the former customer regarding transferring assets to the recruiting firm. As such, FINRA does not believe the

[18] *See* Exchange Act Rel. No. 72459 (June 20, 2014), 79 FR 36855 (June 30, 2014) (Notice of Withdrawal of File No. SR–FINRA–2014–010).

[19] *See* Exhibit 2b for a list of abbreviations assigned to commenters.

[20] *See* FSR, FSI, CAI, Lincoln, Ameriprise, NAIFA, Janney, and Burns.

[21] *See* SIFMA, Cambridge, RJA, RJFS, and Edward Jones.

[22] *See* Schwab, NASAA, and Hanson McClain.

[23] *See* PIABA.

[24] *See* SIFMA, FSR, LPL, Ameriprise, Wells Fargo, Janney, and HD Vest.

[25] *See* Commonwealth and HD Vest.

[26] *See* Commonwealth.

burdens associated with tracking whether there has been individualized contact with a former customer are unreasonable relative to the value in providing the educational communication to such customers.

Furthermore, FINRA does not believe that setting up policies and procedures to supervise a registered person's communications with former customers presents an unreasonable burden to members. Members already are obligated to supervise representatives' communications with customers and have flexibility to design their supervisory systems. FINRA notes that the commenters did not provide specific data or other support for their contention that the delivery requirements would be unworkable for recruiting firms.

One commenter suggested that FINRA include additional language in the proposed rule that a former customer may transfer absent individualized contact and provided examples of transfers absent individualized contact.[27] FINRA notes that proposed Rule 2273(a) and (b)(2) address the application of the proposed rule to transfers occurring absent individualized contact. Among other things, FINRA would consider a former customer's decision to transfer assets to the recruiting firm in response to a general advertisement or after learning of the representative's transfer from another former customer as examples of transfers to the recruiting firm absent individualized contact.

Timing of Delivery of the Educational Communication

FINRA also received comments regarding the timing of delivery of the educational communication. Some commenters supported requiring the delivery of the educational communication prior to the time that a former customer decides to transfer assets to the recruiting firm to ensure that the former customer has sufficient time to consider and respond to the information in the communication.[28]

However, several commenters suggested that the requirement to deliver the educational communication should be integrated into an existing process, such as including the communication with the account transfer approval documentation, so as to make implementation of the requirement more cost effective and efficient for members.[29] One commenter suggested that the requirement to deliver the educational communication should be integrated into verification letters to customers sent in compliance with Rule 17a–3 under the Exchange Act,[30] while another commenter recommended disclosing any recruitment-related compensation received by the representative in writing to the former customer at the time of the first individualized contact with the former customer.[31]

The proposed rule change retains the requirement that a member deliver the educational communication at the time of first individualized contact with a former customer by the member, directly or through the representative, regarding the former customer transferring assets to the member. FINRA believes requiring delivery of the communication at the time of first individualized contact is more effective than requiring delivery of the communication at or prior to account opening because customers typically have already made the decision to transfer assets by that point in the process. FINRA believes the same problem exists with respect to a verification letter sent in compliance with Rule 17a–3 under the Exchange Act. FINRA does not believe that it is particularly burdensome to require members to include as part of a written communication to former customers a non-customized, FINRA-created educational communication that includes key information for the customer to consider in making a decision to transfer assets to a new firm. In addition, FINRA believes that to be effective, the proposed educational communication should be accessible to the former customer at or shortly after the time the first individualized contact is made by the recruiting firm or the representative.

Finally, for the reasons discussed in more detail above, the proposed rule change no longer mandates specific disclosure of financial incentives received by the representative. As such, the suggestion to require that representatives disclose any recruitment-related compensation received by the representative in writing at the time of the first individualized contact with the former customer is inconsistent with the approach in the proposed rule change to identify important considerations for former customers and prompt further inquiry to the extent any of those considerations are of concern or interest to the customer. Moreover, the suggestion would reintroduce the privacy and operational challenges raised by many commenters to the Rule 2243 Proposal. Accordingly, FINRA declines to include the suggested requirement.

Requirement To Provide Educational Communication Following Oral Contact

Under the proposed rule change (as reflected in the *Notice* 15–19 Proposal), if the first individualized contact with the former customer is oral, the member or representative would have to notify the former customer orally that an educational communication that includes important considerations in deciding whether to transfer assets to the member will be provided not later than three business days after the contact.

Some commenters to the *Notice* 15–19 Proposal proposed changing the delivery requirement to provide the communication not later than three business days after such oral contact to a longer time period (*e.g.,* delivering the communication not later than 3, 7, or 10 business days after such contact).[32] The commenters stated that a three business day period for providing the educational communication would be insufficient and would lead to operational and supervisory challenges for members in complying with the requirement. On the other hand, one commenter stated that providing the educational communication within three business days was too late as many customers will make a determination to transfer assets prior to receiving the communication.[33]

The proposed rule change retains the three business day period proposed in the *Notice* 15–19 Proposal. The commenters who objected to the requirement to provide the communication not later than three business days after individualized contact generally supported instead integrating the delivery of the educational communication with an existing process (*e.g.,* the account transfer approval documentation). As discussed above, FINRA believes requiring delivery of the communication at first individualized contact is more effective than delivering the communication at or prior to account opening because customers typically have already made the decision to transfer assets by that point in the process. FINRA believes that the three business day period gives a representative sufficient time to inform

[27] *See* CAI.

[28] *See* Schwab and PIABA.

[29] *See* SIFMA, FSR, FSI, CAI, Commonwealth, Lincoln, LPL, Ameriprise, Wells Fargo, Janney, and HD Vest.

[30] *See* Leaders Group.

[31] *See* Edward Jones.

[32] *See* SIFMA, FSR, CAI, Cambridge, Leaders Group, Lincoln, LPL, RJA, RJFS, Ameriprise, and HD Vest.

[33] *See* Edward Jones.

the recruiting firm of the former customers who have been contacted and, in turn, for the recruiting firm to send the educational communication to those former customers. FINRA understands that firms frequently send account opening documentation within that time frame to customers that have indicated an interest in opening an account.

One commenter stated that FINRA should clarify that the three business day period is for transmission of the educational communication by the member and not for receipt of the communication by the customer.[34] Proposed Rule 2273(b)(1)(B) expressly provides that the educational communication must be ''sent'' within three business days from oral contact or with any other documentation sent to the former customer related to transferring assets to the member, whichever is earlier.

Duration of Delivery Requirement

The *Notice* 15–19 Proposal would have required the recruiting firm to provide the educational communication to former customers for a period of six months following the date the representative begins employment or associates with the member. The proposal requested comment on whether a different time period should apply.

Some commenters supported shortening the length of the applicable period as communications between a representative and former customers typically occur quickly following the representative's transfer to the recruiting firm. For example, one commenter indicated that six months was too long of a period but did not offer an alternative period.[35] Another commenter proposed shortening the period to 60 days.[36] Another group of commenters proposed shortening the period to 90 days.[37] Other commenters supported extending the time period beyond six months. Two commenters supported extending the period to one year.[38] One commenter supported extending the period beyond six months but did not propose an end date.[39]

Based on feedback from the industry, FINRA believes that the representatives who individually contact former customers to transfer assets typically do so soon after being hired or associating with the recruiting firm. In addition, FINRA recognizes that tracking contacts with former customers may be more difficult as time passes from the date of the representative's hire or association. In recognition of these factors, the proposed rule change provides that the delivery of the educational communication shall apply for three months following the date the representative begins employment or associates with the member. FINRA believes a three-month period will effectively achieve the regulatory objective while lessening the operational and supervisory burdens on firms.

Requirement To Deliver Educational Communication in Certain Contexts

Commenters requested that FINRA clarify the application of the *Notice* 15–19 Proposal to or provide an exemption for circumstances in which the representative is not individually recruited to transfer to a new firm (*e.g.,* when the representative transfers firms as a result of a merger or acquisition).[40] For example, one commenter suggested that members should not be required to deliver the educational communication to former customers with application-way accounts held directly with a product sponsor where the only change is a substitution of the member associated with the account.[41] Similarly, one commenter suggested that the requirement to deliver the communication when there is only a change of broker-dealer of record and no costs to the former customer may cause customer confusion.[42] One commenter supported the inclusion of a statement in the text of the proposed educational communication that in certain instances the decision to transfer firms was made by the representative's employer and not by the representative.[43]

FINRA recognizes that a representative may transfer to a new firm in circumstances where the decision may not be completely volitional (*e.g.,* as a result of a merger or acquisition or due to a firm going out of business). In such cases, depending on the facts and circumstances, the accounts of the representative's customers may be transferred to the new firm via bulk transfer, and, in some cases, customers may receive only a negative response letter regarding the transfer of their accounts to a new firm.[44] While a customer may object to the transfer of his or her account to a new firm via bulk transfer, the customer may be unable to maintain the assets in the account at his or her current firm in their current form or the current firm may not be willing to service the account as it has done so in the past. As such, the considerations set forth in the educational communication do not have the same application in the context of a bulk transfer as they do when a customer has a viable choice between staying at his or her current firm with the same level of products and services or transferring assets to the recruiting firm, with the attendant impacts.

Similarly, a change of broker-dealer of record for a customer's account in the application-way business context typically does not present the same considerations for customers related to costs, portability, and differences in products, services and fees between the firms as in circumstances where a representative individually contacts a former customer to transfer assets to a new firm.

In short, these circumstances do not present the investor protection dimensions that the *Notice* 15–19 Proposal was intended to address. In recognition of the different considerations faced by customers whose accounts may be transferred via bulk transfer or as a result of a change of broker-dealer of record, FINRA proposes to interpret the proposed rule change as not applying to circumstances where a customer's account is proposed to be transferred to a new firm via bulk transfer or due to a change of broker-dealer of record. FINRA will read with interest comments regarding whether the educational communication should apply in such circumstances and the impact of any exclusion from the rule for these circumstances.

Supervisory and Operational Issues

One commenter suggested that FINRA state in the proposed rule or supplementary material to the proposed rule that appropriate supervisory procedures to implement the educational delivery requirement would be deemed to exist if a member were to mandate training, spot checks, and certifications.[45] This suggestion is apparently based on a statement in the *Notice* 15–19 Proposal that, in supervising the educational communication requirement, FINRA believes that firms can implement a system reasonably designed to achieve compliance with the *Notice* 15–19 Proposal by using training, spot checks, certifications, or other measures.

[34] *See* CAI.

[35] *See* Cambridge.

[36] *See* HD Vest.

[37] *See* SIFMA, Commonwealth, RJA, RJFS, Wells Fargo, and Janney.

[38] *See* Schwab and PIABA.

[39] *See* Burns.

[40] *See* SIFMA and FSI.

[41] *See* HD Vest.

[42] *See* Leaders Group.

[43] *See* LPL.

[44] *See, e.g., Regulatory Notice* 02–57 (Sept. 2002) and *Regulatory Notice* 15–22 (June 2015).

[45] *See* CAI.

Training, spot checks, and certifications were used as examples of approaches that might be included in a supervisory system reasonably designed to achieve compliance with the proposed rule. However, because firms vary in size, scope of business and client base, FINRA declines to suggest a one-size-fits-all supervisory system to achieve compliance with the educational communication requirement.

One commenter supported revising the *Notice* 15–19 Proposal to expressly include supervisory procedures for members to adopt to implement the requirement.[46] FINRA notes that FINRA Rule 3110 already requires that members have in place supervisory procedures reasonably designed to achieve compliance with FINRA rules. As such, FINRA is not including a specific requirement within the proposed rule change requiring members to adopt specific supervisory procedures.

Some commenters stated that, even if effective supervisory procedures existed for the educational communication requirement, the training, implementation, and maintenance of supervisory controls related to the *Notice* 15–19 Proposal would present considerable costs to firms.[47] Commenters also stated that, in order to demonstrate compliance with the *Notice* 15–19 Proposal, members would need to keep records related to former customers who have been contacted by the member or representative but who have not yet opened an account with the recruiting firm and that such a recordkeeping system would result in costs to the recruiting firm.[48]

FINRA does not believe that the training, implementation, and maintenance of supervisory controls related to the proposed rule change (as reflected in the *Notice* 15–19 Proposal) impose an unreasonable burden on members. Members already are obligated to supervise representatives' communications with customers and have flexibility to design their supervisory systems. FINRA does not believe that requiring a member to maintain a record of former customers contacted by the member, directly or through the representative, and to deliver the required educational communication would appreciably increase the existing burden on firms. As noted above, commenters did not provide specific data or other support for their contention that establishing supervisory controls related to the *Notice* 15–19 Proposal would present considerable costs to firms.

FINRA believes that the investor protection benefits of providing the important information contained in the educational communication to former customers to inform their decision whether to transfer assets to their representative's new firm are reasonably aligned with any costs that may arise under the proposed rule change.

Customer Affirmation

The *Notice* 15–19 Proposal requested comment on whether the proposed rule should include a requirement that a customer affirm receipt of the educational communication at or before account opening at the recruiting firm. Some commenters did not support requiring customer affirmation of the receipt of the educational communication.[49] Other commenters supported requiring customer affirmation of the receipt of the educational communication.[50]

While some firms may elect to include a customer affirmation requirement as part of their supervisory controls in implementing the proposed rule change, the proposed rule change does not incorporate a customer affirmation requirement. FINRA believes that the requirements to provide the educational communication at the time of first individualized contact with a former customer, to follow up in writing if such contact is oral, and to deliver the disclosures with the account transfer approval documentation when no individual contact is made, will ensure that former customers receive and have an opportunity to review the information in the proposed educational communication before they decide to transfer assets to a recruiting firm. Furthermore, FINRA wishes to avoid adding an additional requirement to the proposed rule that may impede the timely transfer of customer assets between members.

At this time, FINRA does not believe that a customer affirmation is necessary to accomplish the goals of the proposed rule change. FINRA will assess the effectiveness of the educational communication requirement without a customer affirmation requirement following implementation of the proposed rule. If FINRA finds that the proposed educational communication alone is not attracting the attention of customers to influence their decision-making process, then it will reconsider a customer affirmation requirement.

Focus of the Educational Communication

Some commenters indicated that the proposed educational communication is too focused on conflicts of interest that may be created by the financial incentives received by a representative for transferring firms.[51] Some commenters stated that the proposed educational communication puts transferring representatives at a disadvantage and may interject a false sense of distrust between former customers and transferring representatives.[52] One commenter stated that the educational communication runs the risk of creating unnecessary customer confusion or alarm, as former customers may believe that it is their responsibility to police costs and suitability.[53]

FINRA recognizes the business rationales for offering financial incentives and transition assistance to recruit experienced representatives and seeks neither to encourage nor discourage the practice with the proposed rule change. The proposed rule change is intended to highlight a broad range of potential implications of transferring assets to the recruiting firm, and customers can engage in further conversations with the recruiting firm or their representative in areas of personal concern or interest. While the proposed educational communication notes that a former customer may wish to consider whether financial incentives received by the representative may create a conflict of interest, it is not particularly focused on that consideration. The educational communication also notes that the former customer may wish to consider whether: (1) Assets may not be directly transferrable to the recruiting firm and as a result the customer may incur costs to liquidate and move those assets or account maintenance fees to leave them with his or her current firm; (2) potential costs related to transferring assets to the recruiting firm, including differences in the pricing structure and fees imposed between the customer's current firm and the recruiting firm; and (3) differences in products and services between the customer's current firm and the recruiting firm. The educational communication is intended to prompt a former customer to make further inquiries of the transferring representative (and, if necessary, the customer's current firm). Furthermore, to the extent that the former customer is unsure about whether the information

[46] *See* PIABA.

[47] *See* RJA, RJFS, and HD Vest.

[48] *See* Cambridge and HD Vest.

[49] *Id.*

[50] *See* PIABA, NAIFA, and Burns.

[51] *See* RJA, RJFS and NAIFA.

[52] *See* Cambridge, Steiner & Libo, CLM Ventura, Lax & Neville and Janney.

[53] *See* Cambridge.

in the educational communication is applicable to his or her account, FINRA believes that it is reasonable to expect the representative and the customer's current firm to discuss the information and the customer's assets and account with the customer.

One commenter stated that before imposing the educational communication requirement, FINRA should establish that a real or potential conflict of interest exists in every transaction and that there is evidence of systemic problems with the account transfer process or the current disclosure regime to justify the costs associated with the proposed rule change.[54] FINRA disagrees with the commenter's premise. FINRA has identified an important investor protection objective (*i.e.,* that former customers should be made aware of material information to make an informed decision about transferring assets where there may be conflict, cost, and product and service implications). Furthermore, as discussed above, FINRA tested the educational communication with a diverse group of retail investors, who indicated that the educational communication effectively conveyed important and useful information. There is no basis to require that FINRA establish that a real or potential conflict of interest exists in ''every'' transaction or that there are systemic problems with the account transfer process or the current disclosure regime in order to promulgate an informed decision rule or any other type of rule.

This commenter also stated that the discussions of investor testing of, and the economic impact assessment for, the proposed educational communication in the *Notice* 15–19 Proposal were insufficient as they failed to address: (1) Whether any of the information in the communication is material to a former customer's decision to transfer assets to the recruiting firm; (2) how the Protocol [55] may or may not address the issues that the *Notice* 15–19 Proposal is trying to address; and (3) how existing FINRA rules protect former customers from harm.[56]

As discussed above, FINRA tested the educational communication with a diverse group of retail investors, who indicated that the educational communication effectively conveyed important and useful information. Investors also indicated that the communication identified issues to consider that they had previously been unaware of and that would be meaningful in making a decision whether to transfer assets to the representative's new firm. FINRA believes that potential conflicts of interest, portability, costs, including differences in the pricing structure and fees and tax implications due to liquidation of assets, and differences in products and services are material to many former customers' decision whether to transfer assets.[57] FINRA also believes that the educational communication may encourage customers to explore the potential cost of transferring assets, including the fees charged by the prior firm. However, if these considerations are not material to a customer's decision whether to transfer assets to the recruiting firm, the customer may disregard them.

FINRA also notes that the Protocol governs the employment transitions of representatives of signatory firms—such as what information is categorized as confidential and is restricted from being moved from one firm to the other—and does not address the issues that are highlighted in the proposed communication (*e.g.,* the Protocol would not require a representative to discuss differences in products and services between firms with a customer who is considering transferring firms). As such, FINRA believes that the Protocol's focus on employment transitions is easily distinguishable from the intention of the proposed educational communication in educating former customers.

With respect to how existing FINRA rules protect former customers from harm, there is no current rule that requires representatives to inform former customers in a timely manner of the potential implications of transferring assets, so as to allow them to make an informed decision that may have cost and service implications, among others. FINRA believes that the proposed rule change is easily distinguishable from and serves a different purpose than other currently existing FINRA rules.

Length of and Terms in the Educational Communication

Some commenters suggested that the proposed educational communication should be streamlined to reduce its length.[58] FINRA believes that the proposed educational communication strikes an appropriate balance between brevity and providing clear and useful information to former customers.

Some commenters supported replacing the term ''broker'' in the educational communication with a different, more ''modern'' term (*e.g.,* registered representative, registered person, financial advisor, or advisor).[59] FINRA believes ''broker'' is a commonly understood generic term for a registered representative. It is used in the proposed educational communication for readability and brevity purposes, which FINRA believes is important to encourage customers to read the document. FINRA notes that the NYSE Communication also uses the term ''broker.''

Application to the Former Customer's Current Firm

The proposed rule change (as reflected in the *Notice* 15–19 Proposal) would impose the requirement to deliver the educational communication on the recruiting firm only. One commenter to the *Notice* 15–19 Proposal supported requiring a former customer's current firm to deliver the communication, if the current firm attempts to induce the former customer to stay at his or her current firm.[60] This commenter also supported revising the substance of the proposed educational communication to include questions that a former customer might consider if the current firm is soliciting the former customer to stay at the current firm.[61] Similarly, some commenters suggested revising the substance of the proposed educational communication to address incentives that the current firm may offer the customer to stay with the current firm [62] or incentives that employees of the current firm may receive to retain the customer.[63]

With the proposed rule change, FINRA is focused on providing customers impactful information to consider when deciding whether to transfer assets to a representative's new firm, where cost and portability issues are most likely to arise and where certain potential conflicts (*e.g.,* financial incentives to attract new assets) are more pronounced. The proposed educational communication is intended to prompt the customer to ask questions of his or her representative and, if necessary, current firm. While the proposed rule change would not require the current firm to provide the

[54] *See* Lax & Neville.

[55] *See supra* note 5.

[56] *Id.*

[57] FINRA notes that the New York Stock Exchange has published a similar educational communication entitled ''If Your Broker Changes Firms, What Do You Do?'' (''NYSE Communication'') that also highlights these considerations for investors who are considering transferring assets to a representative's new firm.

[58] *See* Leaders Group and NAIFA.

[59] *See* SIFMA, Ameriprise, and Janney.

[60] *See* Lincoln.

[61] *Id.*

[62] *See* CLM Ventura, Lax & Neville and Janney.

[63] *See* PIABA.

educational communication to a customer, the proposed educational communication does note that ''some firms pay financial incentives to retain brokers or customers.'' Furthermore, FINRA notes that requiring the current firm to also provide the educational communication to a customer whose representative has transferred to a new firm would result in the customer receiving multiple copies of the same communication.

Contractual and Legal Considerations

One commenter suggested adding supplementary material to the *Notice* 15–19 Proposal clarifying that the proposed rule would not excuse compliance with applicable privacy, trade secret, or contractual obligations. Some commenters indicated that delivery of the proposed educational communication could be seen as evidence that a representative solicited former customers in violation of contractual restrictions and, as a result, be used as evidence in litigation.[64] Other commenters recommended that FINRA clarify that the proposed rule would govern only the educational communication requirement and should not be used as evidence for any other purpose, including that a former customer was improperly solicited.[65] One commenter suggested that FINRA state that the proposed rule would not affect the ability of firms to use employment agreements to prevent representatives from taking customer information.[66]

One commenter suggested that FINRA confirm that the proposed rule does not require or create a presumption in favor of a member sharing a former customer's information with a transferring representative or the recruiting firm.[67] One commenter stated that FINRA should clarify: (1) How members are supposed to comply with Regulation S–P; and (2) that the proposed rule change would supersede any private contractual restriction on representatives taking customer information.[68] Another commenter supported a code of conduct requirement for member responses to customer inquiries prompted by the educational communication to avoid confusion or litigation.[69]

FINRA does not agree that the proposed rule change would encourage violations of federal or state privacy regulations because it does not require the disclosure of any information related to non-public customer personal information. With respect to commenters' concerns regarding non-compete agreements and the prohibitions in Regulation S–P, FINRA notes that the proposed rule change is not intended to impact any contractual agreement between a representative and his or her former firm or new firm and does not require members to disclose information in a manner inconsistent with Regulation S–P.[70] The proposed rule change assumes that recruiting firms and representatives will act in accordance with the contractual obligations established in employment contracts, state law, and, if applicable, the Protocol.[71] For example, FINRA does not intend for the provision of the educational communication to have any relevance to a determination of whether a representative impermissibly solicited a former customer in breach of a contractual obligation.

Some commenters indicated that, due to privacy agreements or Regulation S–P, representatives may not have information available to answer customer inquiries prompted by the educational communication.[72] One commenter indicated that FINRA should provide guidance that it is permissible for a representative to inform a former customer that specific information may not be available to answer the former customer's question unless the former customer provides his or her account information to the representative.[73] To the extent that a representative or member does not have access to information so as to be able to answer a customer's inquiry, FINRA believes that it is reasonable to expect the representative or member to explain the situation to the customer and detail any information that is needed in order to answer the inquiry. FINRA believes that such a conversation may occur in different contexts outside the scope of the proposed rule change (*e.g.,* when a customer asks his or her representative a question regarding a retirement account or college savings account held outside the representative's firm) and that representatives and members have experience in dealing with these types of conversations.

One commenter stated that the discussions of investor testing of, and the economic impact assessment for, the proposed educational communication in the *Notice* 15–19 Proposal were insufficient as they failed to address costs that may be associated with potential increased litigation related to delivery of the educational communication being seen as impermissible solicitation of former customers or some other contractual or legal violation.[74] As noted above, FINRA does not believe the proposed rule change would, and does not intend the proposed rule change to: (1) Impact any contractual agreement between a representative and his or her former firm or new firm; or (2) require members to disclose information in a manner inconsistent with Regulation S–P. As noted above, to the extent that a firm brings a legal challenge against a representative or his or her new firm, FINRA does not intend for the delivery of the educational communication pursuant to the proposed rule change to have any relevance to determine whether or not a representative or the new firm has engaged in improper solicitation of former customers or has committed some other contractual or legal violation. Further, the information contained in the educational communication is generic, making no reference to any firm or registered representative, and comparable to other public information that may be shared, such as a news article. As such, FINRA believes that the educational communication provides no unique information intended to encourage or discourage transfer of assets.

Exemptions

Some commenters to the *Notice* 15–19 Proposal proposed creating a *de minimis* exemption from the requirement to deliver the educational communication if the representative has received or will receive less than $100,000 of either aggregate upfront payments or aggregate potential future payments in connection with transferring to the recruiting firm.[75] One commenter proposed creating a *de minimis* exemption for members: (1) With 150 or fewer representatives; (2) with no proprietary products in customer accounts; and (3) offering $50,000 or less to representatives in

[64] *See* Cambridge and LPL.

[65] *See* SIFMA and HD Vest.

[66] *See* Schwab.

[67] *See* Edward Jones.

[68] *See* HD Vest.

[69] *See* Lax & Neville.

[70] *See* 17 CFR 248.15(a)(7)(i).

[71] As noted above, the Protocol permits representatives of firms that have signed the Protocol to take client names, addresses, phone numbers, email addresses, and account title information when they change firms, provided they leave a copy of this information, including account numbers, with their branch manager when they resign. *See supra* note 5.

[72] *See* RJA, RJFS, and HD Vest.

[73] *See* Burns.

[74] *See* Lax & Neville.

[75] *See* SIFMA, Schwab, and HD Vest.

connection with transferring to the member.[76]

The proposed rule change does not include a *de minimis* exemption. Unlike the Rule 2243 Proposal, the proposed rule change would not require the calculation and disclosure of ranges of recruitment-related compensation that have been or will be received by a transferring representative. Rather, the proposed educational communication would highlight issues beyond potential conflicts of interest that may be created by the receipt of financial incentives, including issues related to portability, costs, including differences in the pricing structure and fees and tax implications due to liquidation of assets, and differences in products and services. As such, an exemption based on the amount of financial incentives paid to the representative would deprive former customers of the other important considerations. Given its scope and requirements, FINRA does not believe that a *de minimis* exemption is appropriate for the proposed rule change.

Furthermore, a *de minimis* exemption would reintroduce the requirement that a recruiting firm calculate the representative's current and future recruitment-related compensation in order to determine whether the *de minimis* exemption would be available. Commenters to the Rule 2243 Proposal cited several operational challenges to the requirement to calculate recruitment-related compensation.

One commenter proposed creating an exemption from the requirement to deliver the educational communication if none of the issues identified in the communication are applicable to the representative's association with the recruiting firm.[77] FINRA believes that such an exemption would present implementation challenges for members as recruiting firms and representatives may be unable to determine that none of the issues identified in the communication are applicable to the transferring representative or former customer prior to delivering the educational communication to the former customer. Fundamentally, FINRA does not believe circumstances are likely to exist where none of the considerations identified in the educational communication are applicable to the representative's association with the recruiting firm. Accordingly, except as discussed above with respect to bulk transfers and changes in the broker-dealer of record in the application-way business context, FINRA does not intend to create an exception from the requirement to deliver the educational communication.

One commenter suggested creating an exemption from the requirement to deliver the educational communication for independent contractor model firms where, as stated by the commenter, the customers are not viewed as being ''own[ed]'' by the firm.[78] FINRA believes that the potential implications of transferring assets to a recruiting firm highlighted in the communication are equally relevant to customers whose representatives are associated with independent contractor model firms. Accordingly, FINRA declines to create an exemption from the requirement to deliver the educational communication for independent contractor model firms.

Impact on Larger Firms

Two commenters stated that the *Notice* 15–19 Proposal would have a disparate impact on larger firms that are more likely to attract representatives with a significant number of customers.[79] FINRA notes that while larger firms may be more likely have representatives with a significant number of customers, larger firms also typically have greater resources as a result of a large client base. Due to these greater resources, FINRA believes that the proposed rule change does not create an unfair burden for large firms.

Application to Former Customers

The *Notice* 15–19 Proposal requested comment on whether the proposal should apply beyond former customers to all customers recruited by the transferring representative during the six months after transfer. Some commenters did not support expanding the proposed rule to apply beyond former customers as defined in the proposal.[80] One commenter supported expanding the requirement to apply to all customers of a representative, not just former customers.[81] Another commenter supported expanding the requirement to apply beyond former customers, if the educational communication delivery requirement was integrated into the account transfer documentation process.[82]

The proposed rule change would apply to customers that meet the definition of a ''former customer'' under the proposed rule. This would include any customer that had a securities account assigned to a representative at the representative's previous firm and would not include a customer account that meets the definition of an institutional account pursuant to FINRA Rule 4512(c) other than accounts held by any natural person. FINRA believes that former customers that a member or representative individually contacts to transfer assets to a new firm are most impacted in recruitment situations because they have already developed a relationship with the representative and because their assets may be both the basis for the representative's recruitment compensation and subject to potential costs and changes if the customer decides to move those assets to the recruiting firm. FINRA did not extend the application of the proposed rule to non-natural person institutional accounts because it believes that such accounts are more sophisticated in their dealings with representatives and that the proposed educational communication would not have as significant an impact on their decision whether to transfer assets to a new firm.

FINRA-Created Educational Communication

One commenter supported the use of a FINRA-created educational communication in lieu of a member-created communication.[83] Other commenters supported permitting members to alter the educational communication to more closely correspond with each member's specific situation.[84] One commenter supported permitting the educational communication to be integrated into a member's individualized account transfer process provided that the timing requirements of the proposed rule are satisfied and that the content is substantially similar to the content in the FINRA-created communication.[85]

To facilitate members providing the educational communication at a relatively low cost and without significant administrative burden, FINRA has developed an educational communication for members to use to satisfy the requirements of the proposed rule change. To ensure that former customers receive uniform information and to ease implementation of the proposed rule change, FINRA does not propose to permit members to revise the communication or integrate the communication into other documents.

Reporting to FINRA

The proposed rule change would not require a member to report to FINRA

[76] *See* Buckman.

[77] *See* CAI.

[78] *See* American Investors Co.

[79] *See* RJA and RJFS.

[80] *See* Cambridge, NAIFA, and HD Vest.

[81] *See* PIABA.

[82] *See* FSI.

[83] *See* Ameriprise.

[84] *See* SIFMA and HD Vest.

[85] *See* CAI.

significant increases in compensation paid to a representative that has former customers at the beginning of the employment or association of the representative with the member. One commenter to the *Notice* 15–19 Proposal stated that it supported FINRA removing the reporting obligation that was included in the Rule 2243 Proposal.[86] Consistent with the *Notice* 15–19 Proposal, the proposed rule change does not include a reporting obligation. However, FINRA will include potential customer harm resulting from recruitment compensation as part of its broader conflicts management review.

Treatment of Dual-Hatted Persons

One commenter to the *Notice* 15–19 Proposal suggested adding supplementary material to the proposed rule to address scenarios where a representative dually registered as an investment adviser representative and broker-dealer representative transfers to a recruiting firm (*e.g.,* that delivery of the communication may not be required if the representative served as an investment adviser representative and will be associated in the same capacity at the recruiting firm).[87]

The proposed rule change would apply to any registered person that transfers to a member and individually contacts a former customer (*i.e.,* a customer that had a securities account assigned to the registered person at the registered person's previous firm) regarding transferring assets to the firm. The proposed rule change would apply to a registered person dually registered as an investment adviser and broker-dealer who associates with a member firm in both an investment advisory and broker-dealer capacity. The proposed rule change would not apply if the registered person transferred to a non-member firm or associated with a member firm only as an investment adviser representative.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2015–057 on the subject line.

Paper Comments

- Send paper comments in triplicate to Robert W. Errett, Deputy Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2015–057. 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 FINRA. 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–FINRA–2015–057 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[88]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32816 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[86] *See* Commonwealth.

[87] *See* SIFMA.

[88] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76771; File No. SR–BX–2015–082]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding NASDAQ Last Sale Plus

December 24, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 14, 2015, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend BX Rule 7039 (BX Last Sale and NASDAQ Last Sale Plus Data Feeds) with language regarding NASDAQ Last Sale (''NLS'') Plus (''NLS Plus''), a comprehensive data feed offered by NASDAQ OMX Information LLC[3] that allows data distributors to access the three last sale products offered by each of Nasdaq, Inc.'s three U.S. equity

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASDAQ OMX Information LLC is a subsidiary of Nasdaq, Inc. (formerly, The NASDAQ OMX Group, Inc.), separate and apart from The NASDAQ Stock Market LLC. The primary purpose of NASDAQ OMX Information LLC is to combine publicly available data from the three filed last sale products of the exchange subsidiaries of Nasdaq, Inc. and from the network processors for the ease and convenience of market data users and vendors, and ultimately the investing public. In that role, the function of NASDAQ OMX Information LLC is analogous to that of other market data vendors, and it has no competitive advantage over other market data vendors; NASDAQ OMX Information LLC performs precisely the same functions as Bloomberg, Thomson Reuters, and other market data vendors.

markets.[4] Specifically, this proposal would allow NLS Plus to reflect cumulative consolidated volume (''consolidated volume'') of real-time trading activity for Tape A securities and Tape B securities. Currently, consolidated volume on NLS Plus is real-time only for Tape C securities and is 15 minute delayed for Tape A securities and Tape B securities.[5] The Exchange also proposes to remove two duplicative terms in the rule.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxbx.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[4] The Nasdaq, Inc. U.S. equity markets include the Exchange, The NASDAQ Stock Market LLC (''NASDAQ''), and NASDAQ OMX PSX (''PSX'') (together known as the ''Nasdaq, Inc. equity markets''). PSX and NASDAQ are filing companion proposals similar to this one. NASDAQ's last sale product, NASDAQ Last Sale, includes last sale information from the FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF''), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority (''FINRA''). *See* Securities Exchange Act Release No. 71350 (January 17, 2014), 79 FR 4218 (January 24, 2014) (SR–FINRA–2014–002). For proposed rule changes submitted with respect to NASDAQ Last Sale, BX Last Sale, and PSX Last Sale, *see, e.g.,* Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178, (June 20, 2008) (SR–NASDAQ–2006–060) (order approving NASDAQ Last Sale data feeds pilot); 61112 (December 4, 2009), 74 FR 65569, (December 10, 2009) (SR–BX–2009–077) (notice of filing and immediate effectiveness regarding BX Last Sale data feeds); and 62876 (September 9, 2010), 75 FR 56624, (September 16, 2010) (SR-Phlx-2010–120) (notice of filing and immediate effectiveness regarding PSX Last Sale data feeds).

[5] Tape A and Tape B securities are disseminated pursuant to the Security Industry Automation Corporation's (''SIAC'') Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS (''CTA''). Tape C securities are disseminated pursuant to the NASDAQ Unlisted Trading Privileges (''UTP'') Plan.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposal is to amend Rule 7039(b). Specifically, this proposal would allow NLS Plus to reflect consolidated volume of real-time trading activity for Tape A securities and Tape B securities. Now, consolidated volume on NLS Plus is real-time only for Tape C securities. The Exchange also proposes to remove two duplicative terms in the rule.

NLS Plus, which is reflected in Rule 7039(b),[6] allows data distributors to access last sale products offered by each of Nasdaq, Inc.'s three equity exchanges. Thus, NLS Plus includes all transactions from all of Nasdaq, Inc.'s equity markets, as well as FINRA/NASDAQ TRF data that is included in the current NLS product. In addition, NLS Plus features total cross-market volume information at the issue level, thereby providing redistribution of consolidated volume information from the securities information processors (''SIPs'') for Tape A, B, and C securities, currently real-time for Tape C securities and 15-minute delayed for Tape A and Tape B securities. Thus, NLS Plus covers all securities listed on NASDAQ and New York Stock Exchange (''NYSE'') (now under the Intercontinental Exchange (''ICE'') umbrella), as well as US ''regional'' exchanges such as NYSE MKT, NYSE Arca, and BATS (also known as BATS/Direct Edge).

NLS Plus offers data for all U.S. equities via two separate data channels: The first data channel reflects NASDAQ, BX, and PSX trades with real-time consolidated volume for NASDAQ-listed securities; and the second data channel reflects NASDAQ, BX, and PSX trades with delayed consolidated volume for NYSE, NYSE MKT, NYSE Arca and BATS-listed securities. The Exchange believes that market data distributors may use the NLS Plus data feed to feed stock tickers, portfolio trackers, trade alert programs, time and sale graphs, and other display systems. The provision of multiple options for investors to receive market data was a primary goal of the market data amendments adopted by Regulation NMS. Finally, NLS Plus provides investors with options for receiving market data that parallel products currently offered by BATS and BATS Y, EDGA, and EDGX and NYSE equity exchanges.[7]

Consolidated volume reflects the consolidated volume at the time that the NLS Plus trade message is generated, and includes the volume for the issue symbol as reported on the consolidated market data feed. The consolidated volume is based on the real-time trades reported via the UTP Trade Data Feed (''UTDF'') and delayed trades reported via CTA. NASDAQ calculates the real-time trading volume for its trading venues, and then adds the real-time trading volume for the other (non-NASDAQ) trading venues as reported via the UTDF data feed. For non-NASDAQ-listed issues, the consolidated volume is based on trades reported via SIAC's Consolidated Tape System (''CTS'') for the issue symbol. The Exchange calculates the real-time trading volume for its trading venues, and then adds the 15-minute delayed trading volume for the other (non-NASDAQ) trading venues as reported via the CTS data feed.

NLS Plus is currently codified in BX Rule 7039(b) as follows:

(b) NASDAQ Last Sale Plus (''NLS Plus''). NLS Plus is a comprehensive data feed produced by NASDAQ OMX Information LLC. It provides last sale data as well as consolidated volume of NASDAQ U.S. equity markets (BX, The NASDAQ Stock Market (''NASDAQ''), and NASDAQ OMX PSX (''PSX'')) and the NASDAQ/FINRA Trade Reporting Facility (''TRF''). NLS Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities and 15-minute delayed information for Tape A and B securities. NLS Plus also contains: Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Reg SHO Short Sale Price Test Restricted Indicator, Trading Action, Symbol Directory, Adjusted Closing Price, and End of Day Trade Summary are

[6] *See* Securities Exchange Act Release Nos. 75709 (August 14, 2015), 80 FR 50671 (August 20, 2015) (SR–BX–2015–047) (notice of filing and immediate effectiveness regarding NLS Plus on BX); and 75830 (September 3, 2015), 80 FR 54640 (September 10, 2015) (SR–BX–2015–054) (notice of filing and immediate effectiveness regarding fees for NLS Plus on BX).

Other exchanges have data feeds that are similar to NLS Plus. *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25) (order approving market data product called BATS One Feed being offered by four affiliated exchanges); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29) (notice of filing and immediate effectiveness to include consolidated volume in BATS One). *See also* Securities Exchange Act Release No. 73553 (November 6, 2014), 79 FR 67491 (November 13, 2014) (SR–NYSE–2014–40) (order granting approval to establish the NYSE Best Quote & Trades (''BQT'') Data Feed).

[7] *Id.*

included. NLS Plus may be received by itself or in combination with NASDAQ Basic.

This proposal essentially reflects one change to NLS Plus as it currently exists. Whereas now consolidated volume on NLS Plus is real-time only for Tape C securities and is 15 minute delayed for Tape A and Tape B securities, this proposal would allow NLS Plus to reflect consolidated volume of real-time trading activity as reported to all of the Tapes. As proposed to be amended, BX Rule 7039(b) would state:

(b) NASDAQ Last Sale Plus (''NLS Plus''). NLS Plus is a comprehensive data feed produced by NASDAQ OMX Information LLC. It provides last sale data as well as consolidated volume of NASDAQ U.S. equity markets (BX, The NASDAQ Stock Market (''NASDAQ''), and NASDAQ OMX PSX (''PSX'')) and the NASDAQ/FINRA Trade Reporting Facility (''TRF''). NLS Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities. NLS Plus also contains: Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Reg SHO Short Sale Price Test Restricted Indicator, Trading Action, and Symbol Directory are included. NLS Plus may be received by itself or in combination with NASDAQ Basic. Additionally, NLS Plus reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape A securities and Tape B securities.

Thus, with this proposal consolidated volume would reflect real-time trading for all Tape A, Tape B, and Tape C securities. Market participants have requested that the Exchange provide NLS Plus consolidated volume that in fact reflects real-time trading for all Tape A, Tape B, and Tape C securities. The Exchange believes that this proposal would be of great benefit to market participants, who could now get similar, real-time data across all U.S. markets that are reported to Tapes A, B, and C. The Exchange believes that its proposal allowing real-time volume on the NLS Plus feed is similar to the BATS One feed, which transmits real-time data.[8]

The Exchange proposes one housekeeping change. This is a technical change to remove two terms that are indicated twice in Rule 7039(b): ''Adjusted Closing Price'' and ''End of Day Trade Summary''.

With respect to latency, as discussed in previous NLS Plus filings,[9] the path for distribution of NLS Plus is not faster than the path for distribution that would be used by a market data vendor to distribute an independently created NLS Plus-like product. As such, the NLS Plus data feed is a data product that a competing market data vendor could create and sell without being in a disadvantaged position relative to the Exchange. In recognition that the Exchange is the source of its own market data and with NASDAQ and PSX being equity markets owned by Nasdaq, Inc., the Exchange represents that the source of the market data it would use to create proposed NLS Plus is available to other vendors. In fact, the overwhelming majority of the data elements and messages in NLS Plus are exactly the same as, and in fact are sourced from, NLS, BX Last Sale, and PSX Last Sale, each of which is available to other market data vendors. The Exchange, NASDAQ, and PSX will continue to make available these individual underlying data elements, and thus, the source of the market data that would be used to create the proposed NLS Plus is the same as what is available to other market data vendors.[10]

The Exchange believes that its proposal would greatly benefit the public and investors, and is consistent with the Act.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[11] in general, and with Section 6(b)(5) of the Act,[12] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The purpose of the proposed rule change is to add language to section (b) of Rule 7039 regarding real-time data across all U.S. markets that are reported to Tapes A, B, and C and are offered on NLS Plus; and to remove two duplicative terms from the rule. The Exchange believes that the proposal facilitates transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by making available additional means by which investors may access real-time volume information about securities transactions, thereby providing investors with additional options for accessing information that may help to inform their trading decisions.

The Exchange notes that the Commission has recently approved a data product on several exchanges that is similar to NLS Plus and is real-time, and specifically determined that the approved data product was consistent with the Act.[13] NLS Plus simply provides market participants with an additional option for receiving real-time market data that has already been the subject of a proposed rule change and that is available from myriad market data vendors.

In adopting Regulation NMS, the Commission granted SROs and broker-

[8] *See* 73918 at 78921: ''[T]he BATS One Feed . . . disseminates, on a real-time basis, the aggregate best bid and offer . . . of all displayed orders for securities traded on the Exchanges and for which the Exchanges report quotes under the Consolidated Tape Association . . . Plan or the Nasdaq/UTP Plan.'' *See* also *http://cdn.batstrading.com/resources/release_notes/2015/SIP-Volume-in-BATS-One.pdf*: ''The BATS One Feed provides affordable, comprehensive and accurate real-time quote and trade data at a fraction of the cost of competitive products. Retail brokers, investment banks, media outlets and other firms will have an opportunity to use the BATS One Feed to build displays that include real-time SIP Consolidated Volume reflecting the total trading volume occurring on all market centers for Tape A, B, and C listed securities [footnote excluded].''

[9] *See* Securities Exchange Act Release No. 75763 (August 26, 2015), 80 FR 52817 (September 1, 2015) (SR-Phlx-2015–72) (notice of filing and immediate effectiveness).

[10] In order to create NLS Plus, the system creating and supporting NLS Plus receives the individual data feeds from each of the Nasdaq, Inc. equity markets and, in turn, aggregates and summarizes that data to create NLS Plus and then distribute it to end users. This is the same process that a competing market data vendor would undergo should it want to create a market data product similar to NLS Plus to distribute to its end users. A competing market data vendor could receive the individual data feeds from each of the Nasdaq, Inc. equity markets at the same time the system creating and supporting NLS Plus would for it to create NLS Plus. Therefore, a competing market data vendor could, as discussed, obtain the underlying data elements from the Nasdaq, Inc. equity markets on the same latency basis as the system that would be performing the aggregation and consolidation of proposed NLS Plus, and provide a similar product to its customers with the same latency they could achieve by purchasing NLS Plus from the Exchange. As such, the Exchange would not have any unfair advantage over competing market data vendors with respect to NLS Plus. Moreover, in terms of NLS itself, the Exchange would access the underlying feed from the same point as would a market data vendor; as discussed, the Exchange would not have a speed advantage.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

[13] *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29) (notice of filing and immediate effectiveness to include consolidated volume in BATS One).

dealers (''BDs'') increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that its NLS Plus market data product is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[14]

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

Moreover, data products such as NLS Plus are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The Exchange believes that, for the reasons given, the proposal is consistent with the Act. The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[15] in general, and with Section 6(b)(5) of the Act,[16] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The purpose of the proposed rule change is to add language to section (b) of Rule 7039 regarding real-time data across all U.S. markets that are reported to Tapes A, B, and C and are offered on NLS Plus; and to remove two duplicative terms from the rule. The Exchange believes that the proposal facilitates transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by making available additional means by which investors may access real-time information about securities transactions, thereby providing investors with additional options for accessing information that may help to inform their trading decisions.

The Exchange notes that the Commission has recently approved a data product on several exchanges that is similar to NLS Plus and is real-time, and specifically determined that the approved data product was consistent with the Act.[17] NLS Plus simply provides market participants with an additional option for receiving real-time market data that has already been the subject of a proposed rule change and that is available from myriad market data vendors.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that its NLS Plus market data product is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[18]

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well. Moreover, data products such as NLS Plus are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The Exchange believes that, for the reasons given, the proposal is 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, as amended. As is true of all NASDAQ's non-core data products, NASDAQ's ability to offer NLS Plus through NASDAQ OMX Information LLC and price NLS Plus is constrained by: (1) Competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data. The Exchange believes that its proposal is pro-

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[15] 15 U.S.C. 78f.

[16] 15 U.S.C. 78f(b)(5).

[17] *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29) (notice of filing and immediate effectiveness to include consolidated volume in BATS One).

[18] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

competitive in that it will allow the Exchange to distribute consolidated volume for Tapes A, B, and C on a real-time basis, similarly to a data product on several exchanges that is similar to NLS Plus. The Exchange believes that this would be of great benefit to market participants, who could now get similar, real-time data across all U.S. markets that are reported to Tapes A, B, and C.

In addition, as discussed, NLS Plus competes directly with a myriad of similar products and potential products of market data vendors. This proposal allows offering on NLS Plus, on a real-time basis, U.S. market data that is reported to Tapes A, B, and C. NLS Plus joins the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/NASDAQ TRF data that is a component of NLS and NLS Plus, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the internet after being purchased).[19] In NASDAQ's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, NASDAQ would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,[20] and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. The Exchange pays rebates to attract orders [sic], charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity [sic]. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The competitive nature of the market for products such as NLS Plus is borne out by the performance of the market. In May 2008, the internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an ''enterprise cap'' of $100,000 for customers receiving only one of the NLS products, and $150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (*i.e.,* a reduction of $100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's product, several other major content providers, including MSN and Morningstar, use the BATS product. Moreover, further evidence of competition can be observed in the recently-developed BATS One Feed and BQT feed.[21]

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce'.'' *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010) (''*NetCoalition I*''). The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce

[19] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' *Antitrust Law Journal,* Vol. 70, No. 3 (2003).

[20] It should be noted that the costs of operating the FINRA/NASDAQ TRF borne by NASDAQ include regulatory charges paid by NASDAQ to FINRA.

[21] *See* supra note 6.

costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NLS Plus would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NLS Plus data revenues, the value of NLS Plus as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and the value of its other data products.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[22] and Rule 19b–4(f)(6) thereunder.[23]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[24] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[25] 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 NLS Plus may as soon as possible offer real-time data across all U.S. markets that are reported to Tapes A, B, and C, in a manner similar to other markets.[26] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[27]

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–BX–2015–082 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2015–082. 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–BX–2015–082 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32902 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 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.

[24] 17 CFR 240.19b–4(f)(6).

[25] 17 CFR 240.19b–4(f)(6)(iii).

[26] *See* Securities Exchange Act Release Nos. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR–BATS–2014–055; SR–BYX–2014–030; SR–EDGA–2014–25; SR–EDGX–2014–25); and 74726 (April 14, 2015), 80 FR 21776 (April 20, 2015) (SR–BATS–2015–29).

[27] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76755; File No. SR–BYX–2015–52]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Proprietary Trader and Proprietary Trader Principal Registration Categories, Securities Trader and Securities Trader Principal Registration Categories, and Establishing the Series 57 Examination

December 23, 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 22, 2015, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Act [3] 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 retire the Proprietary Trader and Proprietary Trader Principal registration categories and to establish the Securities Trader and Securities Trader Principal registration categories. The Exchange is also amending its rules to establish the Series 57 examination as the appropriate qualification examination for Securities Traders and deleting the rule referring to the S501 continuing education program currently applicable to Proprietary Traders. The Exchange will announce the effective date of the proposed rule change in a circular distributed to Members.

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 herein to replace the Series 56 with the Series 57 examination and to make various related changes to its registration rules. Specifically, in response to the FINRA Amendments (defined below), the Exchange is proposing to retire the Proprietary Trader [5] registration categories from its own registration rules relating to securities trading activity. It is also therefore retiring its Proprietary Trader Principal [6] registration category. To take the place of the retired registration categories, the Exchange is establishing new Securities Trader and Securities Trader Principal registration categories. This filing is based upon and in response to SR–FINRA–2015–017, which was recently approved by the Commission.[7]

New Securities Trader Registration Category

Currently, under Exchange Rule 11.4(e), each person associated with a member who is included within the definition of an ''Authorized Trader'' in Rule 1.5(d) is required to register with the Exchange and to pass an appropriate qualification examination before such registration may become effective. The Exchange recognizes the following qualification examinations as acceptable for purposes of registration as an Authorized Trader: Series 7, Series 56, or one of several foreign securities examination modules.

Interpretation and Policy .01(f) of Exchange Rule 2.5 currently provides that a person may register with the Exchange as a Proprietary Trader if such person engages solely in proprietary trading, passes the Series 56 examination and is an associated person of a proprietary trading firm as defined in Interpretation and Policy .01(g) of Exchange Rule 2.5. Therefore, pursuant to Interpretation and Policy .01 to Exchange Rule 2.5, an individual meeting these criteria may register in the Proprietary Trader category after passing the Series 56 examination rather than as a General Securities Representative after passing the Series 7 examination or equivalent foreign securities examination module.

In consultation with FINRA and other exchanges, and in order to harmonize the requirements for individuals engaged in trading activities, the Exchange is now proposing to retire the Proprietary Trader registration category. Similarly, the Exchange is proposing to adopt a new Securities Trader registration category.

Under Exchange Rules, as revised, each person associated with a member who is included within the definition of Authorized Trader will be required to register as a Securities Trader unless they instead qualify based on the Series 7 examination or an equivalent foreign securities examination module. Therefore, representatives who previously qualified for Proprietary Trader registration will be required to register as Securities Traders. Accordingly, the Exchange is proposing to modify paragraph (f) of Interpretation and Policy .01 to reflect the new Securities Trader qualification as a permissible registration for Authorized Traders of Members that engage solely in trading on the Exchange on either an agency or principal basis. In order to register as a Securities Trader, an applicant would be required to have passed the new Securities Trader qualification examination (Series 57) or a predecessor examination (*i.e.,* the Series 56, as described below).

A person registered as a Proprietary Trader in the Central Registration Depository (CRD®) system on the effective date of the proposed rule change will be grandfathered as a Securities Trader without having to take any additional examinations and without having to take any other actions. In addition, individuals who were registered as Proprietary Traders in the CRD system prior to the effective date of the proposed rule change will be eligible to register as Securities Traders without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a representative and the date they register as a Securities Trader.

Persons registered in the new category would be subject to the continuing education requirements of Interpretation and Policy .02(e) to Rule 2.5. The Exchange proposes to amend Interpretation and Policy .02(e) by removing the option for Series 56 registered persons to participate in the S501 Series 56 Proprietary Trader continuing education program in order to satisfy the Regulatory Element. The S501 Series 56 Proprietary Trader continuing education program is being phased out along with the Series 56 Proprietary Trader qualification examination. As a result, effective January 4, 2016, the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons will cease to exist. In place of the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons, the Exchange proposes that Series 57 registered persons be required to take the S101 General Program for Series 7 and all other registered persons.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] Rule 2.5, Interpretation and Policy .01(f).

[6] Rule 2.5, Interpretation and Policy .01(d).

[7] *See* Securities Exchange Act Release No. 75783 (August 28, 2015), 80 FR 53369 (September 3, 2015) (approving SR–FINRA–2015–017) referred to herein as the ''FINRA Amendments.'' According to the release, FINRA's expected effective date for the FINRA Amendments is January 4, 2016.

New Securities Trader Principal Registration Category

Currently, under Interpretation and Policy .01(d), the Exchange requires each Member to register ''Principals'' [8] with the Exchange. The Exchange requires the Series 24 examination to register as Principal. The Exchange will also accept the New York Stock Exchange Series 14 Compliance Official Examination in lieu of the Series 24 to satisfy the Principal examination requirement for any person designated as a Chief Compliance Officer. Further, in addition to the Series 24 or Series 14, in order to supervise the activities of General Securities Representatives a Principal generally must complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14. However, the Exchange currently permits the Series 56 as a prerequisite to the Series 24 or Series 14 for those Principals whose supervisory responsibilities are limited to overseeing the activities of proprietary traders, as described above. Like the Proprietary Trader category discussed above, the Proprietary Trader Principal registration category is being retired. Accordingly, the Exchange proposes to modify the references in the Rule regarding the prerequisite to the Series 24 or 14 for an individual that will supervise Series 57 qualified traders to correspond with the new Securities Trader exam. The Exchange proposes to establish the Securities Trader Principal category in Interpretation and Policy .01(d).

The Exchange has been working with other exchanges and FINRA to develop this new principal registration category and believes that it is an appropriate corollary to the new Securities Trader representative registration category. To qualify for registration as a Securities Trader Principal, an applicant must become qualified and registered as a Securities Trader under proposed Interpretation and Policy .01(c) and pass either the Series 24 or Series 14 examination. A person who is qualified and registered as a Securities Trader Principal would only be permitted to have supervisory responsibility over the activities of Securities Traders, unless such person were separately qualified and registered in another appropriate principal registration category, such as the General Securities Principal registration category. Conversely, the proposed rule change clarifies that each principal who will have supervisory responsibility over registered Securities Traders is required to become qualified and registered as a Securities Trader Principal.

A person registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system on the effective date of the proposed rule change will be eligible to register as a Securities Trader Principal without having to take any additional examinations. An individual who was registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system prior to the effective date of the proposed rule change will also be eligible to register as a Securities Trader Principal without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a principal and the date they register as a Securities Trader Principal. Members, however, will be required to affirmatively register persons transitioning to the proposed registration category as Securities Trader Principals on or after the effective date of the proposed rule change.

Other Changes

In order to accomplish the changes proposed above, the Exchange has proposed modifications throughout Interpretation and Policy .01 and .02 to Rule 2.5 as well as Rule 11.4(e) to eliminate references to Proprietary Trader, Proprietary Trader Principal, and Series 56 examination and to replace such references with Securities Trader, Securities Trader Principal and Series 57 examination. The Exchange also proposes to modify Rule 11.6, which sets forth the registration requirements applicable to Market Maker Authorized Traders, or MMATs, to cross-reference Interpretation and Policy .01 and .02. Although Rule 11.6 currently requires an MMAT to qualify by taking the Series 7 examination, the Exchange does not intend to impose different registration or continuing education requirements on MMATs than are required of Authorized Traders generally. In addition to these changes, the Exchange proposes to delete paragraph (h) to Interpretation .01, which currently states that: ''Principals responsible for supervising the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module in addition to the Series 24.'' The Exchange proposes to eliminate this provision as duplicative with existing language in Interpretation and Policy .01, including paragraph (d), which states that ''[i]ndividuals that supervise the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14 and shall be referred to as General Securities Principals.'' The Exchange also proposes to modify a reference in Interpretation and Policy .01(e) from ''General Securities Representative Principal'' to ''General Securities Principal.'' In addition, the Exchange proposes to eliminate the fees applicable to the Series 56 examination as well as the fees associated with the continuing education necessary to maintain registration after passing the Series 56 examination. Consistent with all other examinations recognized by the Exchange, FINRA will administer the Series 57 examination and the continuing education requirements related thereto, and the Exchange will not be separately charging and collecting any fees in order to take such examination or participate in applicable continuing education. Finally, in order to continue to align the Exchange's rules with the rules of its affiliated exchanges, the Exchange proposes to adopt descriptive headings in Interpretation and Policy .02 to Rule 2.5 based on Interpretation and Policy .02 to Rule 2.5 of the rules of EDGA Exchange, Inc. and EDGX Exchange, Inc. and to modify the language, but not the substance, of Rule 11.4(e).

2. Statutory Basis

The Exchange believes that proposed rule change is consistent with Section 6(b)(5) of the Act,[9] 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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the requirements of the Securities Trader and Securities Trader Principal registration categories, as well as the new Securities Trader qualification examination, should help ensure that proprietary traders and the principals who supervise proprietary traders and proprietary trading are, and will continue to be, properly trained and qualified to perform their functions

[8] Pursuant to Interpretation and Policy .01(d) to Rule 2.5, a Principal is ''any individual responsible for supervising the activities of a Member's Authorized Traders and each person designated as a Chief Compliance Officer on Schedule A of Form BD.''

[9] 15 U.S.C. 78f(b)(5).

which should protect investors and the public interest.

(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. Implementation of the proposed changes to the Exchange's registration rules in coordination with the FINRA Amendments does not present any competitive issues, but rather is designed to provide less burdensome and more efficient regulatory compliance for members and enhance the ability of the Exchange to fairly and efficiently regulate members, which will further enhance competition. Additionally, the proposed rule change should not affect intramarket competition because all similarly situated representatives and principals will be required to complete the same qualification examinations and maintain the same registrations.

(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 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 Act[10] and paragraph (f)(6) of Rule 19b–4 thereunder,[11] 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.

The Exchange has requested that the Commission waive the thirty-day operative delay so that the proposal may become operative as of January 4, 2016. The Exchange states that waiving the thirty-day delay would allow the Exchange to eliminate the Proprietary Trader and Proprietary Trader Principal registration categories and adopt the Securities Trader and Securities Trader Principal registration categories at the same time as FINRA and the other national securities exchanges. The Commission believes that waiving the thirty day delay is consistent with the protection of investors and the public interest, as it will enable BYX to have the new requirements in effect at the same time as the other SROs . Therefore, the Commission hereby waives the thirty-day operative delay and designates the proposal operative as of January 4, 2016.[12]

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 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–BYX–2015–52 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–BYX–2015–52. 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–BYX–2015–52 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32814 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4.

[12] For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76748; File No. SR–NYSE–2015–52]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change to the Co-Location Services Offered by the Exchange (the Offering of a Wireless Connection To Allow Users To Receive Market Data Feeds From Third Party Markets) and To Reflect Changes to the Exchange's Price List Related to These Services

December 23, 2015.

I. Introduction

On October 23, 2015, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') pursuant to Section 19(b)(1)[1] of the Securities Exchange Act

[1] 15 U.S.C. 78s(b)(1).

of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend the co-location services offered by the Exchange to include a means for co-located Users to receive market data feeds from third party markets through a wireless connection. The proposed rule change was published in the **Federal Register** on November 12, 2015.[4] No comment letters were received in response to the Notice. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to change the co-location services offered by the Exchange to include a means for Users to receive market data feeds from third party markets (the ''Third Party Data'') through a wireless connection.[5] In addition, the proposed rule change reflects changes to the Exchange's Price List related to these co-location services.

The Exchange proposes to offer the wireless connection to provide Users with an alternative means of connectivity for Third Party Data. As the Exchange notes, wireless connections involve beaming signals through the air between antennas that are within sight of one another.[6] Because the signals travel a straight, unimpeded line, and because light waves travel faster through air than through glass (fiber optics), wireless messages have lower latency than messages travelling through fiber optics.[7]

Under the proposed rule change, the Exchange would utilize a network vendor to provide a wireless connection to the Third Party Data through wireless connections from the Exchange access centers in Secaucus and Carteret, New Jersey, to its data center in Mahwah, New Jersey, through a series of towers equipped with wireless equipment.[8] A User that chooses this optional service would be able to receive data feeds from NASDAQ and BATS Exchange, Inc. over a wireless connection. To receive Third Party Data, the User would enter into a contract with the relevant third party market, which would charge the User the applicable market data fees for the Third Party Data. The Exchange would charge the User fees for the wireless connection for the Third Party Data.[9]

A User would be charged a $5,000 non-recurring initial charge for each wireless connection and a monthly recurring charge (''MRC'') that would vary depending upon the feed that the User opts to receive. If a User purchased two wireless connections, it would pay two non-recurring initial charges. The MRC for a wireless connection to each of BATS Pitch BZX Gig shaped data, DirectEdge EDGX Gig shaped data, and NASDAQ BX Totalview-ITCH data will be $6,000; the MRC for a wireless connection of NASDAQ Totalview-ITCH data will be $8,500; and the MRC for a wireless connection of NASDAQ Totalview-ITCH and BX Totalview-ITCH data will be $12,000. The Exchange proposes to waive the first month's MRC, to allow Users to test the receipt of the feed(s) for a month before incurring any MRCs.

The wireless connections would include the use of one port for connectivity to the Third Party Data. A User will only require one port to connect to the Third Party Data, irrespective of how many of the five wireless connections it orders. If a User that has more than one wireless connection wishes to use more than one port to connect to the Third Party Data,[10] the Exchange proposes to make such additional ports available for a monthly fee per port of $3,000.

The Exchange represents that there is limited bandwidth available on the wireless connection for data feeds from third parties. As a result, the Exchange has decided to offer as Third Party Data only the data feeds that are in high demand from Users. Although constrained by bandwidth with respect to the number of feeds it can carry, the Exchange represents that the wireless network offered by the Exchange can be made available to an unlimited number of Users.

The wireless connection would provide Users with an alternative means of connectivity for Third Party Data. Currently, Users can receive Third Party Data through other methods, including, for example, from another User, through a telecommunications provider, or over the internet protocol (''IP'') network.[11] In addition, Users can receive Third Party Data from wireless networks offered by third party vendors. The Exchange represents that there are currently at least four third party vendors that offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center. The Exchange states that its proposed wireless connection would traverse wireless connections through a series of towers equipped with wireless equipment, including a pole on the grounds of the data center.[12] The Exchange states that access to such pole or the roof is not required for third parties to establish wireless networks that can compete with Exchange's proposed service and, in particular, represents that based on the information available to it, the proposed wireless connection would provide data at the same or similar speed, and at the same or similar cost, as existing wireless networks, thereby enhancing competition.[13]

The wireless connection to the Third Party Data is expected to be available no later than March 1, 2016. The Exchange will announce the date that the wireless connection to the Third Party Data will be available through a customer notice.

III. Discussion 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.[14] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[15] which requires that

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[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 76374 (November 5, 2015), 80 FR 70021 (November 12, 2015) (''Notice'').

[5] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR–NYSE–2015–40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC and NYSE Arca, Inc. *See* Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR–NYSE–2013–59).

[6] *See* Notice, *supra* note 4 at 70021.

[7] *See id.*

[8] The NASDAQ Stock Market LLC (''NASDAQ'') offers a similar wireless service. *See* Securities Exchange Act Release No. 68735 (January 25, 2013), 78 FR 6842 (January 31, 2013) (SR–NASDAQ–2012–119) (approving a proposed rule change to establish a new optional wireless connectivity for co-located clients).

[9] A User would only receive the Third Party Data for which it had entered into a contract. For example, a User that contracted with NASDAQ for the NASDAQ Totalview-ITCH data feed but did not contract to receive any other Third Party Data would receive only the NASDAQ Totalview-ITCH data feed through its wireless connection.

[10] For example, a User with two wireless connections for Third Party Data may opt to purchase an additional port in order to route the options and equity data it receives to different cabinets.

[11] The IP network is a local area network available in the data center. *See* Securities Exchange Act Release No. 74222 (February 6, 2015), 80 FR 7888 (February 12, 2015) (SR–NYSE–2015–05) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

[12] *See* Notice, *supra* note 4 at 70023.

[13] *See* Notice, *supra* note 4 at 70022–23.

[14] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f(b)(4).

the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[17] which requires that the rules of the exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that the Exchange's proposal to provide this additional connectivity option is consistent with the requirement of Section 6(b)(5) of the Act. The Commission believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the Exchange makes wireless connectivity available to all Users on an equal basis. All Users that voluntarily select this service option will be charged the same amount for the same services, and there would be no differentiation among Users with regard to the fees charged for the service. Further, the Exchange represents that Users of the new wireless connection would not receive Third Party Data that is not available to all Users. In addition, the Exchange represents that Users that do not opt to utilize the Exchange's wireless connections would still be able to obtain Third Party Data through other methods, such as from wireless networks offered by third party vendors, other Users, through telecommunications providers, or over the IP network.

The Commission also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act.[18] All Users that voluntarily select this service option will be charged the same amount for the same services, and there would be no differentiation among Users with regard to the fees charged for the service. The Commission notes the Exchange's representation that the fees associated with providing the wireless connections are reasonable because the Exchange will incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for initial installation and monitoring, support and maintenance of such services. The Exchange states that the costs associated with the wireless connections are incrementally higher than fiber optics-based solutions due to the expense of the wireless equipment, cost of installation and testing and ongoing maintenance of the network, and that fees also reflect the benefit received by Users in terms of lower latency over the fiber optics option. In addition, the Exchange believes that the proposed waiver of the first month's MRC is reasonable as it would allow Users to test the receipt of the feed(s) for a month before incurring any monthly recurring fees and may act as an incentive to Users to utilize the new service.

The Commission also finds that consistent with Section 6(b)(8) of the Act the proposed rule change does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange states that Users currently can receive Third Party Data from competing wireless networks offered by third party vendors, including at least four third party vendors that offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center. The Exchange represents, based on the information available to it, that the proposed wireless connection would provide data at the same or similar speed, and at the same or similar cost, as existing wireless networks, thereby enhancing competition.[19] The Exchange also notes that the proposed wireless connection would compete not just with other wireless connections, but also with fiber optic networks, which may be more attractive to some Users as they are more reliable and less susceptible to weather conditions. For these reasons, the Commission does not believe that the proposed rule change imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule change (SR–NYSE–2015–52) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32817 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(8).

[18] 15 U.S.C. 78f(b)(4).

[19] *See supra* notes 12 and 13 and accompanying text.

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–31949]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

December 23, 2015.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of December 2015. A copy of each 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. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 19, 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: The Commission: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Hae-Sung Lee, Attorney-Adviser, at (202) 551–7345 or Chief Counsel's Office at (202) 551–6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE., Washington, DC 20549–8010.

College and University Facility Loan Trust One [File No. 811–05291]

Summary: Applicant, a closed-end investment company, seeks an order

declaring that it has ceased to be an investment company. Applicant currently has fewer than 10 beneficial owners and will continue to operate as a private investment fund in reliance on section 3(c)(1) of the Act.

Filing Dates: The application was filed on November 18, 2015, and amended on November 19, 2015 and November 20, 2015.

Applicant's Address: c/o U.S. Bank National Association, One Federal Street, Boston, MA 02110.

Ramius IDF LLC [File No. 811–22494]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of securities and does not propose to make a public offering. Applicant will continue to operate as a private investment fund in reliance on section 3(c)(7) of the Act.

Filing Dates: The application was filed on November 19, 2015, and amended on December 3, 2015.

Applicant's Address: 830 Third Avenue, 4th Floor, New York, New York 10022.

Ramius IDF Master Fund LLC [File No. 811–22493]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of securities and does not propose to make a public offering. Applicant will continue to operate as a private investment fund in reliance on section 3(c)(7) of the Act.

Filing Dates: The application was filed on November 19, 2015, and amended on December 3, 2015.

Applicant's Address: 830 Third Avenue, 4th Floor, New York, New York 10022.

GMAM Absolute Return Strategies Fund, LLC [File No. 811–21259]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant is not presently making an offering of securities and does not propose to make any offering of securities. Applicant will continue to operate as a private investment fund in reliance on section 3(c)(7) of the Act.

Filing Date: The application was filed on November 20, 2015.

Applicant's Address: 1345 Avenue of the Americas, 20th Floor, New York, NY 10105.

Outlook Funds Trust [File No. 811–22909]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 13, 2015, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $3,378 incurred in connection with the liquidation were paid by applicant's investment adviser.

Filing Date: The application was filed on November 25, 2015.

Applicant's Address: Three Canal Plaza, Suite 600, Portland, ME 04101.

Morgan Stanley Eastern Europe Fund, Inc. [File No. 811–08346]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On March 20, 2015, applicant made a liquidating distribution to its shareholders, based on net asset value. Applicant has nine uncashed distribution checks that are being held by applicant's transfer agent until these shareholders are located or until a period specified by state law. Expenses of $53,897 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on December 3, 2015.

Applicant's Address: c/o Morgan Stanley Investment Management Inc., 522 Fifth Avenue, New York, New York 10036.

ING Mayflower Trust [File No. 811–07978]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant transferred its assets to Voya Global Value Advantage Fund, and on July 13, 2013, made a final distribution to its shareholders based on net asset value. Expenses of $250,950 incurred in connection with the reorganization were paid by applicant's investment adviser.

Filing Dates: The application was filed on February 2, 2015, and amended on August 12, 2015 and December 18, 2015.

Applicant's Address: 7337 E. Doubletree Ranch Road, Suite 100, Scottsdale, AZ 85258.

Hatteras Global Private Equity Partners Institutional, LLC [File No. 811–22257]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant currently has fewer than 100 holders of its securities, and is not presently making, has never made, and does not propose to make a public offering of securities. Applicant will continue to operate as a private investment fund in reliance on section 3(c)(1) of the Act.

Filing Date: The application was filed on December 21, 2015.

Applicant's Address: 6601 Six Forks Road, Suite 340, Raleigh, North Carolina 27615.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2015–32823 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76768; File No. SR–NASDAQ–2015–155]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NOM Rules at Chapter XV, Section 2

December 24, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2015, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter XV, entitled ''Options Pricing,'' at Section 2, which governs pricing for Exchange members using the NASDAQ Options Market (''NOM''), the Exchange's facility for executing and routing standardized equity and index options.

The Exchange purposes to lower the Non-NOM Market Maker [3] Penny Pilot Options [4] Fee for Removing Liquidity

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A ''Non-NOM Market Maker'' is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM.

[4] *See* Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot);

for options overlying iShares MSCI Emerging Markets (''EEM''), SPDR Gold Shares (''GLD''), iShares Russell 2000 ETF (''IWM''), PowerShares QQQ (''QQQ''), and SPDR S&P 500 (''SPY'') from $0.55 to $0.50 per contract. While the changes proposed herein are effective upon filing, the Exchange has designated the amendments [sic] become operative on January 4, 2016.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to lower the Non-NOM Market Maker Penny Pilot Options Fee for Removing Liquidity for options overlying EEM, GLD, IWM, QQQ, and SPY from $0.55 to $0.50 per contract. The details of this proposal are below.

Non-NOM Market Maker Penny Pilot Options Fee for Removing Liquidity

The Exchange proposes, beginning January 4, 2016, to decrease the Non-NOM Market Maker Fee for Removing Liquidity in Penny Pilot Options from $0.55 to $0.50 per contract for options overlying EEM, GLD, IWM, QQQ, and SPY. The Exchange notes that the Fees for Removing Liquidity for other Participants in Penny Pilot Options will remain the same, at $0.050 [sic] per contract. The Exchange believes that lowering this fee may encourage additional order flow to be directed to NOM for options overlying EEM, GLD, IWM, QQQ, and SPY.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,[5] in general, and with 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 members and issuers and other persons using any facility or system which the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, for example, the Commission indicated that market forces should generally determine the price of non-core market data because national market system regulation ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [7] Likewise, in *NetCoalition* v. *NYSE Arca, Inc.*[8] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[9] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [10]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [11] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

Non-NOM Market Maker Penny Pilot Options Fee for Removing Liquidity

The Exchange's proposal to decrease the Non-NOM Market Maker Fee for Removing Liquidity in Penny Pilot Options from $0.55 to $0.50 per contract for options overlying EEM, GLD, IWM, QQQ, and SPY is reasonable because the Exchange seeks to assess all Participants the same rate of $0.50 per contract to remove Penny Pilot Options on NOM. Also, the Exchange believes that lowering this fee may encourage additional order flow to be directed to NOM for options overlying EEM, GLD, IWM, QQQ, and SPY.

The Exchange's proposal to decrease the Non-NOM Market Maker Fee for Removing Liquidity in Penny Pilot Options from $0.55 to $0.50 per contract for options overlying EEM, GLD, IWM, QQQ, and SPY is equitable and not unfairly discriminatory because all Participants will be assessed a $0.50 per contract Fee for Removing Liquidity in Penny Pilot Options for all options transacted on NOM.

60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR–NASDAQ–2009–091) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009) (SR–NASDAQ–2009–097) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61455 (February 1, 2010), 75 FR 6239 (February 8, 2010) (SR–NASDAQ–2010–013) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62029 (May 4, 2010), 75 FR 25895 (May 10, 2010) (SR–NASDAQ–2010–053) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 65969 (December 15, 2011), 76 FR 79268 (December 21, 2011) (SR–NASDAQ–2011–169) (notice of filing and immediate effectiveness [sic] extension and replacement of Penny Pilot); 67325 (June 29, 2012), 77 FR 40127 (July 6, 2012) (SR–NASDAQ–2012–075) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through December 31, 2012); 68519 (December 21, 2012), 78 FR 136 (January 2, 2013) (SR–NASDAQ–2012–143) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through June 30, 2013); 69787 (June 18, 2013), 78 FR 37858 (June 24, 2013) (SR–NASDAQ–2013–082) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through December 31, 2013); 71105 (December 17, 2013), 78 FR 77530 (December 23, 2013) (SR–NASDAQ–2013–154) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through June 30, 2014); 79 FR 31151 [sic] (May 23, 2014), 79 FR 31151 (May 30, 2014) (SR–NASDAQ–2014–056) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through December 31, 2014); 73686 (December 2, 2014) [sic], 79 FR 71477 (November 25, 2014) [sic] (SR–NASDAQ–2014–115) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through June 30, 2015) and 75283 (June 24, 2015), 80 FR 37347 (June 30, 2015) (SR–NASDAQ–2015–063) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot) *See also* NOM Rules, Chapter VI, Section 5.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4) and (5).

[7] Securities Exchange Act Release No. 51808 at 37499 (June 9, 2005) (''Regulation NMS Adopting Release'').

[8] *NetCoalition* v. *NYSE Arca, Inc.,* 615 F.3d 525 (D.C. Cir. 2010).

[9] *See NetCoalition,* at 534.

[10] *Id.* at 537.

[11] *Id.* at 539 (quoting ArcaBook Order, 73 FR at 74782–74783).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed change to fees assessed to Participants for execution of securities does not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues.

Non-NOM Market Maker Penny Pilot Options Fee for Removing Liquidity

The Exchange's proposal to decrease the Non-NOM Market Maker Fee for Removing Liquidity in Penny Pilot Options from $0.55 to $0.50 per contract for options overlying EEM, GLD, IWM, QQQ, and SPY does not impose an undue burden on intra-market competition because the Exchange will assess all Participants the same Fee for Removing Liquidity in Penny Pilot Options.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of Participants or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2015–155 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2015–155. 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–NASDAQ–2015–155 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32895 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76753; File No. SR–MSRB–2015–03]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 and Amendment No. 2, Consisting of Proposed New Rule G–42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G–8, on Books and Records To Be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors

December 23, 2015.

I. Introduction

On April 24, 2015, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change consisting of proposed new Rule G–42, on duties of non-solicitor municipal advisors, and proposed amendments to Rule G–8, on books and records to be made by brokers, dealers, municipal securities dealers, and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

municipal advisors. The proposed rule change was published for comment in the **Federal Register** on May 8, 2015.[3] The Commission received fifteen comment letters on the proposal.[4] On June 16, 2015, the MSRB granted an extension of time for the Commission to act on the filing until August 6, 2015. On August 6, 2015, the Commission issued an order instituting proceedings (''OIP'') under Section 19(b)(2)(B) of the Act[5] to determine whether to approve or disapprove the proposed rule change.[6] On August 12, 2015, the MSRB responded to the comments[7] and filed Amendment No. 1 to the proposed rule change.[8] The Commission published notice of Amendment No. 1 on August 25, 2015.[9] In response to the OIP or Amendment No. 1, the Commission received 13 comment letters.[10] On October 28, 2015, the MSRB granted an extension of time for the Commission to act on the filing until January 3, 2016. On November 9, 2015, the MSRB filed Amendment No. 2 to the proposed rule change.[11] The Commission published notice of Amendment No. 2 on November 17, 2015,[12] and the Commission received seven comment letters in response to Amendment No. 2.[13] On December 16, 2015, the MSRB submitted a response to the comments received on the OIP, Amendment No. 1 and Amendment No. 2.[14] This order approves the proposed rule change, as modified by Amendment No. 1 and Amendment No. 2.

II. Description of the Proposed Rule Change

As described more fully in the Proposing Release, as modified by Amendment No. 1 and Amendment No. 2, the MSRB is proposing to adopt new Rule G–42, on duties of non-solicitor municipal advisors and proposed amendments to Rule G–8, on books and records to be made by brokers, dealers, municipal securities dealers, and municipal advisors (the ''proposed rule change'').

Proposed Rule G–42

Proposed Rule G–42 would establish the core standards of conduct and duties of municipal advisors when engaging in municipal advisory activities, other than municipal advisory solicitation activities (''municipal advisors''). In summary, the core provisions of Proposed Rule G–42 would:

- Establish certain standards of conduct consistent with the fiduciary duty owed by a municipal advisor to its municipal entity clients, which includes a duty of care and of loyalty;
- Establish the standard of care owed by a municipal advisor to its obligated person clients;
- Require the full and fair disclosure, in writing, of all material conflicts of interest and legal or disciplinary events that are material to a client's evaluation of a municipal advisor;
- Require the documentation of the municipal advisory relationship, specifying certain aspects of the relationship that must be included in the documentation;
- Require that recommendations made by a municipal advisor are suitable for its clients, or that it determine the suitability of recommendations made by third parties when appropriate; and
- Specifically prohibit a municipal advisor from engaging in certain activities, including, in summary:
  - Receiving excessive compensation;
  - delivering inaccurate invoices for fees or expenses;
  - making false or misleading representations about the municipal advisor's resources, capacity or knowledge;
  - participating in certain fee-splitting arrangements with underwriters;
  - participating in any undisclosed fee-splitting arrangements with providers of investments or services to a municipal entity or obligated person client of the municipal advisor;
  - making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities, with limited exceptions; and
  - entering into certain principal transactions with the municipal advisor's municipal entity clients, within limited exceptions.

In addition, the proposed rule change would define key terms used in

[3] Exchange Act Release No. 74860 (May 4, 2015), 80 FR 26752 (May 8, 2015) (''Proposing Release''). The comment period closed on May 29, 2015.

[4] *See* Letters to Secretary, Commission, from Dustin McDonald, Director, Federal Liaison Center, Government Finance Officers Association (''GFOA''), dated May 22, 2015; Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), dated May 28, 2015; Cristeena Naser, Vice President, Center for Securities, Trust & Investments, American Bankers Association (''ABA''), dated May 29, 2015; Terri Heaton, President, National Association of Municipal Advisors (''NAMA''), dated May 29, 2015; Hill A. Feinberg, Chairman and Chief Executive Officer and Michael Bartolotta, Vice Chairman, First Southwest Company (''First Southwest''), dated May 29, 2015; Guy E. Yandel, EVP and Head of Public Finance, et al., George K. Baum & Company (''GKB''), dated May 29, 2015; David T. Bellaire, Executive Vice President and General Counsel, Financial Services Institute (''FSI''), dated May 29, 2015; Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors LLC, (''Wells Fargo''), dated May 29, 2015; Tamara K. Salmon, Associate General Counsel, Investment Company Institute (''ICI''), dated May 29, 2015; W. David Hemingway, Executive Vice President, Zions First National Bank (''Zions''), dated May 29, 2015; Lindsey K. Bell, Millar Jiles, LLP (''Millar Jiles''), dated May 29, 2015; Michael Nicholas, Chief Executive Officer, Bond Dealers of America (''BDA''), dated May 29, 2015; Joy A. Howard, WM Financial Strategies (''WM Financial''), dated May 29, 2015; Leo Karwejna, Managing Director, Chief Compliance Officer, The PFM Group (''PFM''), dated May 29, 2015; and Dustin T. McDonald, Director, Federal Liaison Center, GFOA, dated June 15, 2015. Staff from the Office of Municipal Securities discussed the proposed rule change with representatives from SIFMA on May 21, 2015, representatives from NAMA on June 3, 2015 and representatives from BDA on June 17, 2015.

[5] 15 U.S.C. 78s(b)(2)(B).

[6] *See* Exchange Act Release No. 75628 (August 6, 2015), 80 FR 48355 (August 12, 2015). The comment period closed on September 11, 2015.

[7] *See* Letter from Michael L. Post, MSRB, to Secretary, SEC, dated August 12, 2015 (''August Response Letter''), available at *http://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-19.pdf.*

[8] *See* Letter from Michael L. Post, MSRB, to Secretary, SEC, dated August 12, 2015, available at *http://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-20.pdf.*

[9] *See* Exchange Act Release No. 75737 (August 19, 2015), 80 FR 51645 (August 25, 2015). The comment period closed on September 11, 2015.

[10] *See* letters from Michael Nicholas, Chief Executive Officer, BDA, dated September 11, 2015 and November 4, 2015; John C. Melton, Sr., Executive Vice President, Coastal Securities (''Coastal Securities''), dated September 11, 2015; Jeff White, Principal, Columbia Capital Management, LLC (''Columbia Capital''), dated September 10, 2015; Joshua Cooperman, Cooperman Associates (''Cooperman''), dated September 9, 2015; David T. Bellaire, Executive Vice President & General Counsel, FSI, dated September 11, 2015; Dustin McDonald, Director, Federal Liaison Center, GFOA, dated September 14, 2015; Tamara K. Salmon, Associate General Counsel, ICI, dated September 11, 2015; Lindsey K. Bell, Millar Jiles, dated September 11, 2015; Terri Heaton, President, NAMA, dated September 11, 2015; Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, dated September 11, 2015; Joy A. Howard, Principal, WM Financial, dated September 11, 2015; and W. David Hemingway, Executive Vice President, Zions, dated September 10, 2015. Staff from the Office of Municipal Securities discussed the proposed rule change with representatives from BDA on October 5, 2015 and representatives from SIFMA on October 15, 2015.

[11] *See* Letter from Michael L. Post, MSRB, to Secretary, SEC, dated November 9, 2015, available at *http://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-36.pdf.*

[12] *See* Exchange Act Release No. 76420 (November 10, 2015), 80 FR 71858 (November 17, 2015). The comment period closed on December 1, 2015.

[13] *See* Letters to Secretary, Commission, from Michael Nicholas, Chief Executive Officer, BDA, dated December 1, 2015; David T. Bellaire, Executive Vice President and General Counsel, FSI, dated December 1, 2015; Dustin McDonald, Director, Federal Liaison Center, GFOA, dated December 1, 2015; Tamara K. Salmon, Associate General Counsel, ICI, dated December 1, 2015; Terri Heaton, President, NAMA, dated December 7, 2015; Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, dated December 1, 2015; and Spencer Wright dated December 16, 2015.

[14] *See* Letter to Secretary, Commission, from Michael L. Post, MSRB, dated December 16, 2015 (the ''December Response Letter'' and, together with the August Response Letter, the ''MSRB Response Letters''), available at *http://www.sec.gov/comments/sr-msrb-2015-03/msrb201503-44.pdf.*

Proposed Rule G–42 and provide supplementary material. The supplementary material would provide additional guidance on the core concepts in the proposed rule, such as the duty of care, the duty of loyalty, the impact of client action that is independent of or contrary to the advice of a municipal advisor, suitability of recommendations and ''Know Your Client'' obligations; provide context for issues such as the scope of an engagement, conflicts of interest disclosures, excessive compensation, and the applicability of the proposed rule change to 529 college savings plans (''529 plans'') and other municipal entities; provide guidance regarding the definition of ''principal transaction;'' recognize the continued applicability of state and other laws regarding fiduciary and other duties owed by municipal advisors; include information regarding requirements that must be met for a municipal advisor to be relieved of certain provisions of Proposed Rule G–42 in instances when it inadvertently engages in municipal advisory activities; and, finally, provide a narrow exception to the proposed prohibition on certain principal transactions with municipal entity clients for transactions in specified types of fixed income securities.

Standards of Conduct

Section (a) of Proposed Rule G–42 would establish the core standards of conduct and duties applicable to municipal advisors. Subsection (a)(i) of Proposed Rule G–42 would provide that each municipal advisor in the conduct of its municipal advisory activities for an obligated person client is subject to a duty of care. Subsection (a)(ii) would provide that each municipal advisor in the conduct of its municipal advisory activities for a municipal entity client is subject to a fiduciary duty, which includes a duty of loyalty and a duty of care.

Proposed supplementary material would provide guidance on the duty of care and the duty of loyalty. Paragraph .01 of the Supplementary Material would describe the duty of care to require, without limitation, a municipal advisor to: (1) Exercise due care in performing its municipal advisory activities; (2) possess the degree of knowledge and expertise needed to provide the municipal entity or obligated person client with informed advice; (3) make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client; and (4) undertake a reasonable investigation to determine that the municipal advisor is not basing any recommendation on materially inaccurate or incomplete information. The duty of care that would be established in section (a) of Proposed Rule G–42 would also require the municipal advisor to have a reasonable basis for: any advice provided to or on behalf of a client; any representations made in a certificate that it signs that will be reasonably foreseeably relied upon by the client, any other party involved in the municipal securities transaction or municipal financial product, or investors in the municipal entity client's securities or securities secured by payments from an obligated person client; and, any information provided to the client or other parties involved in the municipal securities transaction in connection with the preparation of an official statement for any issue of municipal securities as to which the advisor is advising.

Paragraph .02 of the Supplementary Material would describe the duty of loyalty to require, without limitation, a municipal advisor, when engaging in municipal advisory activities for a municipal entity, to deal honestly and with the utmost good faith with the client and act in the client's best interests without regard to the financial or other interests of the municipal advisor. Paragraph .02 would also provide that the duty of loyalty would preclude a municipal advisor from engaging in municipal advisory activities with a municipal entity client if it cannot manage or mitigate its conflicts of interest in a manner that will permit it to act in the municipal entity's best interests.

Paragraph .03 of the Supplementary Material would specify that a municipal advisor is not required to disengage from a municipal advisory relationship if a municipal entity client or an obligated person client elects a course of action that is independent of or contrary to advice provided by the municipal advisor.

Paragraph .04 of the Supplementary Material would specify that a municipal advisor could limit the scope of the municipal advisory activities to be performed to certain specified activities or services if requested or expressly consented to by the client, but could not alter the standards of conduct or impose limitations on any of the duties prescribed by Proposed Rule G–42. Paragraph .04 would provide that, if a municipal advisor engages in a course of conduct that is inconsistent with the mutually agreed limitations to the scope of the engagement, it may result in negating the effectiveness of the limitations.

Paragraph .08 of the Supplementary Material would state, as a general matter, that, municipal advisors may be subject to fiduciary or other duties under state or other laws and nothing in Proposed Rule G–42 would supersede any more restrictive provision of state or other laws applicable to municipal advisory activities.

Disclosure of Conflicts of Interest and Other Information

Section (b) of Proposed Rule G–42 would require a municipal advisor to fully and fairly disclose to its client in writing all material conflicts of interest, and to do so prior to or upon engaging in municipal advisory activities. The provision would set forth a non-exhaustive list of scenarios under which a material conflict of interest would arise or be deemed to exist and that would require a municipal advisor to provide written disclosures to its client. Subsections (b)(i)(A) through (E) would provide specific scenarios that give rise to conflicts of interest that would be deemed to be material and require proper disclosure to a municipal advisor's client. Under the proposed rule change, a material conflict of interest would always include: Any affiliate of the municipal advisor that provides any advice, service or product to or on behalf of the client that is directly related to the municipal advisory activities to be performed by the disclosing municipal advisor; any payments made by the municipal advisor, directly or indirectly, to obtain or retain an engagement to perform municipal advisory activities for the client; any payments received by the municipal advisor from a third party to enlist the municipal advisor's recommendations to the client of its services, any municipal securities transaction or any municipal financial product; any fee-splitting arrangements involving the municipal advisor and any provider of investments or services to the client; and any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice. Subsection (b)(i)(F) would require municipal advisors to disclose any other actual or potential conflicts of interest, of which the municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair its ability to provide advice to or on behalf of its client in accordance with the applicable standards of

conduct established by section (a) of the proposed rule.

Under subsection (b)(i), if a municipal advisor were to conclude, based on the exercise of reasonable diligence, that it had no known material conflicts of interest, the municipal advisor would be required to provide a written statement to the client to that effect.

Subsection (b)(ii) would require disclosure of any legal or disciplinary event that would be material to the client's evaluation of the municipal advisor or the integrity of its management or advisory personnel. A municipal advisor would be permitted to fulfill this disclosure obligation by identifying the specific type of event and specifically referring the client to the relevant portions of the municipal advisor's most recent SEC Forms MA or MA–I [15] filed with the Commission, if the municipal advisor provides detailed information specifying where the client could access such forms electronically.

Paragraph .05 of the Supplementary Material would provide that the required conflicts of interest disclosures must be sufficiently detailed to inform the client of the nature, implications and potential consequences of each conflict and must include an explanation of how the municipal advisor addresses or intends to manage or mitigate each conflict.[16]

Paragraph .07 of the Supplementary Material would provide that a municipal advisor that inadvertently engages in municipal advisory activities but does not intend to continue the municipal advisory activities or enter into a municipal advisory relationship [17] would not be required to comply with sections (b) and (c) of Proposed Rule G–42 (relating to disclosure of conflicts of interest and documentation of the relationship), if the municipal advisor takes the prescribed actions listed under paragraph .07 promptly after it discovers its provision of inadvertent advice. The municipal advisor would be required to provide to the client a dated document that would include: A disclaimer stating that the municipal advisor did not intend to provide advice and that, effective immediately, the municipal advisor has ceased engaging in municipal advisory activities with respect to that client in regard to all transactions and municipal financial products as to which advice was inadvertently provided; a notification that the client should be aware that the municipal advisor has not provided the disclosure of material conflicts of interest and other information required under section (b); an identification of all of the advice that was inadvertently provided, based on a reasonable investigation; and a request that the municipal entity or obligated person acknowledge receipt of the document. The municipal advisor also would be required to conduct a review of its supervisory and compliance policies and procedures to ensure that they are reasonably designed to prevent inadvertently providing advice to municipal entities and obligated persons. The final sentence of paragraph .07 of the Supplementary Material would also clarify that the satisfaction of the requirements of paragraph .07 would have no effect on the applicability of any provisions of Proposed Rule G–42 other than sections (b) and (c), or any other legal requirements applicable to municipal advisory activities.

Documentation of the Municipal Advisory Relationship

Section (c) of Proposed Rule G–42 would require each municipal advisor to evidence each of its municipal advisory relationships by a writing, or writings created and delivered to the municipal entity or obligated person client prior to, upon or promptly after the establishment of the municipal advisory relationship. The documentation would be required to be dated and include, at a minimum: [18]

- The form and basis of direct or indirect compensation, if any, for the municipal advisory activities to be performed, as provided in proposed subsection (c)(i);
- the information required to be disclosed in proposed section (b), including the disclosures of conflicts of interest, as provided in proposed subsection (c)(ii);
- a description of the specific type of information regarding legal and disciplinary events requested by the Commission on SEC Form MA and SEC Form MA–I, as provided in proposed subsection (c)(iii), and detailed information specifying where the client may electronically access the municipal advisor's most recent Form MA and each most recent Form MA–I filed with the Commission; [19]
- the date of the last material change to the legal or disciplinary event disclosures on any SEC Forms MA or MA–I filed with the Commission by the municipal advisor and a brief explanation of the basis for the materiality of the change or addition, as provided in proposed subsection (c)(iv);
- the scope of the municipal advisory activities to be performed and any limitations on the scope of the engagement, as provided in proposed subsection (c)(v);
- the date, triggering event, or means for the termination of the municipal advisory relationship, or, if none, a statement that there is none, as provided in proposed subsection (c)(vi); and
- any terms relating to withdrawal from the municipal advisory relationship, as provided in proposed subsection (c)(vii).

Paragraph .06 of the Supplementary Material would require municipal advisors to promptly amend or supplement the writing(s) required by section (c) during the term of the municipal advisory relationship as necessary to reflect any material changes or additions in the required information. Paragraph .06 would also provide that a municipal advisor would not be required to provide the disclosure of conflicts of interest and other information required under proposed section (c)(ii) if the municipal advisor previously fully complied with the requirements of proposed section (b) to disclose such information and proposed subsection (c)(ii) would not require the disclosure of any materially different information than that previously disclosed to the client.

[15] *See* 17 CFR 249.1300 (SEC Form MA); 17 CFR 249.1310 (SEC Form MA–I).

[16] The MSRB believes that this requirement is analogous to the requirement of Form ADV (17 CFR 279.1) under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) that obligates an investment adviser to describe how it addresses certain conflicts of interest with its clients. *See, e.g.,* Form ADV, Part 2, Item 5.E.1 of Part 2A (requiring an investment adviser to describe how it will address conflicts of interest that arise in regards to fees and compensation it receives, including the investment adviser's procedures for disclosing the conflicts of interest with its client). *See also* Form ADV, Part 2A Items 6, 10, 11, 14 and 17.

[17] Under subsection (f)(vi) of Proposed Rule G–42, the MSRB notes that a municipal advisory relationship would be deemed to exist when a municipal advisor enters into an agreement to engage in municipal advisory activities for a municipal entity or obligated person, and would be deemed to have ended on the earlier of (i) the date on which the municipal advisory relationship has terminated pursuant to the terms of the documentation of the municipal advisory relationship required in section (c) of Proposed Rule G–42 or (ii) the date on which the municipal advisor withdraws from the municipal advisory relationship.

[18] While no acknowledgement from the client of its receipt of the documentation would be required, the MSRB notes that a municipal advisor must, as part of the duty of care it owes its client, reasonably believe that the documentation was received by its client.

[19] The MSRB notes that compliance with this requirement could be achieved in the same manner, and (so long as done upon or prior to engaging in municipal advisory activities for the client) concurrently with providing to the client the information required under proposed subsection (b)(ii).

Recommendations and Review of Recommendations of Other Parties

Section (d) of Proposed Rule G–42 would provide that a municipal advisor must not recommend that its client enter into any municipal securities transaction or municipal financial product unless the municipal advisor has a reasonable basis to believe, based on the information obtained through the reasonable diligence of the municipal advisor, that the recommended transaction or product is suitable for the client. Proposed section (d) also contemplates that a municipal advisor may be requested by the client to review and determine the suitability of a recommendation made by a third party to the client. If a client were to request this type of review, and such review were within the scope of the engagement, the municipal advisor's determination regarding the suitability of the third-party's recommendation regarding a municipal securities transaction or municipal financial product would be subject to the same reasonable diligence standard—requiring the municipal advisor to obtain relevant information through the exercise of reasonable diligence.

As to both types of review, the municipal advisor would be required under proposed section (d) to inform its municipal entity or obligated person client of its evaluation of the material risks, potential benefits, structure and other characteristics of the recommended municipal securities transaction or municipal financial product; the basis upon which the advisor reasonably believes the recommended transaction or product is, or (as may be applicable in the case of a review of a recommendation) is not, suitable for the client; and whether the municipal advisor has investigated or considered other reasonably feasible alternatives to the recommended municipal securities transaction or municipal financial product that might also or alternatively serve the client's objectives.

Paragraph .09 of the Supplementary Material would provide guidance related to a municipal advisor's suitability obligations. Under this provision, a municipal advisor's determination of whether a municipal securities transaction or municipal financial product is suitable for its client must be based on numerous factors, as applicable to the particular type of client, including, but not limited to: The client's financial situation and needs, objectives, tax status, risk tolerance, liquidity needs, experience with municipal securities transactions or municipal financial products generally or of the type and complexity being recommended, financial capacity to withstand changes in market conditions during the term of the municipal financial product or the period that municipal securities to be issued are reasonably expected to be outstanding, and any other material information known by the municipal advisor about the client and the municipal securities transaction or municipal financial product, after the municipal advisor has conducted a reasonable inquiry.

In connection with a municipal advisor's obligation to determine the suitability of a municipal securities transaction or a municipal financial product for a client, which should take into account its knowledge of the client, paragraph .10 of the Supplementary Material would require a municipal advisor to know its client. The obligation to know the client would require a municipal advisor to use reasonable diligence to know and retain essential facts concerning the client and the authority of each person acting on behalf of the client, and is similar to requirements in other regulatory regimes.[20] The facts ''essential'' to knowing one's client would include those required to effectively service the municipal advisory relationship with the client; act in accordance with any special directions from the client; understand the authority of each person acting on behalf of the client; and comply with applicable laws, rules and regulations.

Specified Prohibitions

Subsection (e)(i)(A) would prohibit a municipal advisor from receiving compensation from its client that is excessive in relation to the municipal advisory activities actually performed for the client. Paragraph .11 of the Supplementary Material would provide additional guidance on how compensation would be determined to be excessive. Included in paragraph .11 are several factors that would be considered when evaluating the reasonableness of a municipal advisor's compensation relative to the nature of the municipal advisory activities performed, including, but not limited to: The municipal advisor's expertise, the complexity of the municipal securities transaction or municipal financial product, whether the fee is contingent upon the closing of the municipal securities transaction or municipal financial product, the length of time spent on the engagement and whether the municipal advisor is paying any other relevant costs related to the municipal securities transaction or municipal financial product.

Subsection (e)(i)(B) would prohibit municipal advisors from delivering an invoice for fees or expenses for municipal advisory activities that is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities.

Subsection (e)(i)(C) would prohibit a municipal advisor from making any representation or submitting any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact, about its capacity, resources or knowledge in response to requests for proposals or in oral presentations to a client or prospective client for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.

Subsection (e)(i)(D) would prohibit municipal advisors from making or participating in two types of fee-splitting arrangements: (1) Any fee-splitting arrangement with an underwriter on any municipal securities transaction as to which the municipal advisor has provided or is providing advice; and (2) any undisclosed fee-splitting arrangement with providers of investments or services to a municipal entity or obligated person client of the municipal advisor.

Subsection (e)(i)(E) would, generally, prohibit a municipal advisor from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities. However, the provision contains three exceptions. The prohibition would not apply to: (1) Payments to an affiliate of the municipal advisor for a direct or indirect communication with a municipal entity or obligated person on behalf of the municipal advisor where such communication is made for the purpose of obtaining or retaining an engagement to perform municipal advisory activities; (2) reasonable fees

[20] The MSRB notes that similar requirements apply to brokers and dealers under FINRA Rule 2090 (Know Your Customer) and swap dealers under Commodity Futures Trading Commission (''CFTC'') Rule 402(b) (General Provisions: Know Your Counterparty), 17 CFR 23.402(b), found in CFTC Rules, Ch. I, Pt. 23, Subpt. H (Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing with Counterparties, including Special Entities) (17 CFR 23.400 *et seq.*). Notably, the CFTC's rule applies to dealings with special entity clients, defined to include states, state agencies, cities, counties, municipalities, other political subdivisions of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State. *See* CFTC Rule 401(c) (defining ''special entity'') (17 CFR 23.401(c)).

paid to another municipal advisor registered as such with the Commission and MSRB for making such a communication as described in subsection (e)(i)(E)(1); and (3) payments that are permissible ''normal business dealings'' as described in MSRB Rule G–20.

Principal Transactions

Subsection (e)(ii) of Proposed Rule G–42 would, subject to the exception provided in paragraph .14 of the Supplementary Material, prohibit a municipal advisor to a municipal entity, and any affiliate of such municipal advisor, from engaging with the municipal entity client in a principal transaction that is the same, or directly related to the, issue of municipal securities or municipal financial product as to which the municipal advisor is providing or has provided advice to the municipal entity client. The ban on principal transactions would apply only with respect to clients that are municipal entities. The ban would not apply to principal transactions between a municipal advisor (or an affiliate of the municipal advisor) and the municipal advisor's obligated person clients. Although such transactions would not be prohibited, the MSRB notes that all municipal advisors, including those engaging in municipal advisory activities for obligated person clients, are currently subject to the MSRB's fundamental fair-practice rule, Rule G–17.

Paragraph .08 of the Supplementary Material would provide an exception to the ban on principal transactions in subsection (e)(ii) in order to avoid a possible conflict with existing MSRB Rule G–23, on activities of financial advisors. Specifically, the ban in subsection (e)(ii) would not apply to an acquisition as principal, either alone or as a participant in a syndicate or other similar account formed for the purpose of purchasing, directly or indirectly, from an issuer all or any portion of an issuance of municipal securities on the basis that the municipal advisor provided advice as to the issuance, because such a transaction is the type of transaction that is addressed, and, in certain circumstances, prohibited by Rule G–23.

For purposes of the prohibition in proposed subsection (e)(ii), subsection (f)(ix) would define the term ''principal transaction'' to mean ''when acting as principal for one's own account, a sale to or a purchase from the municipal entity client of any security or entrance into any derivative, guaranteed investment contract, or other similar financial product with the municipal entity client.'' Further, paragraph .13 of the Supplementary Material would clarify that the term ''other similar financial product,'' as used in subsection (f)(ix), would include a bank loan, but only if it is in an aggregate principal amount of $1,000,000 or more and is economically equivalent to the purchase of one or more municipal securities.

Paragraph .14 of the Supplementary Material would provide an exception (the ''Exception'') to the ban on principal transactions for transactions in specified fixed income securities. As provided in proposed section (a) of paragraph .14 of the Supplementary Material, a principal transaction could be excepted from the specified prohibition only if the municipal advisor also is a broker-dealer registered under Section 15 of the Exchange Act,[21] and each account for which the municipal advisor would be relying on the Exception is a brokerage account subject to the Exchange Act,[22] the rules thereunder, and the rules of the self-regulatory organizations(s) of which the broker-dealer is a member. In addition, the municipal advisor could not exercise investment discretion (as defined in Section 3(a)(35) of the Exchange Act) [23] with respect to the account, unless granted by the municipal entity client on a temporary or limited basis.[24]

Under proposed section (b) of paragraph .14 of the Supplementary Material, neither the municipal advisor nor any affiliate of the municipal advisor may be providing, or have provided, advice to the municipal entity client as to an issue of municipal securities or a municipal financial product that is directly related to the principal transaction, except advice as to another principal transaction that also meets all the other requirements of proposed paragraph .14.

Proposed section (c) of paragraph .14 of the Supplementary Material would limit a municipal advisor's principal transactions under the Exception to sales to or purchases from a municipal entity client of any U.S. Treasury security, agency debt security or corporate debt security. In addition, the proposed Exception would not be available for transactions involving municipal escrow investments as defined in Exchange Act Rule 15Ba1–1(h) [25] because the MSRB believes that this is an area of heightened risk where, historically, significant abuses have occurred. The terms ''U.S. Treasury security,'' ''agency debt security'' and ''corporate debt security,'' and related terms, ''agency,'' ''government-sponsored enterprise,'' ''money market instrument'' and ''securitized product'' would be defined for purposes of proposed paragraphs .14 and .15 of the Supplementary Material in new proposed paragraph .15 of the Supplementary Material.

To comply with proposed section (d) of paragraph .14 of the Supplementary Material, a municipal advisor would have two options. Under the first option, which is set forth in proposed subsection (d)(1) of paragraph .14, a municipal advisor would be required, on a transaction-by-transaction basis, to disclose to the municipal entity client in writing before the completion of the principal transaction the capacity in which the municipal advisor is acting and obtain the consent of the client to such transaction. Consent would mean informed consent, and in order to make informed consent, the municipal advisor, consistent with its fiduciary duty, would be required to disclose specified information, including the price and other terms of the transaction, as well as the capacity in which the municipal advisor would be acting.[26] ''Before completion'' would mean either prior to execution of the transaction, or after execution but prior to the settlement of the transaction.[27]

Alternatively, a municipal advisor could comply with proposed subsection (d)(2) of paragraph .14 by meeting six requirements, as set forth in proposed paragraphs (d)(2)(A) through (F) of paragraph .14 and summarized below. First, under proposed paragraph (d)(2)(A), neither the municipal advisor nor any of its affiliates could be the issuer, or the underwriter (as defined in Exchange Act Rule 15c2–12(f)(8)),[28] of a security that is the subject of the principal transaction. Second, under proposed paragraph (d)(2)(B), the municipal advisor would be required to obtain from the municipal entity client an executed written, revocable consent that would prospectively authorize the municipal advisor directly or indirectly to act as principal for its own account in selling a security to or purchasing a security from the municipal entity

[21] 15 U.S.C. 78*o*.

[22] 15 U.S.C. 78a *et seq.*

[23] 15 U.S.C. 78(c)(a)(35).

[24] The MSRB notes that the proposed requirements are similar to those found in Advisers Act Rule 206(3)–T(a)(7) and (1), respectively. 17 CFR 275.206(3)–3T(a)(7) and (1).

[25] 17 CFR 240.15Ba1–1(h).

[26] *See* Amendment No. 2.

[27] These requirements are substantially similar to long-standing interpretive guidance regarding Advisers Act Section 206(3). 15 U.S.C. 80b–6(3).

[28] 17 CFR 240.15c2–12(f)(8).

client, so long as such written consent were obtained after written disclosure to the municipal entity client explaining: (i) The circumstances under which the municipal advisor directly or indirectly may engage in principal transactions; (ii) the nature and significance of conflicts with the municipal entity client's interests as a result of the transactions; and (iii) how the municipal advisor addresses those conflicts.

Third, under proposed paragraph (d)(2)(C), the municipal advisor, prior to the execution of each principal transaction, would be required to: (i) Inform the municipal entity client, orally or in writing, of the capacity in which it may act with respect to such transaction and (ii) obtain consent from the municipal entity client, orally or in writing, to act as principal for its own account with respect to such transaction.

Fourth, under proposed paragraph (d)(2)(D), a municipal advisor would be required to send a written confirmation at or before completion of each principal transaction that includes the information required by 17 CFR 240.10b–10 or MSRB Rule G–15, and a conspicuous, plain English statement informing the municipal entity client that the municipal advisor: (i) Disclosed to the client prior to the execution of the transaction that the municipal advisor may be acting in a principal capacity in connection with the transaction and the client authorized the transaction and (ii) sold the security to, or bought the security from, the client for its own account.

Fifth, under proposed paragraph (d)(2)(E), a municipal advisor would be required to send its municipal entity client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the client's account in reliance upon the Exception, and the date and price of the transactions.

Sixth, under proposed paragraph (d)(2)(F), each written disclosure would be required to include a conspicuous, plain English statement regarding the ability of the municipal entity client to revoke the prospective written consent to principal transactions without penalty at any time by written notice.

A municipal advisor's use and compliance with the requirements of the Exception would not be construed as relieving it in any way from acting in the best interests of its municipal entity client nor from any obligation that may be imposed by other applicable provisions of the federal securities laws and state law.

Definitions

Section (f) of Proposed Rule G–42 would provide definitions of the terms ''affiliate of the municipal advisor,'' ''municipal advisory relationship,'' ''official statement,'' and ''principal transaction.'' Further, for several terms in Proposed Rule G–42 that have been previously defined by federal statute or SEC rules, proposed section (f) would, for purposes of Proposed Rule G–42, adopt the same meanings. These terms would include ''advice;'' ''municipal advisor;'' ''municipal advisory activities;'' ''municipal entity;'' and ''obligated person.''

Applicability of Proposed Rule G–42 to 529 College Savings Plans and Other Municipal Fund Securities

Paragraph .12 of the Supplementary Material emphasizes the proposed rule's application to municipal advisors whose municipal advisory clients are sponsors or trustees of municipal fund securities.

Proposed Amendments to Rule G–8

The proposed amendments to Rule G–8 would require each municipal advisor to make and keep a copy of any document created by the municipal advisor that was material to its review of a recommendation by another party or that memorializes its basis for any determination as to suitability.

III. Summary of Comments Received and the MSRB's Response

As noted previously, the Commission received 15 comment letters in response to the Proposing Release, 13 comment letters in response to the OIP or Amendment No. 1 and seven comment letters in response to Amendment No. 2.[29] The MSRB responded to the comment letters received on the Proposing Release in its August Response Letter,[30] and the MSRB responded to the comment letters received on the OIP, Amendment No. 1 and Amendment No. 2 in its December Response Letter.[31]

A. Standards of Conduct—Scope of Duties

In response to the Proposing Release, SIFMA stated that the addition of ''without limitation'' in Proposed Rule G–42(a)(ii) raises significant and unnecessary ambiguities, as a fiduciary duty is generally understood to encompass a duty of care and duty of loyalty.[32] It also stated that the language ''includes, but is not limited to'' in paragraph .02 of the Supplementary Material was vague, and suggested that the MSRB specify what other duties are included. In response to the comment, the MSRB, in Amendment No. 1, eliminated the phrase '', without limitation,'' in Proposed Rule G–42(a)(ii). However, the MSRB did not make the suggested change to paragraph .02 of the Supplementary Material because the MSRB stated its intent to make clear that the proposed rule change is not an exhaustive statement of all aspects of the duty of loyalty.[33]

B. Duty of Care—Reasonable Investigation of Facts

In response to the Proposing Release, four commenters expressed concern regarding the duty of care standard, as expressed in paragraph .01 of the Supplementary Material, which requires municipal advisors to undertake ''a reasonable investigation'' to avoid basing recommendations on ''materially inaccurate or incomplete information.'' [34] All four commenters argued that a municipal advisor should be permitted to assume that information beyond what is publicly available and is provided by the client is complete and accurate. ICI and SIFMA argued that this requirement was inconsistent with current regulatory regimes as other financial professionals are not required to investigate information provided by clients.[35] SIFMA expressed concern that this requirement would make a municipal advisor potentially liable to its client for that client's own misrepresentations.[36] ICI argued that in the context of 529 college savings plans, it is not uncommon for the municipal advisor that is acting as a plan sponsor to rely on its state partner to provide the advisor with the information necessary for the advisor to fulfill its obligations and duties to the plan.[37] In such circumstances, ICI argued, municipal advisors should be able to presume the states' representatives are providing materially accurate and complete information. GFOA supported the duty of care provisions generally but expressed concern that requiring a municipal advisor to investigate this information ''may be excessive'' and could lead to cost increases that could be passed on to the client.[38] Finally,

[29] *See supra* notes 4, 10 and 13.

[30] *See* August Response Letter.

[31] *See* December Response Letter.

[32] *See* SIFMA letter dated May 28, 2015.

[33] *See* August Response Letter.

[34] *See* letters from ICI dated May 29, 2015; GFOA dated June 15, 2015; SIFMA dated May 28, 2015; and WM Financial dated May 29, 2015.

[35] *See* letters from ICI dated May 29, 2015 and SIFMA dated May 28, 2015.

[36] *See* SIFMA letter dated May 28, 2015.

[37] *See* ICI letter dated May 29, 2015.

[38] *See* GFOA letter dated June 15, 2015.

NAMA requested the MSRB provide clarity by providing ''non-exclusive explanatory examples of what constitutes a 'reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action.' '' [39]

In its response to comments, the MSRB noted that it had previously responded to similar comments in the Proposing Release and that it had determined that the requirement would not result in an unreasonable and unnecessary burden for municipal advisors or their clients.[40] In response to Amendment No. 1 or the OIP, Columbia Capital, ICI, NAMA, SIFMA and WM Financial each expressed similar concerns regarding the same requirement.[41] In Columbia Capital's view, the proposed requirement is unreasonable because it would hold a municipal advisor accountable if a municipal entity or obligated person fails to provide the municipal advisor pertinent non-public information that might have impacted its advice or recommendations.[42] ICI noted its consistent support of Proposed Rule G–42, but reiterated its objection to the requirement that a municipal advisor conduct a reasonable investigation of the veracity of the information provided by a municipal advisory client.[43] ICI stated its view that, to date, the MSRB has failed to provide any rationale, or ''meaningful information'' supporting the necessity of the requirement, or why such investigation is in the public interest. In addition, ICI stated that the MSRB has not provided sufficient economic analysis for this requirement. NAMA believed the proposed rule change does not provide adequate guidance as to what a ''reasonable investigation'' would require of a municipal advisor.[44] NAMA believed, without further clarity, examination for compliance with the proposed rule change by financial regulators ''could lead to unsettling results.'' SIFMA commented that the proposed obligation is ''unnecessary, counterproductive, and inefficient.'' [45] In addition, SIFMA believed that the requirement would impose unnecessary costs on municipal advisor clients, who, in SIFMA's opinion, would ultimately bear the financial burden of having their municipal advisor investigate facts already known to the client. ICI and SIFMA both pointed to other regulatory regimes and rules where, according to the commenters, regulated entities (*e.g.,* broker-dealers, swap dealers and investment advisers) are not required to investigate information provided by clients.

WM Financial supported the requirement that a municipal advisor should conduct reasonable investigations of publicly available documentation and engage in discussions with the client such that the municipal advisor's recommendations reflect what the advisor reasonably believes is in the customer's best interest.[46] However, WM Financial commented that a municipal advisor should not be required to determine whether the information provided to it by its client is materially inaccurate or incomplete, and should be able to rely on publicly available documents as being true and accurate.

In response to Amendment No. 2, ICI reiterated the concerns regarding the Proposed Rule's requirement that municipal advisors undertake a reasonable investigation of the accuracy and completeness of information on which a municipal advisor bases its recommendation.[47] ICI stated that Amendment No. 2, despite the amendment stating otherwise, did not address its concerns regarding the ''reasonable investigation requirement'' and the MSRB should provide its basis for maintaining the requirement. As included in its previous comment letters addressing the ''reasonable investigation'' requirement, ICI again stated that the MSRB has not provided a sufficient economic analysis of the potential impact of the requirement and should be required to do so with special particularity for ''advice rendered in connection with 529 college savings plans.''

In response to these comments, the MSRB stated that the duty of care is a core principle underlying many of the obligations of the proposed rule change, and the proposed requirement to conduct a reasonable investigation is vital because the veracity of the information on which a municipal advisor bases its recommendation can have a significant impact on the ability of a municipal advisor to make informed and suitable recommendations.[48] The MSRB further stated its belief that the proposed requirement is necessary to promote the integrity of the municipal advisory relationship and protect clients from the potentially costly consequences of transactions undertaken based on unsuitable recommendations. The MSRB reiterated that a municipal advisor would not be required to go to impractical lengths to determine the accuracy and completeness of the information on which it would be basing its advice and/or recommendation.[49] Instead, the MSRB stated that a municipal advisor would be required to investigate using reasonable diligence. The MSRB further stated that it understands that municipal advisors currently, and regularly, follow an industry practice of conducting due diligence and fact finding inquiries that may, or, with some modest modifications, satisfy the requirement to undertake a ''reasonable investigation.'' In such cases, the MSRB believes the proposed requirement would add only nominal costs, if any.

C. Duty of Care—Preparing Official Statements

In response to Amendment No. 1 or the OIP, SIFMA commented that proposed paragraph .01 of the Supplementary Material should more explicitly state that municipal advisors assisting in the preparation of any portion of an official statement in connection with a competitive transaction must exercise ''reasonable diligence with respect to the accuracy and completeness of any portion of the official statement as to which the municipal advisor assisted in the preparation.'' [50] SIFMA stated that while the proposed rule does include a reference to this requirement, the rule language should more explicitly clarify this obligation. In response, the MSRB stated that the rule language, as proposed, is sufficient to alert municipal advisors of their obligation and that the rule language conveys the importance of exercising due care when providing information or advice in connection with the preparation of an official statement.[51]

D. Disclosure of Conflicts of Interest

Three commenters expressed concerns regarding the differing timing of documentation required by sections

[39] *See* NAMA letter dated May 29, 2015.

[40] *See* August Response Letter (citing Proposing Release, 80 FR 26752, at 26763, 26773–74, 26783–84).

[41] *See* letters from Columbia Capital dated September 10, 2015; ICI dated September 11, 2015; NAMA dated September 11, 2015; SIFMA dated September 11, 2015; and WM Financial dated September 11, 2015.

[42] *See* Columbia Capital letter dated September 10, 2015.

[43] *See* ICI letter dated September 11, 2015.

[44] *See* NAMA letter dated September 11, 2015.

[45] *See* SIFMA letter dated September 11, 2015.

[46] *See* WM Financial letter dated September 11, 2015.

[47] *See* ICI letter dated December 1, 2015.

[48] *See* December Response Letter.

[49] *See id.; see also* Proposing Release, 80 FR 26752, at 26753, 26761, 26763, 26773–74 and 26784; *see also* August Response Letter.

[50] *See* SIFMA letter dated September 11, 2015.

[51] *See* December Response Letter.

(b) and (c) of Proposed Rule G–42.[52] Each of the commenters recommended that the timing requirement in section (b), on disclosure of conflicts of interest and other information, be changed to match that in section (c), on documentation of the municipal advisory relationship. BDA and GKB believe that disclosures of conflicts of interest only matter when municipal advisors enter into municipal advisory relationships.[53] NAMA stated that the differing timing requirements would lead to ''confusing guidance and duplicative disclosures'' to clients.[54]

The MSRB previously considered and addressed the same or similar comments regarding the timing requirements of proposed sections (b) and (c),[55] and determined not to make the recommended changes. The MSRB reasoned that the suggested change would conflict with the intention of having municipal advisors disclose conflicts of interest prior to or at least upon engaging in municipal advisory activities and could cause municipal advisors to delay making the required disclosures until the municipal advisory relationship has been reduced to writing, which could be a significant amount of time after the client has received and considered, and potentially acted on, advice or recommendations from the municipal advisor.[56] However, in Amendment No. 1, the MSRB streamlined the steps needed to comply with proposed sections (b) and (c) in proposed paragraph .06 of the Supplementary Material. Under proposed paragraph .06, a municipal advisor would not be required to provide the disclosure of conflicts of interest and other information required under proposed subsection (c)(ii), if the municipal advisor previously fully complied with the requirements of section (b) to disclose such information and subsection (c)(ii) would not require the disclosure of any materially different information than that previously disclosed.

Columbia Capital commented that it supports the requirement in proposed section (b) that a municipal advisor disclose material conflicts of interest prior to or upon engaging in municipal advisory activities.[57] However, Columbia Capital suggested modifying the rule language to state that a municipal advisor must provide such disclosures ''at any time requested by the municipal entity or obligated person, but not later than engaging in'' municipal advisory activities. Columbia Capital believed this would provide more clarity regarding the requirement, without changing the substance, and thereby promote better compliance with the proposed section. In response, the MSRB stated that the suggested language would not necessarily provide more clarity to municipal advisors or better aide in compliance with the proposed requirement than the current rule language. The MSRB believes that it would be desirable to maintain the proposed rule language of section (b) because it more clearly coordinates with the language in proposed section (c)[58] regarding the documentation of the municipal advisory relationship and would, therefore, better assist municipal advisors in complying with the different timing requirements of both sections. The MSRB further responded that section (b) contemplates that disclosures may be made at any time prior to engaging in municipal advisory activities, and therefore nothing in the proposed rule change would prevent a municipal advisor and its client from agreeing that the disclosures would be made when requested by the client, so long as the disclosures are made in compliance with all of the terms of proposed section (b) and other applicable rules.

NAMA suggested merging the two ''catch-all provisions'' in subsections (b)(i)(A) and (b)(i)(G) of Proposed Rule G–42 because it is not clear what the difference is between the two paragraphs.[59] In response, the MSRB combined the disclosures required under paragraphs (b)(i)(A) and (b)(i)(G) in new paragraph (b)(i)(F) of Proposed Rule G–42.[60]

In response to the Proposing Release, WM Financial stated that contingent fees that are based on the completion of a transaction, but not on the size of a transaction, are not a conflict of interest.[61] It argued that contingent fee arrangements benefit municipal entities by insuring their government funds will not be drawn upon for payment of fees if the transaction is not completed. Accordingly, WM Financial requested that the proposed rule change not require a ''conflict of interest'' disclosure for contingent fees that do not inherently create conflicts of interest. In response to Amendment No. 1 or the OIP, WM Financial further commented that contingent fee arrangements do not give rise to material conflicts of interest requiring disclosure in every case, and disclosure should not be required of contingent fee arrangements that do not inherently create conflicts of interest.[62] WM Financial believed that such arrangements also serve a useful and beneficial function for municipal entity clients (*e.g.,* for clients with relatively small budgets) in that ''governmental funds will not be drawn upon for payment of fees if the transaction is not completed.''

Columbia Capital commented that every type of fee structure ''creates a set of incentives and disincentives that can be detrimental to the municipal entity or obligated person,'' and specifying contingent compensation arrangements in the proposed rule implies that contingent compensation arrangements are more problematic or imbued with greater conflicts of interest than other compensation arrangements.[63] Columbia Capital suggested that the proposed rule be modified to require municipal advisors to disclose how they are compensated and to discuss incentives and disincentives that result from such compensation arrangements and structures.

In response to these comments, the MSRB stated that requiring municipal advisors to disclose conflicts of interest that could arise from, or are inherent in, contingent compensation is an appropriate and necessary measure to protect municipal entity and obligated person clients.[64] The MSRB noted that, in connection with underwriters, the MSRB requires analogous disclosures in an analogous context. Pursuant to Rule G–17, the MSRB requires a dealer acting as an underwriter to disclose to an issuer whether its underwriting compensation will be ''contingent on the closing of a transaction or the size of a transaction,'' because, as the MSRB has stated, such circumstances may present a conflict of interest as a result of the underwriter's financial incentive

[52] *See* letters from BDA dated May 29, 2015; GKB dated May 29, 2015; and NAMA dated May 29, 2015.

[53] *See* letters from BDA dated May 29, 2015 and GKB dated May 29, 2015.

[54] *See* NAMA letter dated May 29, 2015.

[55] *See* Proposing Release, 80 FR 26752, at 26769–70.

[56] *See* August Response Letter.

[57] *See* Columbia Capital letter dated September 10, 2015.

[58] Proposed section (c) would require a municipal advisor to ''evidence each of its municipal advisory relationships by a writing or writings created and delivered to the municipal entity or obligated person client *prior to, upon or promptly after* the establishment of the municipal advisory relationship.'' (emphasis added).

[59] *See* NAMA letter dated May 29, 2015.

[60] *See* Amendment No. 1.

[61] *See* WM Financial letter dated May 29, 2015.

[62] *See* WM Financial letter dated September 11, 2015.

[63] *See* Columbia Capital letter dated September 10, 2015.

[64] *See* December Response Letter.

to recommend a transaction that is ''unnecessary or to recommend that the size of the transaction be larger than is necessary.'' [65] The MSRB believes that the scenarios in which proposed paragraph (b)(i)(E) would apply are substantially similar, are subject to the same concerns, and warrant the application of similar disclosure requirements to help make transparent potential conflicts of interest. The MSRB stated that the purpose of the disclosure requirement, is, of course, to allow a municipal advisor's client to make an informed decision based on relevant facts and circumstances, and, as the MSRB previously explained, municipal advisors would have the opportunity to provide a client with additional context about the benefits and drawbacks of other fee arrangements in relation to a contingent fee arrangement so that the client could choose a fee arrangement that it understands, with which it is comfortable, and that serves its needs.[66] The MSRB further stated that it does not disagree that other fee arrangements also may give rise to conflicts, and noted that other terms of proposed section (b) require broad disclosure of all actual and potential material conflicts of interest. In addition, as the MSRB has emphasized, it does not endorse, nor discourage, the use of any particular lawful compensation arrangement.

E. Documentation of Municipal Advisory Relationship

GFOA and NAMA expressed concerns with disclosing information regarding legal or disciplinary events through reference to the municipal advisor's most recent Form MA and Form MA–I.[67] Both commenters stated it was difficult or burdensome for clients to find the relevant Form MA and Form MA–I documents in the SEC's EDGAR system. GFOA requested the proposed rule be amended to require municipal advisors to provide copies of Form MA-Is directly to their clients as part of the documentation of the relationship, rather than providing the location of the forms.[68] GFOA also suggested that municipal advisors be required to notify clients of changes to Form MA that are material and to provide clients with the updated Form MA with an explanation of how any changes made to the form materially pertain to the nature of the relationship between the municipal advisor and the client.

In response to the comments, the MSRB noted that the provision in proposed section (b) allowing the municipal advisor to provide legal or disciplinary event disclosures by identifying the specific type of event and referencing the relevant portions of the municipal advisor's most recent Forms MA or MA–I is permissive, not mandatory.[69] Also in response to GFOA's comment, the MSRB revised Proposed Rule G–42(c)(iv) to require municipal advisors to provide the client not only the date of the last material change or addition to the legal or disciplinary event disclosures on any Form MA or Form MA–I, but also to provide a brief explanation of the basis for the materiality of each change or addition.[70] The MSRB stated that this explanation would allow a client to assess the effect that such changes may have on the municipal advisory relationship and evaluate whether it should seek or review additional information.[71]

In response to Amendment No. 1 or the OIP, SIFMA objected to the revisions to subsection (c)(iv), requiring municipal advisors to provide a brief explanation of the basis for the materiality of each change or addition, on the grounds that it would be ''unnecessary and overly burdensome, outweighing any potential benefit.'' [72] SIFMA agreed that municipal advisory clients should have access to information regarding a municipal entity's legal and disciplinary events, and that clients should receive notifications of material new disclosures. However, in SIFMA's view, the additional requirement would not create any benefit for a municipal advisor's client and would result in ''additional paperwork burdens'' for the municipal advisor. SIFMA added that Form MA and MA–I disclosures, in a manner similar to SEC Forms BD and ADV and the Financial Industry Regulatory Authority (''FINRA'') Form U4, already require an explanation of the events that would also be required to be disclosed and explained under proposed subsection (c)(iv). In response to SIFMA's comments, the MSRB stated that requiring a municipal advisor to provide a brief explanation of the basis for the materiality of each change or addition would allow a municipal entity client to assess the effect that such changes may have on the municipal advisory relationship and evaluate whether it should seek or review additional information.[73] When developing this amendment, the MSRB stated that it gave due consideration to comments submitted by GFOA suggesting changes to the information disclosures that GFOA believed would allow issuers to focus more efficiently on disclosures that would be material to them and affect them directly.

NAMA requested the MSRB provide more clarity about the term ''detailed information'' in the requirement in subsection (c)(iii) that the municipal advisor provide ''detailed information specifying where the client may electronically access the municipal advisor's most recent Form MA and each most recent Form MA–I filed with the Commission.'' [74] NAMA suggested the MSRB provide non-exclusive examples; for example, allowing municipal advisors to provide clients with a link to the municipal advisor's EDGAR page. In response to the comment, the MSRB stated that a municipal advisor would be able to satisfy this aspect of its disclosure obligation by, for example, providing its client with a functioning Uniform Resource Locator (''URL'') to the municipal advisor's most recent Form MA or MA–I filed with the SEC through the EDGAR system.[75] The MSRB noted that this was only an example and does not preclude other methods of compliance.

F. Documentation Related to Recommendations

BDA and First Southwest expressed concern that documentation requirements for recommendations are too burdensome.[76] First Southwest estimated that municipal advisors may spend between 20% and 30% of their time writing letters to document compliance, providing a laundry list of consequences that would dilute the advice given, ''similar to the way G–17 letters from underwriters have become boiler plate disclosures and have lost significance.'' [77] BDA suggested that the proposed rule should specifically state that such communication to clients under section (d) may be oral and is not required to be in writing.[78] BDA was concerned that informing a client of risks, benefits or other aspects of a transaction in writing may not be in the

[65] *See id.* (citing MSRB Interpretive Notice Concerning the Application of MSRB Rule G–17 to Underwriters of Municipal Securities, dated August 2, 2012).

[66] *See* Proposing Release, 80 FR 26752, at 26764–65; *see also* August Response Letter.

[67] *See* letters from GFOA dated June 15, 2015 and NAMA dated May 29, 2015.

[68] *See* GFOA letter dated June 15, 2015.

[69] *See* August Response Letter.

[70] *See* Amendment No. 1.

[71] *See* August Response Letter.

[72] *See* SIFMA letter dated September 11, 2015.

[73] *See* December Response Letter.

[74] *See* NAMA letter dated May 29, 2015.

[75] *See* August Response Letter.

[76] *See* letters from BDA dated May 29, 2015 and First Southwest dated May 29, 2015.

[77] *See* First Southwest letter dated May 29, 2015.

[78] *See* BDA letter dated May 29, 2015.

client's best interest because that writing could be obtainable through Freedom of Information Act requests and other means.

In response, the MSRB stated that the documentation required by Proposed Rule G–8(h)(iv) is an appropriately tailored recordkeeping requirement that will assist regulatory examiners in assessing the compliance of municipal advisors with Proposed Rule G–42.[79] In addition, the MSRB stated its belief that the recordkeeping requirements will not be overly burdensome because municipal advisors would be required to maintain only the documents created by the municipal advisor that were material to its review of a recommendation by another party or that memorialize the basis for any conclusions as to suitability.

In response to Amendment No. 1 or the OIP, BDA, Columbia Capital, NAMA and SIFMA expressed concern over the documentation requirement under Proposed Rule G–8(h)(iv), which would require a municipal advisor to keep a copy of any document created by a municipal advisor ''that was material to its review of a recommendation by another party or that memorializes the basis for any determination as to suitability.'' [80] BDA, Columbia Capital and SIFMA expressed concern about the examination of municipal advisors by financial regulators (such as the SEC and FINRA), including the question of how the regulators would determine whether a municipal advisor had complied with the proposed requirements related to recommendations and documentation retention. The commenters stated that the proposed rule change should provide additional guidance on the documentation to be maintained. BDA stated that a transaction on which a municipal advisor is advising may take place over the course of years, and that it would be difficult for a municipal advisor to have a financial regulatory examiner come in after the completion of a transaction and examine the municipal advisor's documentation process. BDA noted that ''it just takes one element of omission to find a firm at fault.'' [81] Finally, BDA commented that, without additional guidance about how a municipal advisor would comply with the proposed provisions addressing recommendations, a discrepancy may occur between information the examiner desired to review and that which the municipal advisor could provide.

Columbia Capital commented that it would be very difficult for a municipal advisor to ''document the rationale for every point of advice in a municipal advisory relationship, including documenting the rationale for every conceivable path not taken.'' [82] Columbia Capital stated that, without additional specificity, a municipal advisor's recommendation could be subject to unreasonable scrutiny by examiners that would not adequately take into account the totality of the circumstances that impacted the formation of the recommendation provided by the municipal advisor. SIFMA also commented that it is unclear as to what documentation should be maintained to ''demonstrate in a regulatory examination'' that which the municipal advisor relied upon in making a suitability determination.[83]

In addition, Columbia Capital stated its belief that the recordkeeping requirements ''might actually conflict with [a firm's] fiduciary duty where [the] client desires to maintain such internal dialogue in confidence'' but where the client (in particular public clients) is subject to open records laws that may frustrate that desire. NAMA stated that the proposed rule is unclear as to whether the document requirements apply to the financing ''as a whole'' or whether they apply to ''every facet of a transaction'' which could span several months.[84] SIFMA stated that the proposed documentation requirement is ''vastly more burdensome'' than the documentation requirement currently applicable to investment advisers.

In response to comments, the MSRB reiterated its belief that Proposed Rule G–8(h)(iv) is an appropriately tailored recordkeeping requirement that will assist regulatory examiners in assessing the compliance of municipal advisors with Proposed Rule G–42.[85] The MSRB stated that the recordkeeping requirement will not be overly burdensome because municipal advisors would be required to maintain only the documents created by the municipal advisor that: (a) Were material to its review of a recommendation by another party or (b) memorialize the basis for any conclusions as to suitability of a recommendation the municipal advisor provided. By limiting the proposed recordkeeping requirement to documents that were material to the review of a recommendation or that memorialize the basis for a suitability determination as to a recommendation, the MSRB stated it does not believe that the proposed rule would require, as suggested by Columbia Capital, a municipal advisor ''to document the rationale for every point of advice'' and ''the rationale for every conceivable path not taken.'' In the Proposing Release, the MSRB discussed communications between municipal advisors and their clients, noting that certain communications would constitute recommendations of a municipal securities transaction or municipal financial product and others, advice.[86] The MSRB clarified that only the former triggers a suitability determination under the proposed rule. Therefore, if a municipal advisor's communication with its municipal entity or obligated person client is advice but not a recommendation, the proposed documentation requirement would not apply.

With regard to Columbia Capital's concerns about a municipal advisor maintaining a level of confidentiality as may be requested by a client, the MSRB stated that the proposed rule would not create the conflict discussed because Proposed Rule G–8(h)(iv) would not require a municipal advisor to deliver documents that must be maintained by the municipal advisor to the client or into the possession of a party not privy to, or contemplated under, the municipal advisory relationship.[87] Under Proposed Rule G–42(d), a municipal advisor would be required to ''inform'' its client, in a manner that comports with its duty of care and the expressed terms of its agreement with its client, of certain aspects of its recommendations, and, the municipal advisor and its client would have some discretion as to the manner in which that information is provided. The MSRB stated its belief that the discretion provided for in the proposed rule will allow a municipal advisor to reasonably accommodate a request by a municipal advisory client such as that described by Columbia Capital and also comply with its fiduciary obligations.

G. Suitability Analysis

NAMA supported section (d)'s requirements to inform clients about reasons for a recommendation, however, it stated that greater clarity through a non-exclusive list of examples of how regulated entities could comply with the

[79] *See* August Response Letter.

[80] *See* letters from BDA dated September 11, 2015; Columbia Capital dated September 10, 2015; NAMA dated September 11, 2015; and SIFMA dated September 11, 2015.

[81] *See* BDA letter dated September 11, 2015.

[82] *See* Columbia Capital letter dated September 11, 2015.

[83] *See* SIFMA letter dated September 11, 2015.

[84] *See* NAMA letter dated September 11, 2015.

[85] *See* December Response Letter.

[86] *See id.* (citing Proposing Release, 80 FR 26752, at 26756).

[87] *See* December Response Letter.

regulation was needed.[88] Specifically, NAMA suggested the MSRB provide examples of how a municipal advisor should perform its reasonable diligence to satisfy the criteria listed in section (d). NAMA also requested guidance on section (d)(iii), regarding informing a client whether the municipal advisor investigated or considered reasonably feasible alternatives because NAMA was concerned that a municipal advisor would be required to provide a list that was exhaustive and non-germane to the client.

PFM requested the MSRB provide a more concise definition of the term ''suitable'' to enable municipal advisors to comply with the requirements and stated that the ''perfunctory list of generic factors'' for consideration in paragraph .08 of the Supplementary Material failed to provide municipal advisors with a clear definition of such an important term.[89]

The MSRB responded to the comments by stating that it chose not to take a more prescriptive or descriptive approach to determining suitability in the proposed rule change because it would risk creating inflexible requirements that would fail to adequately account for the diversity of municipal advisors, the activities in which they engage and the varying needs of clients.[90] In response to NAMA's request for additional guidance on proposed subsection (d)(iii), the MSRB stated that the language in that subsection would not require a municipal advisor to provide its client with an exhaustive list of ''alternative financings'' particularly if such alternative financings are not germane to the client. The MSRB stated that the provision also would not require the municipal advisor to conduct a suitability analysis on any ''reasonably feasible alternative'' considered or investigated by the municipal advisor. Instead, the MSRB noted that the municipal advisor would be obligated only to inform clients whether or not it considered or investigated reasonably feasible alternatives, and the decision whether to have the municipal advisor discuss the alternatives it considered or investigated would be left to the discretion of the municipal advisor and its client.

In response to Amendment No. 1 or the OIP, SIFMA commented that it is unclear when a communication constitutes a ''recommendation'' (thus triggering a suitability analysis under the proposed rule change), as opposed to ''advice'' or, as SIFMA referenced, ''ancillary advice.'' [91] According to SIFMA's comment, in order to ''design effective policies and procedures, and to evidence compliance with this obligation'' municipal advisors need to be certain of when their suitability obligation applies. In SIFMA's view, because of the uncertainty created by the proposed rule regarding ''what is a recommendation versus what is ancillary advice,'' FINRA and SEC examiners also would need additional guidance to properly examine for compliance with the rule.

In response to SIFMA's comments, the MSRB stated that the proposed rule would adopt, and apply to municipal advisors, the existing MSRB interpretive guidance regarding the general principles currently applicable to dealers for determining whether a particular communication constitutes a recommendation of a securities transaction.[92] In conformance with that interpretive guidance, the MSRB noted that it has stated that a municipal advisor's communication to its client that could reasonably be viewed as a ''call to action'' to engage in a municipal securities transaction or enter into a municipal financial product would be considered a recommendation and would obligate the municipal advisor to conduct a suitability analysis of its recommendation that adheres to the requirement established by the proposed rule. The MSRB also noted that it previously has stated that, depending on all of the facts and circumstances, communications by a municipal advisor to a client that relate to, but are not recommendations of, a municipal securities transaction or municipal financial product might constitute advice (and therefore trigger many other provisions of the proposed rule change) but would not trigger the suitability obligation set forth in proposed section (d). The MSRB stated that providing a more prescriptive definition of the term ''recommendation'' is unnecessary and that the proposed rule, along with the related and referenced interpretive guidance that has been in place for dealers for over a decade, will provide municipal advisors, and SEC and FINRA examiners with sufficient guidance on this subject.

In response to the Proposing Release, GFOA expressed concern that the language in subsection (d)(ii) implies that municipal advisors would be permitted to make a recommendation to a client that is unsuitable, which seemed contrary to the proposed rule's duty of care and loyalty requirements.[93] In Amendment No. 1, the MSRB revised the language in subsection (d)(ii) in response to GFOA's comment.[94]

H. Sophisticated Municipal Issuers

First Southwest requested an exemption to the suitability standard in proposed section (d) and paragraph .08 of the Supplementary Material for ''sophisticated municipal issuers.'' [95] First Southwest stated that certain issuers are capable of independently evaluating risks in issuing municipal securities, and exercising independent judgment in evaluating recommendations of a municipal advisor. In response to the comment, the MSRB noted that when the SEC adopted the final municipal advisor registration rule [96] it did not include an exemption from registration as a municipal advisor for persons providing advice to clients of a certain sophistication.[97] The MSRB stated its belief that it would be premature to categorically exclude certain clients from the protections of the proposed rule given that municipal advisors have become subject only recently to the SEC's regulatory framework governing their registration and the MSRB's developing regulatory framework for municipal advisors.

I. Inadvertent Advice

SIFMA suggested that the safe harbor in paragraph .06 [98] of the Supplementary Material for inadvertent advice be expanded to include the prohibition on principal transactions.[99] SIFMA argued that firms would be unlikely to rely on the safe harbor unless it also provided an exemption for inadvertent advice triggering the prohibition on principal transactions.

In response to these comments, the MSRB stated that section (d) of Proposed Rule G–42 applies only in the case where a municipal advisor makes a recommendation of a municipal securities transaction or municipal

[88] *See* NAMA letter dated May 29, 2015.

[89] *See* PFM letter dated May 29, 2015.

[90] *See* August Response Letter.

[91] *See* SIFMA letter dated September 11, 2015.

[92] *See* December Response Letter (citing Proposing Release, 80 FR 26752, at 26756 n. 18 (citing MSRB Rule G–19 and MSRB Notice 2002–30 (September 25, 2002), Notice Regarding Application of Rule G–19, on Suitability of Recommendations and Transactions, to Online Communications)).

[93] *See* GFOA letter dated June 15, 2015.

[94] *See* August Response Letter.

[95] *See* First Southwest letter dated May 29, 2015.

[96] *See* Registration of Municipal Advisors, Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467 (November 12, 2013) (''SEC Final Rule'').

[97] *See* August Response Letter.

[98] Proposed paragraph .06 was renumbered in Amendment No. 1 as proposed paragraph .07.

[99] *See* SIFMA letter dated May 28, 2015.

financial product, or where within the scope of the engagement and at the client's request, the municipal advisor reviews a recommendation of a third party.[100] The MSRB believes these limitations will address SIFMA's concerns to some degree. In addition, the MSRB stated that other commenters expressed concern that if the safe harbor were to relieve municipal advisors from compliance with proposed subsection (e)(ii), on principal transactions, the provision might be misinterpreted or misused in a manner contrary to the purposes of the SEC's registration regime and the fiduciary duty owed to municipal entity clients.

In response to Amendment No. 1 or the OIP, Columbia Capital expressed concern regarding the inadvertent advice exemption, stating it is ''rife for abuse'' and that the MSRB should define ''inadvertent'' very narrowly.[101] WM Financial argued that the inadvertent advice provision creates a loophole that would allow broker dealers to serve as financial advisors (without a fiduciary duty) and then switch to serving as an underwriter by claiming that such advice was inadvertent.[102] WM Financial suggested that any entity relying on the inadvertent advice provision should be required to file the required documentation not only with the issuer, but also with the MSRB, and that the filing should be made public. In addition, WM Financial suggested that any entity relying on the inadvertent advice provision be allowed to rely on the exception only one time in any calendar year.

In response to the comments, the MSRB noted that the inadvertent advice exemption would only apply when a municipal advisor inadvertently engages in municipal advisory activities but does not intend to continue the municipal advisory activities or enter into a municipal advisory relationship.[103] The MSRB further explained that the proposed paragraph would only relieve the municipal advisor from complying with proposed sections (b) and (c) (relating to disclosure of conflicts of interest and documentation of the relationship) of Proposed Rule G–42, and not any other requirements. The MSRB believes that proposed paragraph .07 is sufficiently clear with regard to the narrow relief it allows and that the obligations that municipal advisors would be required to undertake to obtain that relief are adequate to curb the types of abuse about which commenters have expressed concern.

J. Prohibition on Delivering Inaccurate Invoices

SIFMA expressed support for the prohibition on delivering inaccurate invoices, but requested the addition of materiality and knowledge qualifiers (*i.e.,* a municipal advisor may not *intentionally* deliver a *materially* inaccurate invoice), so that immaterial or unintentional errors would not be prohibited.[104] In response to the comment, the MSRB modified Proposed Rule G–42(e)(i)(B) to prohibit ''delivering an invoice . . . for municipal advisory activities that is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities'' and to delete the words ''do not accurately reflect'' within the same provision.[105] The MSRB declined to add a state-of-mind requirement as SIFMA requested because it would not sufficiently protect municipal entity and obligated person clients.

K. Prohibited Principal Transactions

In response to the Proposing Release, ten commenters expressed a variety of concerns with the prohibition on certain principal transactions in Proposed Rule G–42(e)(ii).[106] In response to Amendment No. 1 or the OIP, seven commenters addressed the proposed prohibition on certain principal transactions.[107] In Amendment No. 2, the MSRB incorporated the Exception to the principal transaction ban in response to the comments received. In response to Amendment No. 2, six commenters addressed the Exception.[108]

1. Consistency With Exchange Act

BDA, FSI, Millar Jiles, SIFMA and Zions commented that, if no exception to the proposed principal transaction ban were added, the Proposed Rule would be inconsistent with one or more of the following provisions of the Exchange Act: [109] Section 15B(b)(2)(L),[110] Section 15B(b)(2)(L)(i),[111] Section 15B(b)(2)(C),[112] and Section 3(f).[113] The commenters suggested exceptions to the proposed ban or other changes, including an exception modeled on those found in other regulatory regimes, an exception when advice is provided to a municipal entity client that is incidental to securities execution services, an exception limited to riskless principal transactions in certain fixed income securities, an exception when the municipal entity is otherwise represented with respect to the principal transaction by another registered municipal advisor, an exception for affiliates or remote businesses, and modifications to narrow the scope of the prohibition.

The MSRB responded to the foregoing comments by incorporating the Exception to the principal transaction ban, as discussed below under ''Exception to Principal Transaction Ban.''

2. Comparison With Similar Regulatory Regimes

In response to the Proposing Release, SIFMA and Zions expressed concerns that the prohibition on principal transactions is overbroad and inconsistent with existing regulatory regimes regarding financial professionals.[114] Both commenters argued that restrictions on principal transactions for municipal advisors and their affiliates should be consistent with those on investment advisers, who are permitted to engage in principal transactions provided they make relevant disclosures and obtain client consent.

In response to Amendment No. 1 or the OIP, BDA, Coastal Securities, FSI, Millar Jiles, SIFMA and Zions commented that the principal transaction ban should be revised to

[100] *See* August Response Letter.

[101] *See* Columbia Capital letter dated September 10, 2015.

[102] *See* WM Financial letters dated May 29, 2015 and September 11, 2015.

[103] *See* December Response Letter.

[104] *See* SIFMA letter dated May 28, 2015.

[105] *See* Amendment No. 1; *see also* August Response Letter.

[106] *See* letters from SIFMA dated May 28, 2015; Zions dated May 29, 2015; ABA dated May 29, 2015; BDA dated May 29, 2015; GKB dated May 29, 2015; Millar Jiles dated May 29, 2015; FSI dated May 29, 2015; GFOA dated June 15, 2015; Wells Fargo dated May 29, 2015; and NAMA dated May 29, 2015.

[107] *See* letters from BDA dated September 11, 2015 and December 1, 2015; Coastal Securities dated September 11, 2015; FSI dated September 11, 2015; GFOA dated September 14, 2015; Millar Jiles dated September 11, 2015; SIFMA dated September 11, 2015; and Zions dated September 10, 2015.

[108] *See* letters from BDA dated December 1, 2015; FSI dated December 1, 2015; GFOA dated December 1, 2015; NAMA dated December 1, 2015; SIFMA dated December 1, 2015; and Spencer Wright dated December 16, 2015.

[109] *See* letters from BDA dated September 11, 2015; FSI dated September 11, 2015; Millar Jiles dated September 11, 2015; SIFMA dated September 11, 2015; and Zions dated September 10, 2015 (raising concerns regarding the following provisions of the Exchange Act, in connection with the principal transaction ban: Section 15B(b)(2)(L) (SIFMA and Zions); Section 15B(b)(2)(L)(i) (BDA, FSI, SIFMA and Zions); Section 15B(b)(2)(C) (FSI, SIFMA and Zions); and Section 3(f) (Millar Jiles and SIFMA)).

[110] 15 U.S.C. 78*o*–4(b)(2)(L).

[111] 15 U.S.C. 78*o*–4(b)(2)(L)(i).

[112] 15 U.S.C. 78*o*–4(b)(2)(C).

[113] 15 U.S.C. 78c(f).

[114] *See* letters from SIFMA dated May 28, 2015 and Zions dated May 29, 2015.

permit municipal advisors to engage in principal transactions with their municipal entity clients, provided that disclosure of conflicts is made to the client and the client consents.[115] Commenters suggested that the MSRB consider incorporating an exception to the proposed ban modeled on, or similar to, Section 206(3) of the Investment Advisers Act of 1940 (''Advisers Act'') [116] or Advisers Act Rule 206(3)–3(T),[117] available to firms dually registered as a broker-dealer and investment adviser.[118] FSI and Millar Jiles stated that a ban on principal transactions was unnecessary in view of the fiduciary relationship between a municipal advisor and its municipal entity client. Zions commented that the proposed ban is inconsistent with the federal regulation of investment advisers, and stated that the MSRB has no basis for treating municipal advisors differently than investment advisers when setting fiduciary duty standards, and municipal advisors should be permitted to engage in principal transactions with their municipal entity clients, provided that advice and consent requirements are met. FSI suggested an exception to the ban could include certain disclosure and client consent provisions similar to Advisers Act Temporary Rule 206(3)–3T that permits investment advisers that are also broker-dealers to act in a principal capacity in transactions with certain advisory clients.[119] FSI also suggested the proposed exception be limited to certain fixed-income securities as defined by Rule 10b–10(d)(4).

The MSRB responded to the foregoing comments by incorporating the Exception to the principal transaction ban, as discussed below under ''Exception to Principal Transaction Ban.''

3. Advice Incidental to Securities Execution Services

FSI, GFOA and SIFMA requested an exemption to the principal transaction prohibition when advice is provided to a municipal entity client that is incidental to or ancillary to a broker-dealer's execution of securities transactions, including transactions involving municipal bond proceeds or municipal escrow funds.[120] GFOA expressed concern that the proposed prohibition could force small governments to establish ''a more expensive fee-based arrangement with an investment adviser in order to receive this very limited type of advice on investments that are not risky.'' [121]

In response to Amendment No. 1 or the OIP, BDA, FSI, GFOA, and SIFMA also suggested that the MSRB consider an exception to the ban for limited advice that is incidental to securities execution services.[122] GFOA acknowledged that the ban makes sense in the context of a traditional financial advisor, however, GFOA was concerned about what it viewed to be a removal of the issuer from the conflicts of interest process and the lack of an exception to the proposed ban regarding the investment of proceeds of municipal securities and municipal escrow investments.[123] FSI stated that a ban on transactions, where the advice is incidental to the securities execution services, would impose an unnecessary burden on competition, and suggested an exception be incorporated for transactions executed in such circumstances.[124] FSI also suggested that the exception could be limited to transactions in certain fixed income securities or, alternatively, limited to riskless principal transactions in certain fixed income securities. Commenters, including BDA, FSI, GFOA, Millar Jiles, SIFMA and Zions, noted the importance, in their view, of: (i) Preserving municipal entities' choice and access to services and products at favorable prices; (ii) preserving municipal entities' access to financial advisors with whom such municipal entities have relationships; and (iii) avoiding increased costs to municipal entities.[125]

The MSRB responded to the foregoing comments by incorporating the Exception to the principal transaction ban, as discussed below under ''Exception to Principal Transaction Ban.''

4. Scope of Principal Transaction Ban: ''Directly Related To''

BDA, GKB and SIFMA expressed concern that the language in subsection (e)(ii) limiting the principal transaction prohibition to transactions ''directly related to the same municipal securities transaction or municipal financial product'' is vague or overly broad.[126] One of the commenters proposed alternative language prohibiting a principal transaction ''if the structure, timing or terms of such principal transaction was established on the advice of the municipal advisor. . . .'' [127] The commenter also requested clarification regarding the application of the principal transaction ban to several specific scenarios.[128]

SIFMA argued that any prohibition should be more narrowly tailored to prevent principal transactions directly related to the advice provided by the municipal advisor.[129] SIFMA believed that, as written, the prohibition would prevent a firm from acting as counterparty on a swap after having advised a municipal entity client on investing proceeds from a connected issuance of municipal securities. SIFMA proposed alternative language prohibiting principal transactions ''directly related to the *advice rendered by such municipal advisor.''* SIFMA also requested clarification regarding when a ban would end because as written, the prohibition would require firms to check for advisory relationships that may have ended long before the proposed principal transaction takes place.

In response to Amendment No. 1 or the OIP, SIFMA commented that the MSRB failed to consider a suggestion to amend the ban to limit its scope to principal transactions that are directly related to the advice provided by the municipal advisor.[130]

In response to the comments, the MSRB determined not to narrow, broaden or otherwise modify the standard in this regard.[131] The MSRB stated its belief that the alternative rule text suggested by SIFMA would not be a more effective or efficient means for achieving the stated objective of the proposed ban, which is to eliminate a category of particularly acute conflicts of interest that would arise in a

[115] *See* letters from BDA dated September 11, 2015; Coastal Securities dated September 11, 2015; FSI dated September 11, 2015; Millar Jiles dated September 11, 2015; SIFMA dated September 11, 2015; and Zions dated September 10, 2015.

[116] 15 U.S.C. 80b–6(3) (''Section 206(3)'').

[117] 17 CFR 275.206(3)–3T (''IA Rule'').

[118] *See, e.g.,* letters from BDA dated September 11, 2015; FSI dated September 11, 2015; Millar Jiles dated September 11, 2015; SIFMA dated September 11, 2015; and Zions dated September 10, 2015.

[119] *See* FSI letter dated May 29, 2015.

[120] *See* letters from FSI dated September 11, 2015; GFOA dated June 15, 2015; and SIFMA dated May 28, 2015.

[121] *See* GFOA letter dated June 15, 2015.

[122] *See* letters from BDA dated November 4, 2015; FSI dated September 11, 2015; GFOA dated September 14, 2015; and SIFMA dated September 11, 2015.

[123] *See* GFOA letter dated June 15, 2015.

[124] *See* FSI letters dated May 29, 2015 and September 11, 2015.

[125] *See* letters from BDA dated September 11, 2015 and November 4, 2015; FSI dated September 11, 2015; GFOA dated September 14, 2015; Millar Jiles dated September 11, 2015; SIFMA dated September 11, 2015; and Zions dated September 10, 2015.

[126] *See* letters from BDA dated May 29, 2015; GKB dated May 29, 2015; and SIFMA dated May 28, 2015.

[127] *See* letters from BDA dated May 29, 2015 and GKB dated May 29, 2015.

[128] *See* BDA letter dated May 29, 2015.

[129] *See* SIFMA letter dated May 28, 2015.

[130] *See* SIFMA letter dated September 11, 2015.

[131] *See* MSRB Response Letters.

fiduciary relationship between a municipal advisor and its municipal entity client. In this context, the MSRB noted that the suggested change could leave transactions that have a high risk of self-dealing insufficiently addressed.

The MSRB modified the proposed ban to incorporate the Exception, discussed below under ''Exception to Prohibited Principal Transactions.'' In light of the MSRB's incorporation of the Exception, the MSRB stated its belief that it is not appropriate to further modify the ban at this time.[132]

5. Affiliates or ''Remote Businesses''

In response to the Proposing Release, SIFMA and Wells Fargo addressed concerns regarding the impact of the principal transaction prohibition on affiliates of municipal advisors.[133] Wells Fargo stated that the MSRB should exempt municipal advisor affiliates operating with information barriers, and stated that if an affiliate has no actual knowledge of the municipal advisory relationship between the municipal entity client and the municipal advisor due to information barriers and governance structures, the risk of a conflict of interest is significantly diminished.[134] SIFMA proposed the addition of a knowledge standard (*i.e.,* to prohibit a municipal advisor and any affiliate from *knowingly* engaging in a prohibited principal transaction), arguing that such a knowledge standard is consistent with Section 206(3) of the Advisers Act.[135] SIFMA suggested that an investment vehicle such as a mutual fund that is advised by a municipal advisor or its affiliate should not itself be an ''affiliate'' of the municipal advisor solely on the basis of the advisory relationship. Otherwise, SIFMA argued the investment fund may be unable to invest in a municipal security if an affiliate of the fund's advisor acted as a municipal advisor on the transaction. SIFMA stated that the ban in this type of situation is unnecessary because mutual funds and similar vehicles have independent boards and their affiliates do not have significant equity stakes in the funds they advise.

In response to Amendment No. 1 or the OIP, SIFMA commented that the MSRB failed to consider limiting the application of the ban to affiliates of a municipal advisor that have no knowledge of the municipal advisory engagement, or more broadly to affiliates and business units of the municipal advisor that have no such knowledge.[136] SIFMA commented that the proposed rule would ''significantly harm competition'' because it would lead to municipal advisor firms exiting the municipal advisory marketplace. SIFMA commented that a decrease in municipal advisors may result in the remaining firms increasing their fees and a deterioration in the quality of the services provided by municipal advisory firms.

In response to the comments, the MSRB stated its belief that the proposed ban, as to affiliates, is appropriately targeted given the acute nature of the conflicts of interest presented and the risk of self-dealing by affiliates in transactions that are ''directly related'' to the municipal securities transaction or municipal financial product as to which the affiliated municipal advisor has provided advice.[137] The MSRB believes that the concerns expressed by various commenters, including the concerns regarding the potential impact on competition in the municipal advisory marketplace, will be substantially mitigated, if they at all manifest, by the MSRB's inclusion of the Exception to the principal transaction ban.

6. Bank Loans

Several commenters expressed concerns with proposed paragraph .11 of the Supplementary Material under which a bank loan would be subject to the prohibition on principal transactions if the loan was ''in an aggregate principal amount of $1,000,000 or more and economically equivalent to the purchase of one or more municipal securities.'' [138]

ABA expressed a general concern that banking organizations that are required to operate through a variety of affiliates and subsidiaries would fall within the scope of the ''common control'' definition in the statute and the prohibition would prevent a banking organization from providing ordinary bank services to a municipal entity.[139] ABA also requested the prohibition be amended to exclude bank loans made by an affiliate from the definition of ''other similar financial products'' if the bank enters into the loan after the municipal entity solicits bidders for such loan using a request for proposal and the bank intends to hold the loan on its books until maturity. ABA believed that there should be few concerns regarding conflicts if a loan is entered into by an affiliate of a municipal advisor and a municipal entity would be free to choose its lender based on factors most appropriate for the municipality and its taxpayers. In addition, ABA stated that the potential conflicts of interest should be substantially mitigated if a bank holds a loan on its books to maturity because in such cases, the commenter believes the interest of the municipal entity and the bank are aligned in that each party wants funding that serves the particular needs of the municipal entity and both parties must be satisfied that the loan can be repaid and desire that it be repaid.[140]

Similarly, Millar Jiles suggested that a municipal advisor should be able to satisfy its fiduciary obligation to a municipal entity by procuring bids for the proposed financing (and thus make a principal bank loan through an affiliated entity permissible), stating that if the affiliate of the municipal advisor were the lowest bidder, the municipality would be penalized by being forced to borrow at a higher rate under the proposed rule change.[141]

The MSRB responded that even if both elements (*i.e.,* the use of an RFP and intent to hold a loan to maturity) were incorporated as conditions to exclude certain principal transactions from the prohibition in Proposed Rule G–42(e)(ii), the conflicts of interest are not sufficiently mitigated to eliminate the concerns of overreaching and self-dealing and other actions inconsistent with the fiduciary duty between a municipal and its client.[142] The MSRB reasoned that the bank and borrower are counterparties with conflicting interests, and a lender's intent at one point in time to hold a loan on its books until maturity would provide insufficient controls or checks over conflicts of interest inherent in the transaction. The MSRB explained that at any time after making the loan, a bank would be free to change its intent and sell the loan if doing so was in the bank's best interest. The MSRB also stated its belief that an RFP process does not protect a municipal entity sufficiently from conflicts of interest because, for example, a municipal advisor may be able to inappropriately influence the municipal entity client to obtain a loan instead of issuing a municipal security,

[132] *See* December Response Letter.

[133] *See* letters of SIFMA dated May 28, 2015 and Wells Fargo dated May 29, 2015.

[134] *See* Wells Fargo letter dated May 29, 2015.

[135] *See* SIFMA letter dated May 28, 2015.

[136] The MSRB responded to a prior comment by SIFMA regarding this matter, stating that SIFMA's suggestion to add a knowledge qualifier would be overly stringent, which could hinder regulatory examinations and enforcement. *See* August Response Letter.

[137] *See* December Response Letter.

[138] *See* letters from ABA dated May 29, 2015; Millar Jiles dated May 29, 2015; BDA dated May 29, 2015; and Zions dated May 29, 2015.

[139] *See* ABA letter dated May 29, 2015.

[140] *Id.; see also* Zions letter dated May 29, 2015.

[141] *See* Millar Jiles letter dated May 29, 2015.

[142] *See* August Response Letter.

or to influence the RFP process or requirements to favor the selection of the municipal advisor's bank affiliate as lender.

Zions argued that bank loans ''should be excluded in their entirety'' from Proposed Rule G–42.[143] Zions believed that it would be paradoxical to allow individuals and private businesses to borrow money from banks that are fiduciaries, but to prevent municipal entities from doing the same. Alternatively, Zions requested that MSRB increase the threshold loan amount in paragraph .11 of the Supplementary Material to align with the bank qualified exemption amount in the Internal Revenue Code, which it states is currently $10 million.

In response to Zions's comments, the MSRB noted that proposed paragraph .12, on principal transactions—other similar financial products, is limited substantially and would target only those loans that would be the same as, or directly related to, the municipal securities transaction or municipal financial product as to which the municipal advisor is providing or has provided advice and which would be considered ''economically equivalent to the purchase of one or more municipal securities.'' [144] The MSRB also responded to the comments regarding increasing the threshold from $1 million to $10 million by stating the same threshold is used in other aspects of the regulation of municipal securities such as SEC Rule 15c2–12,[145] and that after the MSRB has experience with the rule as in effect, the MSRB may solicit information regarding whether the threshold should be modified.

In response to Amendment No. 1 or the OIP, Zions commented that the principal transaction ban is overly broad and inconsistent with federal banking laws, and, as an alternative to generally permitting principal transactions (subject to disclosure and consent requirements), bank loans should be excluded in their entirety from the ban.[146] Zions commented that banks, as highly regulated entities, should be allowed to continue offering traditional banking services to municipal entities, including as principal. Zions further commented that determining on a case-by-case basis whether a particular transaction is economically equivalent to the purchase of one or more municipal securities is unnecessarily complex and costly for products that are already thoroughly regulated. As an example of the complexity of applying the standard, Zions stated that the written evidence of indebtedness from municipal entities must have virtually the same structure and provisions that would be in place for a municipal security. Zions stated that the only clear way to distinguish between direct bank loans and municipal securities is to look at the intent of the acquirer at the time of acquisition. In Zions's view, if the indebtedness is acquired with an intent to distribute, the instrument should be deemed a security, but if a bank acquires the indebtedness directly for its own portfolio with no intent to distribute, the instrument is, and should be treated as, a bank loan. If bank loans are potentially subject to the ban, Zions suggested, as an alternative, that the threshold bank loan amount be higher than $1 million. Zions believed that the threshold amount should be consistent with, and pegged to, the $10 million threshold for bank-qualified obligations under Section 265 of the Internal Revenue Code.[147] In addition, Zions commented that, for the Proposed Rule to be consistent with the Exchange Act, the proposed threshold should be raised to $10 million. Zions also commented that unless the threshold amount was increased, the proposed ban would be inconsistent with the goals of the Community Reinvestment Act (''CRA'').[148] Zions believed that the ban may prevent municipal advisors, such as Zions, from issuing direct loans to smaller and more remote municipal entities and/or cause banks to provide services to underserviced municipalities in less than all three of the required categories of the CRA (*i.e.,* lending, investments and financial services).

In response to Zions's comments, the MSRB stated that the concerns are addressed to some extent by the bank exemption from the definition of ''municipal advisor.'' [149] In addition, the MSRB stated that even in situations where a bank's provision of advice were not exempt and Proposed Rule G–42 and the ban applied, Zions's concerns referenced above and its concern regarding the impact to smaller communities or projects in such communities as a result of the proposed ban, should be substantially ameliorated because the MSRB has added the Exception. The MSRB explained that bank loans were included in the ban and should remain as a ''similar financial product'' because, as a matter of market practice, bank loans serve as a financing alternative to the issuance of municipal securities and pose a comparable, acute potential for self-dealing and other breaches of the fiduciary duty owed by a municipal advisor to a municipal entity client. The MSRB also stated that it does not find support in the comments for importing into the proposed term ''Other Similar Financial Products'' an unrelated dollar threshold (*i.e.,* $10 million) from a statutory provision regarding the bank qualification of municipal securities, in lieu of the proposed $1 million threshold.

In response to Zions's comments that the principal transaction ban should be eliminated because of its possible impact on the CRA, the MSRB noted that the proposed prohibition on principal transactions is narrowly targeted and would have a limited impact on a municipal advisor or its affiliate providing loans and financial services, generally. The MSRB also stated that Zions's comments do not demonstrate—and the MSRB is not aware of any indication—that Congress intended the requirements of the CRA to take precedence over other statutory and regulatory requirements.

BDA commented on the language of paragraph .11 of the Supplementary Material, arguing that the phrase ''economically equivalent'' is ''too ambiguous and does not provide clarity.'' [150] BDA acknowledged this phrase appeared intended to develop a standard that does not require the determination of when a bank loan constitutes a security, and acknowledged difficulties applying the *Reves* [151] test to make such a determination. However, BDA argued that this language will ''compound the confusion'' and requested that the MSRB be clear about which structural components of a direct purchase structure would cause it to fall within the scope of the transaction ban.

The MSRB responded that not all loans of $1 million or more would be considered an ''other similar financial product,'' and that determination would depend on the facts and circumstances regarding a particular loan, including structure and marketing.[152] In response to BDA's comment about applying the *Reves* test, the MSRB stated that *Reves* would not be the appropriate test to determine whether a bank loan is considered an ''other similar financial product,'' because the defined term is drafted intentionally to include bank

[143] *See* Zions letter dated May 29, 2015.

[144] *See* August Response Letter.

[145] 17 CFR 240.15c2–12(a).

[146] *See* Zions letter dated September 10, 2015.

[147] 26 U.S.C. 265 *et seq.*

[148] 12 U.S.C. 2901 *et seq.*

[149] *See* December Response Letter (citing 17 CFR 240.15Ba1–1(d)(e)(iii)).

[150] *See* BDA letter dated May 29, 2015.

[151] *Reves* v. *Ernst & Young,* 494 U.S. 56 (1990).

[152] *See* August Response Letter.

loans other than those that are a security.

Millar Jiles also expressed confusion regarding the ''economically equivalent'' language.[153] Millar Jiles requested clarity regarding the time period over which bank loans should be aggregated in order to determine whether a series of loans meets the ''aggregate principal amount'' threshold specified in paragraph .11 of the Supplementary Material. Millar Jiles also noted that the typical bank loan to a municipal entity is for the purchase of equipment and is payable over a term of less than five years, while the typical municipal security is secured by a pledge of revenues and is payable over a much longer term. Millar Jiles asked whether a bank loan of $1,500,000 which is secured by real or personal property and which is payable over a term of five years or less would be ''economically equivalent to the purchase of one or more municipal securities.''

In response to Millar Jiles's comments, the MSRB stated that whether one or more loans would be aggregated to reach the $1 million threshold would depend on the facts and circumstances surrounding the transactions, including but not limited to factors such as how close in time to the other the loans occurred, the purpose of each loan and the similarity of purpose among the loans, and whether such loans are components of a more comprehensive plan of financing. The MSRB clarified that no single factor would be determinative in such an analysis.

7. Separate Registered Municipal Advisor

SIFMA suggested the proposed subsection (e)(ii) be revised to permit an otherwise prohibited principal transaction where the municipal entity is represented by more than one municipal advisor, including a separate registered municipal advisor with respect to the principal transaction.[154] SIFMA argued this exemption would be comparable to the independent registered municipal advisor exemption, and would permit municipal entities to contract with a counterparty of their choice. SIFMA also noted this would be especially beneficial to municipal entities who may hire several municipal advisors for different elements of the same transaction.

The MSRB concluded that the incorporation at this stage of an exception to the ban like that suggested by SIFMA would be premature, add additional and unnecessary complexity, and be potentially burdensome to administer.[155] To provide appropriate protection to municipal entities while including an exception such as that suggested by SIFMA, it likely would be necessary to impose a number of conditions, as the MSRB previously noted.[156] The MSRB believes that the Exception to the proposed ban is the more appropriate approach to maintain the necessary protections for municipal entities, investors and the public while helping to ensure that issuers will continue to have access to a competitive market for municipal advisory and other financial services. The MSRB believes the Exception will provide a useful, practical path for a municipal advisor that is otherwise prohibited from engaging in certain principal transactions with its municipal entity client to do so, subject to the stated terms and conditions, and the MSRB has proposed the Exception to be responsive to the comments from a range of commenters, including SIFMA.

8. Governing Body Approval

In response to Amendment No. 1 or the OIP, BDA suggested that the principal transaction ban be amended not only for municipal advisors providing advice in connection with the trading as principal of securities, but also to allow most principal transactions if the transaction is approved by the governing body of the municipal entity client after the governing body has been fully informed about any actual or potential conflicts of interest associated with the principal transaction.[157]

In response to BDA's comment, the MSRB stated that BDA's proposed exception was quite broadly drawn and may, in many instances, not address the type of self-dealing transactions and the resulting abuses from self-dealing that the statutory requirements and the developing regulatory framework for municipal advisors were intended to address.[158] Even if both conditions (*i.e.,* disclosure of potential and actual conflicts of interest and a vote approving the transaction) were incorporated in an exception of the scope suggested by BDA, the MSRB believes that the conflicts of interest of the municipal entity's counter-party—its own municipal advisor—would be fully present, and not sufficiently mitigated to eliminate or substantially reduce the concerns of overreaching and self-dealing and other actions inconsistent with the fiduciary duty of the municipal advisor. The MSRB believes that the Exception to the proposed principal transaction ban is responsive to the concerns raised by the BDA generally.

9. Exception to Principal Transaction Ban

In response to Amendment No. 2, the SEC received six comment letters on the principal transaction ban and the proposed Exception.[159] NAMA supported the proposed rule change, as amended by Amendment No. 1 and Amendment No. 2, and urged the SEC to approve it ''without further erosion of the important principal transaction ban that is in place to protect issuers.'' [160] NAMA stated its belief that the Exception is sufficient to accomplish the proposed rule's objective ''in light of the difficulties principal transactions raise.''

SIFMA commented that the Exception shows movement toward a more workable construct than the complete principal transaction ban, but that ''importing into the Exception all of the procedural accoutrements of Section 206(3) and Rule 206(3)–3T, adopted in another context,'' has resulted in the Exception being unreasonably limited and unworkable in practice.[161] SIFMA also commented that the Exception's requirements for the alternative under proposed paragraph .14(d)(2) of the Supplementary Material to obtain additional transaction-by-transaction consent undermines the utility of obtaining advance written consent, and presents challenging issues of documentation and recordkeeping. SIFMA stated that it would present unworkable challenges to the municipal advisor and municipal entities that may seek to execute ordinary course transactions ''several times per day or more.'' SIFMA stated that the procedural requirements included in proposed paragraph .14(d)(2), in the context of Advisers Act Rule 206(3)–3T,[162] have discouraged broker-dealers from relying on that rule and have limited its ultimate utility.

BDA acknowledged that the Exception has addressed what it termed ''marginal considerations surrounding

[153] *See* Millar Jiles letter dated May 29, 2015.

[154] *See* SIFMA letters dated May 28, 2015 and September 11, 2015.

[155] *See* December Response Letter.

[156] *See* August Response Letter (identifying some of the substantial additional relationship documentation that likely would be required).

[157] *See* BDA letter dated November 4, 2015.

[158] *See* December Response Letter.

[159] *See* letters from BDA dated December 1, 2015; FSI dated December 1, 2015; GFOA dated December 1, 2015; NAMA dated December 7, 2015; SIFMA dated December 1, 2015; and Spencer Wright dated December 16, 2015.

[160] *See* NAMA letter dated December 7, 2015.

[161] *See* SIFMA letter dated December 1, 2015.

[162] 17 CFR 275.206(3)–3T.

the principal transactions ban,'' but, in its view, an exception would not be ''meaningful and useful'' unless the municipal advisor could ''provide[] advice to the municipal entity in connection with the issuance of municipal securities the proceeds of which are being invested.'' [163] BDA also commented that the consent and disclosure requirements are too burdensome to be useful, and, as a practical matter, the provisions would require transaction-by-transaction written consent since the alternative (to obtaining such consents) is too extensive to make it worth a dealer's effort. BDA recognized that the MSRB followed the principles in the investment adviser context, but believed that the approach ''does not take into consideration the vast differences between brokerage operations and investment advisory operations.''

In response to these comments, the MSRB first explained that the issues raised by the Exception arise with respect to a limited universe of municipal advisory activities—namely, advising with respect to the investment of proceeds of municipal securities or municipal escrow investments.[164] Next, the MSRB explained that advising with respect to the investment of municipal bond proceeds or municipal escrow investments falls under the municipal advisor regulatory regime only if no exclusion or exemption is available. The MSRB stated:

> If the firm is an investment adviser registered under the Advisers Act, the giving of investment advice on the investment of proceeds of municipal securities and municipal escrow investments can be excluded. If the municipal entity makes a qualifying request for proposals (''RFP'') or request for qualifications (''RFQ'') on the investment of proceeds of municipal securities or on municipal escrow investments, or a qualifying mini-RFP or mini-RFQ, the giving of advice in response can be exempt. If the municipal entity relies on the advice of an independent registered municipal advisor (''IRMA'') with respect to the same aspects of the investment of proceeds of municipal securities or municipal escrow investments, the firm's giving of advice can be exempt, subject to certain procedural requirements. Additionally, if a firm selling investments provides general information but no SEC-defined ''advice,'' then the firm need not rely on any exclusion or exemption at all.[165]

The MSRB explained that it is generally only beyond all of these scenarios that a firm could be subject to Proposed Rule G–42 and the principal transaction ban based on the providing of advice on the investment of bond proceeds or municipal escrow investments.

The MSRB further responded to commenters' concerns by stating that it crafted the Exception to the principal transaction ban drawing on Section 206(3) of the Advisers Act [166] and the IA Rule. The MSRB explained that its approach was influenced by a number of considerations, and stated that highly important among them were the recurring urgings by commenters during the development of Proposed Rule G–42 that the MSRB look to the regulatory regime applicable to investment advisers that provides such advisers the ability to engage in principal transactions with their clients, subject to requirements that include providing full disclosure and obtaining informed consent. The MSRB also noted that the IA Rule has been consistently considered by representatives of the industry, including SIFMA, to be operating as intended, well protecting investors, and extensively relied upon.

GFOA expressed a concern that the procedural requirements of the Exception would be too complex or burdensome and render the relief intended to be granted ''illusory.'' [167] GFOA stated that this has proved to be the case with similar requirements that apply to principal transactions by investment advisers. GFOA acknowledged, however, that in some respects it would ''need feedback from dealers before reaching [a] conclusion'' regarding the workability of the Exception, recognizing that its members are, of course, not broker-dealers.

In response to GFOA's comments, the MSRB stated that it is clear from repeated commentary by representatives of broker-dealers and supporting data, that similar provisions for investment advisers have been manageable and relied upon extensively, providing an ample basis to believe that the similar approach in proposed paragraph .14(d)(2) of the Supplementary Material will be useful and workable for a significant portion of those firms that wish to use an option under the Exception.

GFOA asked whether the consent required to be obtained under proposed paragraph .14(d)(1) of the Supplementary Material may be oral as opposed to written. The MSRB responded that oral consent would be sufficient under proposed paragraph .14(d)(1).[168]

GFOA also asked whether certain communications that would be required to be made in writing under the Exception may be made through email. In response, the MSRB stated that such communications may be made by email, provided the municipal advisor satisfies the same procedural conditions that the SEC applies to an investment adviser when communicating with customers via email as set forth in SEC guidance regarding the use of electronic media.[169]

GFOA asked whether a broker-dealer that has provided advice to a municipal entity based on one of the exclusions or exemptions to the definition of ''municipal advisor'' (*e.g.,* the underwriter exclusion) would be able to sell investments of bond proceeds to that municipal entity as principal, assuming that the requirements of proposed paragraph .14 are met. The MSRB stated that it assumes that, although not stated explicitly by GFOA, the firm in this scenario also would be providing advice on the investment of bond proceeds, without the availability of an exclusion or exemption for that advice. Otherwise, as the MSRB explained, the firm would not be a municipal advisor to the municipal entity and subject to Rule G–42 and the principal transaction ban. A firm in this scenario would not be specifically prohibited by the principal transaction ban from selling investments of bonds proceeds to a municipal entity as principal, assuming all of the limitations and conditions of proposed paragraph .14 are met.

GFOA asked why a broker-dealer that is a municipal advisor must, under MSRB Rule G–3,[170] pass the municipal advisor representative professional qualifications examination (Series 50) to sell ''Treasuries, agencies, and corporate debt securities when bond proceeds are invested, while the Series 7 suffices for the same broker to sell the same securities to a municipal entity when the funds invested are not bond proceeds.'' In response to this question, the MSRB explained the definition of ''municipal advisor'' in the SEC Final Rule and recounted the purpose of the

[163] *See* BDA letter dated December 1, 2015.

[164] *See* December Response Letter.

[165] *See id.* (citations omitted).

[166] 15 U.S.C. 80b–6(3).

[167] *See* GFOA letter dated December 1, 2015.

[168] *See* December Response Letter.

[169] *See id.* (citing Securities Act Release No. 7288 (May 9, 1996), 61 FR 24644 (May 15, 1996), SEC Interpretation of Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information (listing Section 206(3) as a provision to which the interpretation applies), available at: *https://www.sec.gov/rules/interp/33–7288.txt).*

[170] MSRB Rule G–3(d)(ii)(A) provides that: ''Every municipal advisor representative shall take and pass the Municipal Advisor Representative Qualification Examination [(also known as the Series 50 Examination)] prior to being qualified as a municipal advisor representative. The passing grade shall be determined by the Board.''

rulemaking on Rule G–3, on professional qualification requirements.[171]

In response to Amendment No. 2, SIFMA expressed a concern that the Exception would be available, according to proposed paragraph .14(a) of the Supplementary Material, only to a firm that is a registered broker-dealer and only for accounts subject to the Exchange Act, and the rules thereunder, and the rules of self-regulatory organization(s) of which it is a member.[172] SIFMA stated that the registration requirement is ''unnecessary'' and that the policy rationale for requiring the relevant account to be subject to Exchange Act regulation is ''unclear.'' SIFMA recognized that the SEC included these same requirements in the IA Rule, but commented that these requirements only exist in that rule due to the historical context in which the decision in *Financial Planning Association* v. *SEC* (''FPA'') [173] effectively required certain brokerage accounts to be treated as advisory accounts. SIFMA suggested that the Exception should be available to a firm that relies on an exemption from broker-dealer registration, such as a bank. In response to SIFMA's comment, the MSRB stated that the SEC's adopting release for the IA Rule indicates that, although historical context gave the SEC occasion to consider the IA Rule, the SEC also explained that:

> [A] principal consideration in including the requirements was that broker-dealers and their employees ''must comply with the comprehensive set of Commission and self-regulatory organization sales practice and best execution rules that apply to the relationship between a broker-dealer and its customer . . . .'' [174]

The MSRB stated that it similarly considers it necessary that transactions in reliance on the Exception be executed under this comprehensive set of investor protections. In response to SIFMA's concern regarding banks, the MSRB notes that the SEC has provided an exemption from the municipal advisor definition for banks providing advice on multiple subjects, which could mean that a bank engaging in particular principal transactions would not be subject to Proposed Rule G–42 at all.

FSI and SIFMA expressed concerns regarding the requirement, as part of the option under proposed paragraph .14(d)(2), that the municipal advisor provide its client with an annual summary statement.[175] SIFMA commented that the annual disclosure requirement and the special confirmation disclosure requirements are unwieldy and duplicative.[176] SIFMA also commented that both of these would require firms to implement costly operational changes. SIFMA further commented that it is unclear that municipal entity clients would benefit from these disclosures, having previously provided (and not having revoked) their consent to principal transactions, and receiving the ordinary confirmation disclosure required under Exchange Act Rule 10b-10 that would disclose the capacity in which the broker-dealer acted.

The MSRB first noted that a municipal advisor that considers the alternative provided under proposed paragraph .14(d)(1) comparatively more cost-effective, may make transaction-by-transaction written disclosure and obtain written or oral consent under that provision and not be subject to the additional procedural requirements under proposed paragraph.14(d)(2) to make use of the Exception.[177] Second, the MSRB explained that the annual summary statement requirement is designed to ensure that clients receive a periodic record of the principal trading activity in their accounts and are afforded an opportunity to assess the frequency with which their adviser engages in such trades. It stated that when the requirement was adopted as part of the IA Rule in 2007, the concept of an annual summary of transactions involving particular conflicts of interest was not novel, as it was derived from the cross-trade rule under the Advisers Act. The MSRB stated its belief that an annual summary of all principal transactions, which are executed subject to conflicts of interest where certain disclosures have been made and consents obtained, would be particularly beneficial to officials of municipal entities, including newly elected or appointed officials who, upon their election or appointment, may be required to review thoroughly and expeditiously the municipal entity's prior transactions and relationships with financial intermediaries to determine whether the same course with the same intermediaries should continue.

The MSRB also responded that the confirmation disclosure requirement, like the similar requirement under the IA Rule, is designed to ensure that clients are given a written notice and reminder of each transaction that the municipal advisor effects on a principal basis and that conflicts of interest are inherent in such transactions. The MSRB explained that, like under the IA Rule, a firm relying on proposed paragraph .14(d)(2) need not send a duplicate confirmation and may include additional required disclosures on a confirmation otherwise sent to a customer with respect to a particular principal transaction.

BDA commented that the option under proposed paragraph .14(d)(2) would not be meaningful or useful in part because, under proposed paragraph.14(d)(2)(A), neither the firm nor any affiliate would be permitted to be, at the time of a sale, an underwriter of the security.[178] The MSRB responded that it believes this is an important municipal entity protection measure in scenarios where the municipal advisor is not making transaction-by-transaction written disclosure.[179]

SIFMA and FSI objected to the exclusion from the Exception of transactions in connection with municipal escrow investments, and suggested that the Exception be extended.[180] The MSRB explained that the Exception does not so extend because the MSRB believes this is an area of heightened risk where, historically, significant abuses have occurred.[181]

SIFMA commented that the Exception should extend to the purchase and sale of money market instruments, commercial paper, certificates of deposit and other deposit instruments.[182] In SIFMA's view, there is no municipal entity protection reason to exclude them. Similarly, Spencer Wright

[171] *See* December Response Letter.

[172] *See* SIFMA letter dated December 1, 2015.

[173] *Financial Planning Association* v. *SEC,* 482 F.3d 481 (D.C. Cir. 2007).

[174] *See* December Response Letter (citing Advisers Act Release No. 2653 (September 24, 2007), at 28, 72 FR 55022, at 55029 (September 28, 2007) (Temporary Rule Regarding Principal Trades with Certain Advisory Clients); *see also* Advisers Act Release No. 3128 (December 28, 2010), at 22, 75 FR 82236, at 82241 (December 30, 2010) (Temporary Rule Regarding Principal Trades with Certain Advisory Clients) (''The condition that advisers seeking to rely on the rule must also be registered as broker-dealers and that each account with respect to which an adviser seeks to rely on the rule must be a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member, reflect what we believe is an important element of our balancing between easing regulatory burdens (by affording advisers an alternative means of compliance with section 206(3) of the Act) and meeting our investor protection objectives.'')).

[175] *See* letters from FSI dated December 1, 2015 and SIFMA dated December 1, 2015.

[176] *See* SIFMA letter dated December 1, 2015.

[177] *See* December Response Letter.

[178] *See* BDA letter dated December 1, 2015.

[179] *See* December Response Letter.

[180] *See* letters from FSI dated December 1, 2015 and SIFMA dated December 1, 2015.

[181] *See* December Response Letter.

[182] *See* SIFMA letter dated December 1, 2015.

commented that a ban on offering money market securities would adversely affect governments and limit their investment choices.[183]

The MSRB responded that the designated class of securities for purposes of the Exception is intended to address comments previously submitted that an absolute ban on principal transactions in fixed income securities, which are frequently sold by broker-dealers as principal or riskless principal, would be particularly problematic and such a ban would impose a substantial burden on municipal entities.[184] The MSRB also explained that municipal entities seeking to purchase or sell money market instruments and receive related advice would have sufficient access and flexibility to choose among various providers. In addition, the MSRB stated that it limited the fixed income securities for which the Exception is available to generally relatively liquid fixed income securities trading in relatively transparent markets, in order to raise significantly less risk for municipal entity clients. The MSRB does not believe it is appropriate to amend it to include this group of fixed income securities prior to implementing the Exception and reviewing its impact on the market.

SIFMA commented that it was unclear whether the Exception would extend to the affiliates of a municipal advisor, and that there does not appear to be any reason to permit a municipal advisor (if also a broker-dealer) to benefit from the Exception, and not similarly allow an affiliate (if also a broker-dealer, or if exempt from registration as a broker-dealer) to benefit from the Exception.[185] In response, the MSRB stated that the language of proposed paragraph .14 of the Supplementary Material makes clear that the use of the Exception would be limited to the municipal advisor and would not extend to its affiliates.[186] The MSRB explained that the Exception was designed to provide municipal entities access to services from known financial intermediaries with whom they have a relationship, and simultaneously to address and mitigate certain conflicts of interest when a single entity would provide advice that constitutes municipal advisory activity to its municipal entity client and also engage in a principal transaction with such client.

SIFMA, in response to Amendment No. 2, commented that it would be impractical for a firm relying on the Exception to comply with the conflicts disclosure and relationship documentation requirements of proposed sections (b) and (c), particularly on a transaction-by-transaction basis.[187] In response, the MSRB stated that the duties and obligations of a municipal advisor under Proposed Rule G–42 regarding the disclosures of conflicts of interest and other information and municipal advisory relationship documentation should not be waived or diminished because a municipal advisor uses the Exception under proposed paragraph .14.[188] The MSRB further explained that the ban, to which the Exception relates, only would apply in the case of clients that are municipal entities, meaning the disclosures and documentation at issue will always be in support of the fulfillment of a fiduciary duty. In addition, the MSRB stated that the proposed requirements under proposed sections (b) and (c) to provide disclosure of conflicts of interest and other information to a client and document the municipal advisory relationship, respectively, are separate and distinct requirements from the disclosures and consent conditions in proposed paragraph .14.

L. Consistency With Statutory Standards

In response to Amendment No. 1 or the OIP, several commenters expressed the view that the proposed rule change was inconsistent with certain provisions of the Exchange Act.[189] Cooperman, NAMA and SIFMA commented that the proposed rule change is inconsistent with Section 15B(b)(2)(L)(iv) of the Exchange Act,[190] which requires that the MSRB not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, and municipal entities, provided that there is robust protection against fraud. Cooperman suggested that the MSRB could ease the burden on smaller municipal advisors by providing more specific guidance as to the scope of the requirements and restrictions in the proposed rule change. NAMA believed that as a result of the proposed rule change, municipal advisors would have to devote significant time and resources to establish procedures to comply with what it termed ''vague and broad'' rules. In NAMA's view this will be particularly burdensome for smaller municipal advisors. SIFMA also commented that municipal entity clients (in particular small municipal entity clients) would be acutely and adversely affected by the proposed rule change because, in its view, the number of municipal advisors with which the municipal entity could engage would be limited to the point that the municipal entity would not have adequate access to a municipal advisor or would only have the requisite access at an unnecessarily high cost to the municipal entity client.

In response to Amendment No. 2, NAMA subsequently commented that it ''supports the current proposed Rule and urges the SEC to approve it in its current form without further erosion of the important principal transaction ban that is in place to protect investors.'' [191]

In response to Amendment No. 1 or the OIP, SIFMA stated that Proposed Rule G–42 was inconsistent with Section 15B(b)(2)(C) of the Exchange Act [192] as to the requirement that an MSRB rule not ''impose any burden on competition not necessary or appropriate.'' [193] In its view, the proposed rule change is overly burdensome, overly broad, introduces unnecessary costs, and would lead to an inappropriate reduction in competition in the municipal advisory marketplace. In addition, SIFMA indicated that it has observed municipal advisors exiting the municipal advisory business in anticipation of the implementation of the proposed rule change and that this has already resulted in reduced competition in the municipal advisory industry. SIFMA stated that the proposed rule change, in its view, would result in less competition in the municipal advisory industry, increased costs to issuers and fewer services available to issuers of municipal securities. SIFMA also commented that the MSRB could ''achieve the same objectives without burdening competition'' by revising Proposed Rule G–42 consistent with SIFMA's prior comments.

In response to Amendment No. 1 or the OIP, Cooperman, GFOA, ICI and SIFMA questioned the adequacy of the MSRB's economic analysis of the proposed rule change.[194] Cooperman

[183] *See* Spencer Wright letter dated December 16, 2015.

[184] *See* December Response Letter.

[185] *See* SIFMA letter dated December 1, 2015.

[186] *See* December Response Letter.

[187] *See* SIFMA letter dated December 1, 2015.

[188] *See* December Response Letter.

[189] *See* letters from Cooperman dated September 9, 2015; NAMA dated September 11, 2015; and SIFMA dated September 11, 2015.

[190] *See* 15 U.S.C. 78*o*–4(b)(2)(L)(iv).

[191] *See* NAMA letter dated December 7, 2015.

[192] *See* 15 U.S.C. 78*o*–4(b)(2)(C).

[193] *See* SIFMA letter dated September 11, 2015.

[194] *See* letters from Cooperman dated September 9, 2015; GFOA dated September 14, 2015; ICI dated

Continued

believed that the MSRB did not follow its own policy to conduct an economic analysis with respect to Proposed Rule G–42. Cooperman also believed that the MSRB did not gather data on the economic impact of the regulatory regime under Proposed Rule G–42. Rather, according to Cooperman, the MSRB reached its conclusions based on ''unsubstantiated broad brush economic consequences.'' [195] GFOA and SIFMA similarly stated their views that the MSRB provided no economic analysis in concluding that the benefits of Proposed Rule G–42 outweigh the potential costs. ICI commented that the MSRB failed to analyze the potential economic impact of, and asked if there were an unreasonable or unnecessary burden in connection with, the proposed requirement that a municipal advisor undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information, which includes information provided by the municipal advisor's client.

In response to the comments regarding the MSRB's economic analysis, the MSRB noted in its December Response Letter that throughout the development of the proposed rule change the MSRB rigorously followed its Policy on the Use of Economic Analysis in MSRB Rulemaking (''MSRB Policy'').[196] In particular, the MSRB stated that it sought relevant data from industry participants and commenters on multiple occasions in accordance with the MSRB Policy's reference to the SEC's Current Guidance on Economic Analysis in SEC Rulemakings (''SEC Guidance''),[197] which ''stresses the need to *attempt* to quantify anticipated costs and benefits . . . '' (emphasis added) but notes that ''data is necessary'' to do so. Despite these requests, the MSRB stated that it received no data—imperfect or otherwise—or other information, which would support any additional quantification of the impact of the proposed rule change. In the proposed rule change, the MSRB noted this lack of data to explain why further quantification could not be supported.[198] In the absence of relevant data, consistent with the MSRB Policy and SEC Guidance, the MSRB noted that it conducted a qualitative evaluation of the benefits and costs of the proposed rule change based significantly on the SEC's analysis of the municipal advisor market included in the SEC's Final Rule.[199] In its analysis, the MSRB concluded that the market for municipal advisors likely would remain competitive despite the potential exit of some municipal advisors (including small entity municipal advisors), consolidation of municipal advisors or lack of new entrants into the market.

The MSRB believes that commenters' observations that, as a result of the proposed rule change, some municipal advisors may have exited the market and some issuers may be experiencing less competition do not provide a basis for revising the MSRB's prior assessments of the potential impacts of the proposed rule change for several reasons.[200] First, commenters have not provided data to support their observations. Second, to the extent municipal advisors have exited the market, commenters have not provided evidence to support a conclusion that they have done so in anticipation of a proposed rule change rather than, for example, in reaction to the Dodd-Frank Act itself, the subsequent registration requirements, or the professional qualification requirements, all of which were properly included in the baseline against which the impacts of the proposed rule change were assessed. Finally, the commenters have not provided evidence that the exit of any municipal advisor has in fact decreased competition, increased cost or resulted in reduced advisory services.

With regard to the impact of the proposed rule change on small municipal advisors, the MSRB discussed the potential burdens on smaller advisory firms at length and concluded that the likely costs represented only those necessary to achieve the purposes of the Exchange Act.[201] The MSRB is not aware of alternatives—and commenters have not proposed any—that would reduce the burden on small municipal advisor firms while achieving the same regulatory objectives, including what the MSRB believes is the appropriate balance between principles-based provisions and more specifically prescriptive provisions.

Also in response to Amendment No. 1 or the OIP, several commenters indicated their view that the proposed rule change was inconsistent with the Exchange Act in connection with the principal transaction ban if such ban remained as proposed, without any exceptions or modifications. The MSRB, in Amendment No. 2, addressed the primary concerns by adding the Exception. The MSRB believes that the Exception is responsive to the commenters' concerns that, in connection with the proposed ban, Proposed Rule G–42 is inconsistent with the Exchange Act.[202]

M. Relationship Between MSRB Rule G–23 and the Prohibition on Principal Transactions

In response to the Proposing Release, BDA and NAMA stated that the reference to MSRB Rule G–23 in paragraph .08 of the Supplementary Material was unnecessary or enhances the possible conflict between Proposed Rule G–42 and Rule G–23.[203] BDA interpreted the prohibition in Rule G–23 as subsumed by the more stringent provisions of Proposed Rule G–42.[204] NAMA believed the additional activities or principal transactions that should be prohibited under Proposed Rule G–42 (namely advice with respect to municipal derivatives or the investment of proceeds) don't conflict with Rule G–23, but merely supplement the prohibitions in Rule G–23 by extending the list of prohibitions found in Rule G–23.[205]

In response to comments, the MSRB stated that the effect of the final sentence in proposed paragraph .08 is intentionally quite limited.[206] The MSRB clarified that as to a person acting in compliance with Rule G–23, the final sentence in proposed paragraph .08 provides an exception, but only to the specific prohibition on principal transactions in Proposed Rule G–42(e)(ii). The MSRB stated that proposed subsection (e)(ii) would not

September 11, 2015; and SIFMA dated September 11, 2015.

[195] *See* Cooperman letter dated September 9, 2015.

[196] *See* MSRB, Policy on the Use of Economic Analysis in MSRB Rulemaking, *http://msrb.org/About-MSRB/Financial-and-Other-Information/Financial-Policies/Economic-Analysis-Policy.aspx.*

[197] *See* SEC Memorandum Re: Current Guidance on Economic Analysis in SEC Rulemakings (dated March 16, 2012), *https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.*

[198] *See* Proposing Release, 80 FR 26752, at 26784 (''No commenter provided specific cost information or data that would support an improved estimate of the costs of compliance.'').

[199] *See* SEC Final Rule, 78 FR 67467, at 67608.

[200] *See* December Response Letter.

[201] *See* Proposing Release, 80 FR 26752, at 26759–60 (statement on burden on competition); *see also id.* at 26784–85 (economic analysis).

[202] *See* letters from BDA dated September 11, 2015; FSI dated September 11, 2015; Millar Jiles dated September 11, 2015; SIFMA dated September 11, 2015; and Zions dated September 10, 2015, containing statements that the Proposed Rule, with the proposed principal transaction ban, is inconsistent with one or more of the following Exchange Act provisions: Section 15B(b)(2)(L); Section 15B(b)(2)(L)(i); Section 15B(b)(2)(C); and Section 3(f).

[203] *See* letters from BDA dated May 29, 2015 and NAMA dated May 29, 2015.

[204] *See* BDA letter dated May 29, 2015.

[205] *See* NAMA letter dated May 29, 2015.

[206] *See* August Response Letter.

prohibit a type of principal transaction that is already addressed and prohibited, to a certain extent, under Rule G–23, although other provisions of Rule G–42 must be considered as they do apply to the same principal transaction.

In response to Amendment No. 1 or the OIP, NAMA reiterated its comments that the reference to Rule G–23 should be deleted from proposed paragraph .08 because the MSRB's statements regarding that provision in its August Response Letter were unnecessarily complicated.[207] In addition, NAMA believed such statements raise a question that the MSRB may believe that conduct permitted by Rule G–23 would be otherwise prohibited by Proposed Rule G–42 (apart from Proposed Rule G–42(e)(ii)).

In response to NAMA's comments, the MSRB reiterated its earlier response regarding the limited effect of the reference to G–23 in paragraph .08 of the Supplementary Material.[208] The MSRB explained that where certain conduct is not prohibited under Rule G–23 (as an exception to the general prohibition therein), Proposed Rule G–42(e)(ii) (the principal transaction provision) alone would not prohibit such conduct. The MSRB stated that nevertheless, other parts of Proposed Rule G–42 and statutory provisions must be considered to determine whether the conduct, although not prohibited by Rule G–23 and not specifically prohibited under Proposed Rule G–42(e)(ii), would violate another provision of Proposed Rule G–42 or other applicable MSRB rules or other applicable laws or regulations.[209] In this respect, the type of principal transaction excepted by the final sentence of paragraph .08 from Proposed Rule G–42(e)(ii) is no different than any other principal transaction that is not specifically prohibited by subsection (e)(ii). The MSRB restated that merely because a principal transaction is not specifically prohibited by the principal transaction ban does not necessarily mean it is permitted.

N. Request for Prospective Application of Proposed Rule G–42 Requirements

ICI and SIFMA requested the proposed rule change only apply prospectively to municipal advisory relationships entered into, or recommendations of municipal securities transactions or municipal financial products to an existing municipal entity or obligated person client made, after the effective date of the proposed rule change.[210] ICI noted this was relevant with respect to 529 plans ''due to the nature of the advisor's relationship with the plan and duration of existing 529 plan contracts.'' [211] SIFMA argued that reviewing and likely supplementing the documentation for all existing municipal advisory relationships will be overly burdensome for both municipal advisors and their clients.[212]

The MSRB responded that the proposed rule would not require the creation of new contractual relationships or the modification of existing contracts or agreements between municipal advisors and their clients when the rule takes effect.[213] It clarified that if municipal advisors have already delivered documentation meeting some or all of the requirements of proposed section (c), on documentation of municipal advisory relationship, then municipal advisors would be able to rely on such documents to satisfy some or all of their obligations under section (c). The MSRB also stated that documents in place prior to the effective date that are in some way deficient are not required to be withdrawn but may be supplemented by the municipal advisor by the delivery of additional documentation that satisfies any remaining requirements of the proposed rule. The MSRB also clarified that requirements of section (d), on recommendations and review of recommendations of other parties, would apply only to recommendations made or reviewed after the proposed rule change becomes effective. Finally, the MSRB stated that municipal advisors will become subject to the applicable standards of conduct with regard to all of their municipal advisory activities, regardless of whether the relevant engagement began prior to the effective date of the rule.

In response to Amendment No. 1 or the OIP, ICI reiterated its comment that the proposed rule should only apply prospectively when a municipal advisor either enters into a new advisory relationship with a municipal client or when it recommends a new municipal securities transaction or new municipal financial product to an existing municipal client.[214] ICI recommended that the MSRB further clarify ''how each of the new obligations the rule and its Supplementary Material impose on municipal advisors will apply to existing contracts, relationships, and municipal advisory activities.''

The MSRB responded stating that all provisions of the proposed rule would, if approved, apply only prospectively.[215] As previously stated by the MSRB, the requirements of the proposed rule, including its Supplementary Material, would apply prospectively to any activity that is within the definition in the proposed rule of ''municipal advisory activities'' if that activity is engaged in on or after the date of implementation (the ''effective date'') of Rule G–42. The MSRB further clarified that the proposed rule will apply to all municipal advisory relationships that are in existence on or after the effective date, regardless of when a municipal advisor and client may have entered into a particular relationship. The MSRB also noted that in accordance with MSRB Rule G–44 (Supervisory and Compliance Obligations of Municipal Advisors), which is currently in effect, on the effective date of Rule G–42, if approved, each municipal advisor would be required to have established written supervisory procedures reasonably designed to ensure that the municipal advisor and its associated persons are in compliance with Rule G–42 on and after its effective date.

O. Use of Supplementary Material in Proposed Rule G–42

PFM suggested that all supplementary material be removed and moved to separate written interpretative guidance to afford the subjects more ''fittingly robust regulatory guidance.'' [216] PFM was concerned that the supplementary material which does not allow for ''more succinct definitional direction'' would lead to inconsistent application by registrants and ''the potential for unintended consequences as a matter of the statute itself.'' In response to the comment, the MSRB stated that the structure of the proposed rule is intentionally consistent with the structure used by FINRA and other self-regulatory organizations and the MSRB has not to date observed the types of issues or concerns raised by PFM.[217]

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, as modified by Amendment No. 1 and Amendment No. 2, as well as the

[207] *See* NAMA letter dated September 11, 2015.

[208] *See* December Response Letter.

[209] *See* Proposing Release, 80 FR 26752, at 26782–83; *see also* August Response Letter.

[210] *See* letters from ICI dated May 29, 2015 and SIFMA dated May 28, 2015.

[211] *See* ICI letter dated May 29, 2015.

[212] *See* SIFMA letter dated May 28, 2015.

[213] *See* August Response Letter.

[214] *See* ICI letter dated September 11, 2015.

[215] *See* December Response Letter.

[216] *See* PFM letter dated May 29, 2015.

[217] *See* August Response Letter.

comment letters received and the MSRB Response Letters. The Commission finds that the proposed rule change, as amended by Amendment No. 1 and Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.

In particular, the proposed rule change, as amended, is consistent with Sections 15B(b)(2), 15B(b)(2)(C), and 15B(b)(2)(L)(i) of the Act. Section 15B(b)(2) of the Act provides that the MSRB shall propose and adopt rules to effect the purposes of that title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers and municipal advisors.[218] Section 15B(b)(2)(C) of the Act requires that the MSRB's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.[219] Section 15B(b)(2)(L)(i) of the Act requires, with respect to municipal advisors, the MSRB to prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients.[220]

The proposed rule change, as amended, is consistent with Sections 15B(b)(2), 15B(b)(2)(C), and 15B(b)(2)(L)(i) of the Act because it establishes standards of conduct and duties for municipal advisors when engaging in municipal advisory activities. Specifically, the proposed rule change provides that each municipal advisor in the conduct of its municipal advisory activities for an obligated person client is subject to a duty of care. The proposed rule change also provides that each municipal advisor to a municipal entity client is subject to a fiduciary duty that includes a duty of loyalty and a duty of care. Paragraphs .01 and .02 of the Supplementary Material provide guidance on the duty of care and the duty of loyalty, respectively, to assist municipal advisors in complying with such duties. In addition, the proposed rule change includes means to help prevent breaches of these duties by municipal advisors, including the requirements for the information that must be included in the documentation of the municipal advisory relationship; specified activities (such as certain principal transactions and excessive compensation) that would be explicitly prohibited; and disclosure requirements that must accompany a municipal advisor's recommendation regarding a municipal security or a municipal financial product. The Commission believes these requirements are reasonably designed to prevent acts, practices and courses of business as are not consistent with a municipal advisor's fiduciary duty.

The proposed rule change, as amended, would help protect municipal entities and obligated persons by promoting higher ethical and professional standards of the municipal advisors they employ to assist with issuances of municipal securities and transactions in municipal financial products. By requiring municipal advisors to provide detailed disclosures of material conflicts of interest and certain other information prior to or upon the establishment of the municipal advisory relationship, the proposed rule change will help ensure municipal entity and obligated person clients have access to sufficient information to make meaningful choices, based on the merits of the municipal advisor. The Commission believes the disclosure requirements also could incentivize municipal advisors not to engage in misconduct.[221] In addition, the suitability requirements in section (d) of the proposed rule and the related Supplementary Material will help protect municipal entities and obligated persons from the potentially costly consequences of transactions undertaken based on unsuitable recommendations. The proposed amendments to Rule G–8(h) will assist in the enforcement of Proposed Rule G–42 and will allow organizations that examine municipal advisors to more precisely monitor and promote compliance with the proposed rule change.

The Commission also finds that the proposed rule change, as amended, is consistent with Section 15B(b)(2)(L)(iv) of the Act, in that it does not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.[222] While the proposed rule change would affect all municipal advisors, including small municipal advisors, it is a necessary and appropriate regulatory burden in order to promote compliance with the fiduciary duty and the duty of care. Municipal entities and obligated persons will have access to more information about municipal advisors and will be able to make better, more informed choices with lower search costs. The availability of additional, objective information and the fostering of merit-based competition among municipal advisors should lead to enhanced issuer protections and improved outcomes. These improvements likely would enhance investor confidence in the integrity of the municipal securities market. While the proposed rule change would burden some small municipal advisors, the Commission believes that such burden is outweighed by these benefits. In addition, the proposed rule change will provide a benefit to all municipal advisors, including small municipal advisors, that could otherwise face uncertainty regarding the duties and standards of conduct required in order to comply with the relevant provisions of the Exchange Act.

In addition, the Commission finds that the proposed rule change, as amended, is consistent with Section 15B(b)(2)(G) of the Act which provides that the MSRB's rules shall prescribe records to be made and kept by municipal advisors and the periods for which such records shall be preserved.[223] The proposed rule change, through the proposed amendments to Rule G–8(h), would require that a municipal advisor make and keep records of any document created by the municipal advisor that was material to its review of a recommendation by another party or that memorializes the basis for any determination as to suitability. Existing Rule G–9(h) would require that the books and records

[218] 15 U.S.C. 78*o*–4(b)(2).

[219] *See* 15 U.S.C. 78*o*-4(b)(2)(C).

[220] 15 U.S.C. 78*o*–4(b)(2)(L)(i).

[221] *See also* SEC Final Rule, 78 FR 67467, at 67602, 67606, 67618 and 67622 (discussing the disclosure requirements of the municipal advisor registration regime and incentives of municipal advisors not to engage in misconduct).

[222] *See* 15 U.S.C. 78*o*-4(b)(2)(L)(iv).

[223] *See* 15 U.S.C. 78*o*-4(b)(2)(G).

required by the proposed rule change be preserved for a period of not less than five years.

In approving the proposed rule change, as amended, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation.[224] The Commission believes the proposed rule change takes into account competitive concerns that could arise as a result of the costs associated with complying with the standards of conduct and duties that could lead some municipal advisors to exit the market, curtail their activities or consolidate with other firms. The MSRB has made efforts to minimize costs in response to commenters including: (i) Narrowing the scope of the conflicts that must be disclosed, (ii) specifying a less burdensome method for disclosing conflicts and disciplinary actions and documenting the municipal advisory relationship, (iii) clarifying the obligations owed by municipal advisors to obligated persons, (iv) including a limited safe harbor to relieve municipal advisors that inadvertently engage in municipal advisory activities from compliance with section (b) of Proposed Rule G–42, on disclosure of conflicts of interest and other information, and section (c) of Proposed Rule G–42, on documentation of the municipal advisory relationship, and (v) allowing certain municipal advisors to engage in principal transactions in a range of fixed income securities for the investment of bond proceeds. Moreover, the Commission continues to believe ''that the market for municipal advisory services is likely to remain competitive despite the potential exit of municipal advisors, consolidation of municipal advisors, or lack of new entrants into the market.'' [225]

As noted above, the Commission received 35 comment letters on the filing. The Commission believes that the MSRB, through its responses and through proposed changes in Amendment No. 1 and Amendment No. 2, has addressed commenters' concerns.

For the reasons noted above, including those discussed in the MSRB Response Letters, the

Commission believes that the proposed rule change, as amended by Amendment No. 1 and Amendment No. 2, is consistent with the Act.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[226] that the proposed rule change (SR–MSRB–2015–03), as modified by Amendment No. 1 and Amendment No. 2, be, and hereby is, approved.

For the Commission, pursuant to delegated authority.[227]

Brent J. Fields,

Secretary.

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[224] 15 U.S.C. 78c(f).

[225] SEC Final Rule, 78 FR 67467, at 67608.

[226] 15 U.S.C. 78s(b)(2).

[227] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76756; File No. SR–EDGX–2015–66]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Proprietary Trader and Proprietary Trader Principal Registration Categories, Securities Trader and Securities Trader Principal Registration Categories, and Establishing the Series 57 Examination

December 23, 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 22, 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 Act[3] 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 retire the Proprietary Trader and Proprietary Trader Principal registration categories and to establish the Securities Trader and Securities Trader Principal registration categories. The Exchange is also amending its rules to establish the Series 57 examination as the appropriate qualification examination for Securities Traders and deleting the rule referring to the S501 continuing education program currently applicable to Proprietary Traders. The Exchange will announce the effective date of the proposed rule change in a circular distributed to Members.

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 herein to replace the Series 56 with the Series 57 examination and to make various related changes to its registration rules. Specifically, in response to the FINRA Amendments (defined below), the Exchange is proposing to retire the Proprietary Trader [5] registration categories from its own registration rules relating to securities trading activity. It is also therefore retiring its Proprietary Trader Principal [6] registration category. To take the place of the retired registration categories, the Exchange is establishing new Securities Trader and Securities Trader Principal registration categories. This filing is based upon and in response to SR–FINRA–2015–017, which was recently approved by the Commission.[7]

New Securities Trader Registration Category

Currently, under Exchange Rule 11.4(e), each person associated with a member who is included within the definition of an ''Authorized Trader'' in Rule 1.5(d) is required to register with

[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] Rule 2.5, Interpretation and Policy .01(f).

[6] Rule 2.5, Interpretation and Policy .01(d).

[7] *See* Securities Exchange Act Release No. 75783 (August 28, 2015), 80 FR 53369 (September 3, 2015) (approving SR–FINRA–2015–017) referred to herein as the ''FINRA Amendments.'' According to the release, FINRA's expected effective date for the FINRA Amendments is January 4, 2016.

the Exchange and to pass an appropriate qualification examination before such registration may become effective. The Exchange recognizes the following qualification examinations as acceptable for purposes of registration as an Authorized Trader: Series 7, Series 56, or one of several foreign securities examination modules.

Interpretation and Policy .01(f) of Exchange Rule 2.5 currently provides that a person may register with the Exchange as a Proprietary Trader if such person engages solely in proprietary trading, passes the Series 56 examination and is an associated person of a proprietary trading firm as defined in Interpretation and Policy .01(g) of Exchange Rule 2.5. Therefore, pursuant to Interpretation and Policy .01 to Exchange Rule 2.5, an individual meeting these criteria may register in the Proprietary Trader category after passing the Series 56 examination rather than as a General Securities Representative after passing the Series 7 examination or equivalent foreign securities examination module.

In consultation with FINRA and other exchanges, and in order to harmonize the requirements for individuals engaged in trading activities, the Exchange is now proposing to retire the Proprietary Trader registration category. Similarly, the Exchange is proposing to adopt a new Securities Trader registration category.

Under Exchange Rules, as revised, each person associated with a member who is included within the definition of Authorized Trader will be required to register as a Securities Trader unless they instead qualify based on the Series 7 examination or an equivalent foreign securities examination module. Therefore, representatives who previously qualified for Proprietary Trader registration will be required to register as Securities Traders. Accordingly, the Exchange is proposing to modify paragraph (f) of Interpretation and Policy .01 to reflect the new Securities Trader qualification as a permissible registration for Authorized Traders of Members that engage solely in trading on the Exchange on either an agency or principal basis. In order to register as a Securities Trader, an applicant would be required to have passed the new Securities Trader qualification examination (Series 57) or a predecessor examination (*i.e.,* the Series 56, as described below).

A person registered as a Proprietary Trader in the Central Registration Depository (CRD®) system on the effective date of the proposed rule change will be grandfathered as a Securities Trader without having to take any additional examinations and without having to take any other actions. In addition, individuals who were registered as Proprietary Traders in the CRD system prior to the effective date of the proposed rule change will be eligible to register as Securities Traders without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a representative and the date they register as a Securities Trader.

Persons registered in the new category would be subject to the continuing education requirements of Interpretation and Policy .02(e) to Rule 2.5. The Exchange proposes to amend Interpretation and Policy .02(e) by removing the option for Series 56 registered persons to participate in the S501 Series 56 Proprietary Trader continuing education program in order to satisfy the Regulatory Element. The S501 Series 56 Proprietary Trader continuing education program is being phased out along with the Series 56 Proprietary Trader qualification examination. As a result, effective January 4, 2016, the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons will cease to exist. In place of the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons, the Exchange proposes that Series 57 registered persons be required to take the S101 General Program for Series 7 and all other registered persons.

New Securities Trader Principal Registration Category

Currently, under Interpretation and Policy .01(d), the Exchange requires each Member to register ''Principals'' [8] with the Exchange. The Exchange requires the Series 24 examination to register as Principal. The Exchange will also accept the New York Stock Exchange Series 14 Compliance Official Examination in lieu of the Series 24 to satisfy the Principal examination requirement for any person designated as a Chief Compliance Officer. Further, in addition to the Series 24 or Series 14, in order to supervise the activities of General Securities Representatives a Principal generally must complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14. However, the Exchange currently permits the Series 56 as a prerequisite to the Series 24 or Series 14 for those Principals whose supervisory responsibilities are limited to overseeing the activities of proprietary traders, as described above. Like the Proprietary Trader category discussed above, the Proprietary Trader Principal registration category is being retired. Accordingly, the Exchange proposes to modify the references in the Rule regarding the prerequisite to the Series 24 or 14 for an individual that will supervise Series 57 qualified traders to correspond with the new Securities Trader exam. The Exchange proposes to establish the Securities Trader Principal category in Interpretation and Policy .01(d).

The Exchange has been working with other exchanges and FINRA to develop this new principal registration category and believes that it is an appropriate corollary to the new Securities Trader representative registration category. To qualify for registration as a Securities Trader Principal, an applicant must become qualified and registered as a Securities Trader under proposed Interpretation and Policy .01(c) and pass either the Series 24 or Series 14 examination. A person who is qualified and registered as a Securities Trader Principal would only be permitted to have supervisory responsibility over the activities of Securities Traders, unless such person were separately qualified and registered in another appropriate principal registration category, such as the General Securities Principal registration category. Conversely, the proposed rule change clarifies that each principal who will have supervisory responsibility over registered Securities Traders is required to become qualified and registered as a Securities Trader Principal.

A person registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system on the effective date of the proposed rule change will be eligible to register as a Securities Trader Principal without having to take any additional examinations. An individual who was registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system prior to the effective date of the proposed rule change will also be eligible to register as a Securities Trader Principal without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a principal and the date they register as a Securities Trader Principal. Members, however, will be required to affirmatively register persons transitioning to the proposed

[8] Pursuant to Interpretation and Policy .01(d) to Rule 2.5, a Principal is ''any individual responsible for supervising the activities of a Member's Authorized Traders and each person designated as a Chief Compliance Officer on Schedule A of Form BD.''

registration category as Securities Trader Principals on or after the effective date of the proposed rule change.

Other Changes

In order to accomplish the changes proposed above, the Exchange has proposed modifications throughout Interpretation and Policy .01 and .02 to Rule 2.5 as well as Rule 11.4(e) to eliminate references to Proprietary Trader, Proprietary Trader Principal, and Series 56 examination and to replace such references with Securities Trader, Securities Trader Principal and Series 57 examination. The Exchange also proposes to modify Rule 11.18, which sets forth the registration requirements applicable to Market Maker Authorized Traders, or MMATs, to cross-reference Interpretation and Policy .01 and .02. Although Rule 11.18 currently requires an MMAT to qualify by taking the Series 7 examination, the Exchange does not intend to impose different registration or continuing education requirements on MMATs than are required of Authorized Traders generally. In addition to these changes, the Exchange proposes to delete paragraph (h) to Interpretation .01, which currently states that: ''Principals responsible for supervising the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module in addition to the Series 24.'' The Exchange proposes to eliminate this provision as duplicative with existing language in Interpretation and Policy .01, including paragraph (d), which states that ''[i]ndividuals that supervise the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14 and shall be referred to as General Securities Principals.'' The Exchange also proposes to modify a reference in Interpretation and Policy .01(e) from ''General Securities Representative Principal'' to ''General Securities Principal.'' In addition, the Exchange proposes to eliminate the fees applicable to the Series 56 examination as well as the fees associated with the continuing education necessary to maintain registration after passing the Series 56 examination. Consistent with all other examinations recognized by the Exchange, FINRA will administer the Series 57 examination and the continuing education requirements related thereto, and the Exchange will not be separately charging and collecting any fees in order to take such examination or participate in applicable continuing education. Finally, in order to continue to align the Exchange's rules with the rules of its affiliated exchanges, BATS Exchange, Inc. and BATS Y-Exchange, Inc., the Exchange proposes to modify the language, but not the substance, of Rule 11.4(e).

2. Statutory Basis

The Exchange believes that proposed rule change is consistent with Section 6(b)(5) of the Act,[9] 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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the requirements of the Securities Trader and Securities Trader Principal registration categories, as well as the new Securities Trader qualification examination, should help ensure that proprietary traders and the principals who supervise proprietary traders and proprietary trading are, and will continue to be, properly trained and qualified to perform their functions which should protect investors and the public interest.

(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. Implementation of the proposed changes to the Exchange's registration rules in coordination with the FINRA Amendments does not present any competitive issues, but rather is designed to provide less burdensome and more efficient regulatory compliance for members and enhance the ability of the Exchange to fairly and efficiently regulate members, which will further enhance competition. Additionally, the proposed rule change should not affect intramarket competition because all similarly situated representatives and principals will be required to complete the same qualification examinations and maintain the same registrations.

(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 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 Act[10] and paragraph (f)(6) of Rule 19b–4 thereunder,[11] 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.

The Exchange has requested that the Commission waive the thirty-day operative delay so that the proposal may become operative as of January 4, 2016. The Exchange states that waiving the thirty-day delay would allow the Exchange to eliminate the Proprietary Trader and Proprietary Trader Principal registration categories and adopt the Securities Trader and Securities Trader Principal registration categories at the same time as FINRA and the other national securities exchanges. The Commission believes that waiving the thirty day delay is consistent with the protection of investors and the public interest, as it will enable EDGX to have the new requirements in effect at the same time as the other SROs. Therefore, the Commission hereby waives the thirty-day operative delay and designates the proposal operative as of January 4, 2016.[12]

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

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4.

[12] For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 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–2015–66 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–2015–66. 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–2015–66 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32815 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76749; File No. SR–NYSEArca–2015–99]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change to the Co-Location Services Offered by the Exchange (the Offering of a Wireless Connection To Allow Users To Receive Market Data Feeds From Third Party Markets) and to Reflect Changes to the NYSE Arca Options Fee Schedule and the NYSE Arca Equities Schedule of Fees and Charges Related to These Services

December 23, 2015.

I. Introduction

On October 23, 2015, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend the co-location services offered by the Exchange to include a means for co-located Users to receive market data feeds from third party markets through a wireless connection. The proposed rule change was published in the **Federal Register** on November 12, 2015.[4] No comment letters were received in response to the Notice. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to change the co-location services offered by the Exchange to include a means for Users to receive market data feeds from third party markets (the ''Third Party Data'') through a wireless connection.[5] In addition, the proposed rule change reflects changes to the Exchange's Fee Schedules related to these co-location services.

The Exchange proposes to offer the wireless connection to provide Users with an alternative means of connectivity for Third Party Data. As the Exchange notes, wireless connections involve beaming signals through the air between antennas that are within sight of one another.[6] Because the signals travel a straight, unimpeded line, and because light waves travel faster through air than through glass (fiber optics), wireless messages have lower latency than messages travelling through fiber optics.[7]

Under the proposed rule change, the Exchange would utilize a network vendor to provide a wireless connection to the Third Party Data through wireless connections from the Exchange access centers in Secaucus and Carteret, New Jersey, to its data center in Mahwah, New Jersey, through a series of towers equipped with wireless equipment.[8] A User that chooses this optional service would be able to receive data feeds from NASDAQ and BATS Exchange, Inc. over a wireless connection. To receive Third Party Data, the User would enter into a contract with the relevant third party market, which would charge the User the applicable market data fees for the Third Party Data. The Exchange would charge the User fees for the wireless connection for the Third Party Data.[9]

A User would be charged a $5,000 non-recurring initial charge for each wireless connection and a monthly recurring charge (''MRC'') that would vary depending upon the feed that the User opts to receive. If a User purchased two wireless connections, it would pay two non-recurring initial charges. The MRC for a wireless connection to each

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 76364 (November 5, 2015), 80 FR 70051 (November 12, 2015) (''Notice'').

[5] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC and NYSE MKT LLC. *See* Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80).

[6] *See* Notice, *supra* note 4 at 70051.

[7] *See id.*

[8] The NASDAQ Stock Market LLC (''NASDAQ'') offers a similar wireless service. *See* Securities Exchange Act Release No. 68735 (January 25, 2013), 78 FR 6842 (January 31, 2013) (SR–NASDAQ–2012–119) (approving a proposed rule change to establish a new optional wireless connectivity for co-located clients).

[9] A User would only receive the Third Party Data for which it had entered into a contract. For example, a User that contracted with NASDAQ for the NASDAQ Totalview-ITCH data feed but did not contract to receive any other Third Party Data would receive only the NASDAQ Totalview-ITCH data feed through its wireless connection.

of BATS Pitch BZX Gig shaped data, DirectEdge EDGX Gig shaped data, and NASDAQ BX Totalview-ITCH data will be $6,000; the MRC for a wireless connection of NASDAQ Totalview-ITCH data will be $8,500; and the MRC for a wireless connection of NASDAQ Totalview-ITCH and BX Totalview-ITCH data will be $12,000. The Exchange proposes to waive the first month's MRC, to allow Users to test the receipt of the feed(s) for a month before incurring any MRCs.

The wireless connections would include the use of one port for connectivity to the Third Party Data. A User will only require one port to connect to the Third Party Data, irrespective of how many of the five wireless connections it orders. If a User that has more than one wireless connection wishes to use more than one port to connect to the Third Party Data,[10] the Exchange proposes to make such additional ports available for a monthly fee per port of $3,000.

The Exchange represents that there is limited bandwidth available on the wireless connection for data feeds from third parties. As a result, the Exchange has decided to offer as Third Party Data only the data feeds that are in high demand from Users. Although constrained by bandwidth with respect to the number of feeds it can carry, the Exchange represents that the wireless network offered by the Exchange can be made available to an unlimited number of Users.

The wireless connection would provide Users with an alternative means of connectivity for Third Party Data. Currently, Users can receive Third Party Data through other methods, including, for example, from another User, through a telecommunications provider, or over the internet protocol (''IP'') network.[11] In addition, Users can receive Third Party Data from wireless networks offered by third party vendors. The Exchange represents that there are currently at least four third party vendors that offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center. The Exchange states that its proposed wireless connection would traverse wireless connections through a series of towers equipped with wireless equipment, including a pole on the grounds of the data center.[12] The Exchange states that access to such pole or the roof is not required for third parties to establish wireless networks that can compete with Exchange's proposed service and, in particular, represents that based on the information available to it, the proposed wireless connection would provide data at the same or similar speed, and at the same or similar cost, as existing wireless networks, thereby enhancing competition.[13]

The wireless connection to the Third Party Data is expected to be available no later than March 1, 2016. The Exchange will announce the date that the wireless connection to the Third Party Data will be available through a customer notice.

III. Discussion 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.[14] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[15] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[17] which requires that the rules of the exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that the Exchange's proposal to provide this additional connectivity option is consistent with the requirement of Section 6(b)(5) of the Act. The Commission believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the Exchange makes wireless connectivity available to all Users on an equal basis. All Users that voluntarily select this service option will be charged the same amount for the same services, and there would be no differentiation among Users with regard to the fees charged for the service. Further, the Exchange represents that Users of the new wireless connection would not receive Third Party Data that is not available to all Users. In addition, the Exchange represents that Users that do not opt to utilize the Exchange's wireless connections would still be able to obtain Third Party Data through other methods, such as from wireless networks offered by third party vendors, other Users, through telecommunications providers, or over the IP network.

The Commission also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act.[18] All Users that voluntarily select this service option will be charged the same amount for the same services, and there would be no differentiation among Users with regard to the fees charged for the service. The Commission notes the Exchange's representation that the fees associated with providing the wireless connections are reasonable because the Exchange will incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for initial installation and monitoring, support and maintenance of such services. The Exchange states that the costs associated with the wireless connections are incrementally higher than fiber optics-based solutions due to the expense of the wireless equipment, cost of installation and testing and ongoing maintenance of the network, and that the fees also reflect the benefit received by Users in terms of lower latency over the fiber optics option. In addition, the Exchange believes that the proposed waiver of the first month's MRC is reasonable as it would allow Users to test the receipt of the feed(s) for a month before incurring any monthly recurring fees and may act as an incentive to Users to utilize the new service.

The Commission also finds that consistent with Section 6(b)(8) of the

[10] For example, a User with two wireless connections for Third Party Data may opt to purchase an additional port in order to route the options and equity data it receives to different cabinets.

[11] The IP network is a local area network available in the data center. *See* Securities Exchange Act Release No. 74219 (February 6, 2015), 80 FR 7899 (February 12, 2015) (SR–NYSEArca–2015–03) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

[12] *See* Notice, *supra* note 4 at 70053.

[13] *See* Notice, *supra* note 4 at 70052–54.

[14] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(8).

[18] 15 U.S.C. 78f(b)(4).

Act the proposed rule change does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange states that Users currently can receive Third Party Data from competing wireless networks offered by third party vendors, including at least four third party vendors that offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center. The Exchange represents, based on the information available to it, that the proposed wireless connection would provide data at the same or similar speed, and at the same or similar cost, as existing wireless networks, thereby enhancing competition.[19] The Exchange also notes that the proposed wireless connection would compete not just with other wireless connections, but also with fiber optic networks, which may be more attractive to some Users as they are more reliable and less susceptible to weather conditions. For these reasons, the Commission does not believe that the proposed rule change imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule change (SR–NYSEArca–2015–99) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32818 Filed 12–29–15; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76759; File No. SR–EDGA–2015–48]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Proprietary Trader and Proprietary Trader Principal Registration Categories, Securities Trader and Securities Trader Principal Registration Categories, and Establishing the Series 57 Examination

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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.

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(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing herein to replace the Series 56 with the Series 57 examination and to make various related changes to its registration rules. Specifically, in response to the FINRA Amendments (defined below), the Exchange is proposing to retire the Proprietary Trader[5] registration categories from its own registration rules relating to securities trading activity. It is also therefore retiring its Proprietary Trader Principal[6] registration category. To take the place of the retired registration categories, the Exchange is establishing new Securities Trader and Securities Trader Principal registration categories. This filing is based upon and in response to SR–FINRA–2015–017, which was recently approved by the Commission.[7]

New Securities Trader Registration Category

Currently, under Exchange Rule 11.4(e), each person associated with a member who is included within the definition of an ''Authorized Trader'' in Rule 1.5(d) is required to register with the Exchange and to pass an appropriate qualification examination before such registration may become effective. The Exchange recognizes the following qualification examinations as acceptable for purposes of registration as an Authorized Trader: Series 7, Series 56, or one of several foreign securities examination modules.

Interpretation and Policy .01(f) of Exchange Rule 2.5 currently provides that a person may register with the Exchange as a Proprietary Trader if such person engages solely in proprietary trading, passes the Series 56 examination and is an associated person of a proprietary trading firm as defined in Interpretation and Policy .01(g) of Exchange Rule 2.5. Therefore, pursuant to Interpretation and Policy .01 to Exchange Rule 2.5, an individual meeting these criteria may register in the Proprietary Trader category after passing the Series 56 examination rather than as a General Securities Representative after passing the Series 7

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[19] *See supra* notes 12 and 13 and accompanying text.

[20] 15 U.S.C. 78s(b)(2).

[21] 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).

[5] Rule 2.5, Interpretation and Policy .01(f).

[6] Rule 2.5, Interpretation and Policy .01(d).

[7] *See* Securities Exchange Act Release No. 75783 (August 28, 2015), 80 FR 53369 (September 3, 2015) (approving SR–FINRA–2015–017) referred to herein as the ''FINRA Amendments.'' According to the release, FINRA's expected effective date for the FINRA Amendments is January 4, 2016.

examination or equivalent foreign securities examination module.

In consultation with FINRA and other exchanges, and in order to harmonize the requirements for individuals engaged in trading activities, the Exchange is now proposing to retire the Proprietary Trader registration category. Similarly, the Exchange is proposing to adopt a new Securities Trader registration category.

Under Exchange Rules, as revised, each person associated with a member who is included within the definition of Authorized Trader will be required to register as a Securities Trader unless they instead qualify based on the Series 7 examination or an equivalent foreign securities examination module. Therefore, representatives who previously qualified for Proprietary Trader registration will be required to register as Securities Traders. Accordingly, the Exchange is proposing to modify paragraph (f) of Interpretation and Policy .01 to reflect the new Securities Trader qualification as a permissible registration for Authorized Traders of Members that engage solely in trading on the Exchange on either an agency or principal basis. In order to register as a Securities Trader, an applicant would be required to have passed the new Securities Trader qualification examination (Series 57) or a predecessor examination (*i.e.,* the Series 56, as described below).

A person registered as a Proprietary Trader in the Central Registration Depository (CRD®) system on the effective date of the proposed rule change will be grandfathered as a Securities Trader without having to take any additional examinations and without having to take any other actions. In addition, individuals who were registered as Proprietary Traders in the CRD system prior to the effective date of the proposed rule change will be eligible to register as Securities Traders without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a representative and the date they register as a Securities Trader.

Persons registered in the new category would be subject to the continuing education requirements of Interpretation and Policy .02(e) to Rule 2.5. The Exchange proposes to amend Interpretation and Policy .02(e) by removing the option for Series 56 registered persons to participate in the S501 Series 56 Proprietary Trader continuing education program in order to satisfy the Regulatory Element. The S501 Series 56 Proprietary Trader continuing education program is being phased out along with the Series 56 Proprietary Trader qualification examination. As a result, effective January 4, 2016, the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons will cease to exist. In place of the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons, the Exchange proposes that Series 57 registered persons be required to take the S101 General Program for Series 7 and all other registered persons.

New Securities Trader Principal Registration Category

Currently, under Interpretation and Policy .01(d), the Exchange requires each Member to register ''Principals'' [8] with the Exchange. The Exchange requires the Series 24 examination to register as Principal. The Exchange will also accept the New York Stock Exchange Series 14 Compliance Official Examination in lieu of the Series 24 to satisfy the Principal examination requirement for any person designated as a Chief Compliance Officer. Further, in addition to the Series 24 or Series 14, in order to supervise the activities of General Securities Representatives a Principal generally must complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14. However, the Exchange currently permits the Series 56 as a prerequisite to the Series 24 or Series 14 for those Principals whose supervisory responsibilities are limited to overseeing the activities of proprietary traders, as described above. Like the Proprietary Trader category discussed above, the Proprietary Trader Principal registration category is being retired. Accordingly, the Exchange proposes to modify the references in the Rule regarding the prerequisite to the Series 24 or 14 for an individual that will supervise Series 57 qualified traders to correspond with the new Securities Trader exam. The Exchange proposes to establish the Securities Trader Principal category in Interpretation and Policy .01(d).

The Exchange has been working with other exchanges and FINRA to develop this new principal registration category and believes that it is an appropriate corollary to the new Securities Trader representative registration category. To qualify for registration as a Securities Trader Principal, an applicant must become qualified and registered as a Securities Trader under proposed Interpretation and Policy .01(c) and pass either the Series 24 or Series 14 examination. A person who is qualified and registered as a Securities Trader Principal would only be permitted to have supervisory responsibility over the activities of Securities Traders, unless such person were separately qualified and registered in another appropriate principal registration category, such as the General Securities Principal registration category. Conversely, the proposed rule change clarifies that each principal who will have supervisory responsibility over registered Securities Traders is required to become qualified and registered as a Securities Trader Principal.

A person registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system on the effective date of the proposed rule change will be eligible to register as a Securities Trader Principal without having to take any additional examinations. An individual who was registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system prior to the effective date of the proposed rule change will also be eligible to register as a Securities Trader Principal without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a principal and the date they register as a Securities Trader Principal. Members, however, will be required to affirmatively register persons transitioning to the proposed registration category as Securities Trader Principals on or after the effective date of the proposed rule change.

Other Changes

In order to accomplish the changes proposed above, the Exchange has proposed modifications throughout Interpretation and Policy .01 and .02 to Rule 2.5 as well as Rule 11.4(e) to eliminate references to Proprietary Trader, Proprietary Trader Principal, and Series 56 examination and to replace such references with Securities Trader, Securities Trader Principal and Series 57 examination. The Exchange also proposes to modify Rule 11.18, which sets forth the registration requirements applicable to Market Maker Authorized Traders, or MMATs, to cross-reference Interpretation and Policy .01 and .02. Although Rule 11.18 currently requires an MMAT to qualify by taking the Series 7 examination, the Exchange does not intend to impose

[8] Pursuant to Interpretation and Policy .01(d) to Rule 2.5, a Principal is ''any individual responsible for supervising the activities of a Member's Authorized Traders and each person designated as a Chief Compliance Officer on Schedule A of Form BD.''

different registration or continuing education requirements on MMATs than are required of Authorized Traders generally. In addition to these changes, the Exchange proposes to delete paragraph (h) to Interpretation .01, which currently states that: ''Principals responsible for supervising the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module in addition to the Series 24.'' The Exchange proposes to eliminate this provision as duplicative with existing language in Interpretation and Policy .01, including paragraph (d), which states that ''[i]ndividuals that supervise the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14 and shall be referred to as General Securities Principals.'' The Exchange also proposes to modify a reference in Interpretation and Policy .01(e) from ''General Securities Representative Principal'' to ''General Securities Principal.'' In addition, the Exchange proposes to eliminate the fees applicable to the Series 56 examination as well as the fees associated with the continuing education necessary to maintain registration after passing the Series 56 examination. Consistent with all other examinations recognized by the Exchange, FINRA will administer the Series 57 examination and the continuing education requirements related thereto, and the Exchange will not be separately charging and collecting any fees in order to take such examination or participate in applicable continuing education. Finally, in order to continue to align the Exchange's rules with the rules of its affiliated exchanges, BATS Exchange, Inc. and BATS Y-Exchange, Inc., the Exchange proposes to modify the language, but not the substance, of Rule 11.4(e).

2. Statutory Basis

The Exchange believes that proposed rule change is consistent with Section 6(b)(5) of the Act,[9] 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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the requirements of the Securities Trader and Securities Trader Principal registration categories, as well as the new Securities Trader qualification examination, should help ensure that proprietary traders and the principals who supervise proprietary traders and proprietary trading are, and will continue to be, properly trained and qualified to perform their functions which should protect investors and the public interest.

(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. Implementation of the proposed changes to the Exchange's registration rules in coordination with the FINRA Amendments does not present any competitive issues, but rather is designed to provide less burdensome and more efficient regulatory compliance for members and enhance the ability of the Exchange to fairly and efficiently regulate members, which will further enhance competition. Additionally, the proposed rule change should not affect intramarket competition because all similarly situated representatives and principals will be required to complete the same qualification examinations and maintain the same registrations.

(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 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 Act[10] and paragraph (f)(6) of Rule 19b–4 thereunder,[11] 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.

The Exchange has requested that the Commission waive the thirty-day operative delay so that the proposal may become operative as of January 4, 2016. The Exchange states that waiving the thirty-day delay would allow the Exchange to eliminate the Proprietary Trader and Proprietary Trader Principal registration categories and adopt the Securities Trader and Securities Trader Principal registration categories at the same time as FINRA and the other national securities exchanges. The Commission believes that waiving the thirty day delay is consistent with the protection of investors and the public interest, as it will enable EDGA to have the new requirements in effect at the same time as the other SROs. Therefore, the Commission hereby waives the thirty-day operative delay and designates the proposal operative as of January 4, 2016.[12]

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 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–EDGA–2015–48 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.

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4.

[12] For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

All submissions should refer to File No. SR–EDGA–2015–48. 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–EDGA–2015–48 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32819 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76758; File No. SR–BATS–2015–118]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Proprietary Trader and Proprietary Trader Principal Registration Categories, Securities Trader and Securities Trader Principal Registration Categories, and Establishing the Series 57 Examination

December 23, 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 22, 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 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 Act[3] 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 retire the Proprietary Trader and Proprietary Trader Principal registration categories and to establish the Securities Trader and Securities Trader Principal registration categories. The Exchange is also amending its rules to establish the Series 57 examination as the appropriate qualification examination for Securities Traders and deleting the rule referring to the S501 continuing education program currently applicable to Proprietary Traders. The Exchange will announce the effective date of the proposed rule change in a circular distributed to Members.

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 herein to replace the Series 56 with the Series 57 examination and to make various related changes to its registration rules. Specifically, in response to the FINRA Amendments (defined below), the Exchange is proposing to retire the Proprietary Trader[5] registration categories from its own registration rules relating to securities trading activity. It is also therefore retiring its Proprietary Trader Principal[6] registration category. To take the place of the retired registration categories, the Exchange is establishing new Securities Trader and Securities Trader Principal registration categories. This filing is based upon and in response to SR–FINRA–2015–017, which was recently approved by the Commission.[7]

New Securities Trader Registration Category

Currently, under Exchange Rule 11.4(e), each person associated with a member who is included within the definition of an ''Authorized Trader'' in Rule 1.5(d) is required to register with the Exchange and to pass an appropriate qualification examination before such registration may become effective. The Exchange recognizes the following qualification examinations as acceptable for purposes of registration as an Authorized Trader: Series 7, Series 56, or one of several foreign securities examination modules.

Interpretation and Policy .01(f) of Exchange Rule 2.5 currently provides that a person may register with the Exchange as a Proprietary Trader if such person engages solely in proprietary trading, passes the Series 56 examination and is an associated person of a proprietary trading firm as defined in Interpretation and Policy .01(g) of Exchange Rule 2.5. Therefore, pursuant to Interpretation and Policy .01 to Exchange Rule 2.5, an individual meeting these criteria may register in the Proprietary Trader category after passing the Series 56 examination rather than as a General Securities Representative after passing the Series 7

[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).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] Rule 2.5, Interpretation and Policy .01(f).

[6] Rule 2.5, Interpretation and Policy .01(d).

[7] *See* Securities Exchange Act Release No. 75783 (August 28, 2015), 80 FR 53369 (September 3, 2015) (approving SR–FINRA–2015–017) referred to herein as the ''FINRA Amendments.'' According to the release, FINRA's expected effective date for the FINRA Amendments is January 4, 2016.

examination or equivalent foreign securities examination module.

In consultation with FINRA and other exchanges, and in order to harmonize the requirements for individuals engaged in trading activities, the Exchange is now proposing to retire the Proprietary Trader registration category. Similarly, the Exchange is proposing to adopt a new Securities Trader registration category.

Under Exchange Rules, as revised, each person associated with a member who is included within the definition of Authorized Trader will be required to register as a Securities Trader unless they instead qualify based on the Series 7 examination or an equivalent foreign securities examination module. Therefore, representatives who previously qualified for Proprietary Trader registration will be required to register as Securities Traders. Accordingly, the Exchange is proposing to modify paragraph (f) of Interpretation and Policy .01 to reflect the new Securities Trader qualification as a permissible registration for Authorized Traders of Members that engage solely in trading on the Exchange on either an agency or principal basis. In order to register as a Securities Trader, an applicant would be required to have passed the new Securities Trader qualification examination (Series 57) or a predecessor examination (*i.e.,* the Series 56, as described below).

A person registered as a Proprietary Trader in the Central Registration Depository (CRD®) system on the effective date of the proposed rule change will be grandfathered as a Securities Trader without having to take any additional examinations and without having to take any other actions. In addition, individuals who were registered as Proprietary Traders in the CRD system prior to the effective date of the proposed rule change will be eligible to register as Securities Traders without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a representative and the date they register as a Securities Trader.

Persons registered in the new category would be subject to the continuing education requirements of Interpretation and Policy .02(e) to Rule 2.5. The Exchange proposes to amend Interpretation and Policy .02(e) by removing the option for Series 56 registered persons to participate in the S501 Series 56 Proprietary Trader continuing education program in order to satisfy the Regulatory Element. The S501 Series 56 Proprietary Trader continuing education program is being phased out along with the Series 56 Proprietary Trader qualification examination. As a result, effective January 4, 2016, the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons will cease to exist. In place of the S501 Series 56 Proprietary Trader continuing education program for Series 56 registered persons, the Exchange proposes that Series 57 registered persons be required to take the S101 General Program for Series 7 and all other registered persons.

New Securities Trader Principal Registration Category

Currently, under Interpretation and Policy .01(d), the Exchange requires each Member to register ''Principals'' [8] with the Exchange. The Exchange requires the Series 24 examination to register as Principal. The Exchange will also accept the New York Stock Exchange Series 14 Compliance Official Examination in lieu of the Series 24 to satisfy the Principal examination requirement for any person designated as a Chief Compliance Officer. Further, in addition to the Series 24 or Series 14, in order to supervise the activities of General Securities Representatives a Principal generally must complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14. However, the Exchange currently permits the Series 56 as a prerequisite to the Series 24 or Series 14 for those Principals whose supervisory responsibilities are limited to overseeing the activities of proprietary traders, as described above. Like the Proprietary Trader category discussed above, the Proprietary Trader Principal registration category is being retired. Accordingly, the Exchange proposes to modify the references in the Rule regarding the prerequisite to the Series 24 or 14 for an individual that will supervise Series 57 qualified traders to correspond with the new Securities Trader exam. The Exchange proposes to establish the Securities Trader Principal category in Interpretation and Policy .01(d).

The Exchange has been working with other exchanges and FINRA to develop this new principal registration category and believes that it is an appropriate corollary to the new Securities Trader representative registration category. To qualify for registration as a Securities Trader Principal, an applicant must become qualified and registered as a Securities Trader under proposed Interpretation and Policy .01(c) and pass either the Series 24 or Series 14 examination. A person who is qualified and registered as a Securities Trader Principal would only be permitted to have supervisory responsibility over the activities of Securities Traders, unless such person were separately qualified and registered in another appropriate principal registration category, such as the General Securities Principal registration category. Conversely, the proposed rule change clarifies that each principal who will have supervisory responsibility over registered Securities Traders is required to become qualified and registered as a Securities Trader Principal.

A person registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system on the effective date of the proposed rule change will be eligible to register as a Securities Trader Principal without having to take any additional examinations. An individual who was registered as a General Securities Principal and as a Proprietary Trader Principal in the CRD system prior to the effective date of the proposed rule change will also be eligible to register as a Securities Trader Principal without having to take any additional examinations, provided that no more than two years have passed between the date they were last registered as a principal and the date they register as a Securities Trader Principal. Members, however, will be required to affirmatively register persons transitioning to the proposed registration category as Securities Trader Principals on or after the effective date of the proposed rule change.

Other Changes

In order to accomplish the changes proposed above, the Exchange has proposed modifications throughout Interpretation and Policy .01 and .02 to Rule 2.5 as well as Rule 11.4(e) to eliminate references to Proprietary Trader, Proprietary Trader Principal, and Series 56 examination and to replace such references with Securities Trader, Securities Trader Principal and Series 57 examination. The Exchange also proposes to modify Rule 11.6, which sets forth the registration requirements applicable to Market Maker Authorized Traders, or MMATs, to cross-reference Interpretation and Policy .01 and .02. Although Rule 11.6 currently requires an MMAT to qualify by taking the Series 7 examination, the Exchange does not intend to impose

[8] Pursuant to Interpretation and Policy .01(d) to Rule 2.5, a Principal is ''any individual responsible for supervising the activities of a Member's Authorized Traders and each person designated as a Chief Compliance Officer on Schedule A of Form BD.''

different registration or continuing education requirements on MMATs than are required of Authorized Traders generally. In addition to these changes, the Exchange proposes to delete paragraph (h) to Interpretation .01, which currently states that: ''Principals responsible for supervising the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module in addition to the Series 24.'' The Exchange proposes to eliminate this provision as duplicative with existing language in Interpretation and Policy .01, including paragraph (d), which states that ''[i]ndividuals that supervise the activities of General Securities Representatives must successfully complete the Series 7 or an equivalent foreign examination module as a prerequisite to the Series 24 or Series 14 and shall be referred to as General Securities Principals.'' The Exchange also proposes to modify a reference in Interpretation and Policy .01(e) from ''General Securities Representative Principal'' to ''General Securities Principal.'' In addition, the Exchange proposes to eliminate the fees applicable to the Series 56 examination as well as the fees associated with the continuing education necessary to maintain registration after passing the Series 56 examination. Consistent with all other examinations recognized by the Exchange, FINRA will administer the Series 57 examination and the continuing education requirements related thereto, and the Exchange will not be separately charging and collecting any fees in order to take such examination or participate in applicable continuing education. Finally, in order to continue to align the Exchange's rules with the rules of its affiliated exchanges, the Exchange proposes to adopt descriptive headings in Interpretation and Policy .02 to Rule 2.5 based on Interpretation and Policy .02 to Rule 2.5 of the rules of EDGA Exchange, Inc. and EDGX Exchange, Inc. and to modify the language, but not the substance, of Rule 11.4(e).

2. Statutory Basis

The Exchange believes that proposed rule change is consistent with Section 6(b)(5) of the Act,[9] 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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the requirements of the Securities Trader and Securities Trader Principal registration categories, as well as the new Securities Trader qualification examination, should help ensure that proprietary traders and the principals who supervise proprietary traders and proprietary trading are, and will continue to be, properly trained and qualified to perform their functions which should protect investors and the public interest.

(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. Implementation of the proposed changes to the Exchange's registration rules in coordination with the FINRA Amendments does not present any competitive issues, but rather is designed to provide less burdensome and more efficient regulatory compliance for members and enhance the ability of the Exchange to fairly and efficiently regulate members, which will further enhance competition. Additionally, the proposed rule change should not affect intramarket competition because all similarly situated representatives and principals will be required to complete the same qualification examinations and maintain the same registrations.

(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 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 Act[10] and paragraph (f)(6) of Rule 19b–4 thereunder,[11] 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.

The Exchange has requested that the Commission waive the thirty-day operative delay so that the proposal may become operative as of January 4, 2016. The Exchange states that waiving the thirty-day delay would allow the Exchange to eliminate the Proprietary Trader and Proprietary Trader Principal registration categories and adopt the Securities Trader and Securities Trader Principal registration categories at the same time as FINRA and the other national securities exchanges. The Commission believes that waiving the thirty day delay is consistent with the protection of investors and the public interest, as it will enable BATS to have the new requirements in effect at the same time as the other SROs. Therefore, the Commission hereby waives the thirty-day operative delay and designates the proposal operative as of January 4, 2016.[12]

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 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–2015–118 on the subject line.

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4.

[12] For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–BATS–2015–118. 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–2015–118 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32825 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76750; File No. SR–NYSEMKT–2015–85]

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving Proposed Rule Change to the Co-location Services Offered by the Exchange (the Offering of a Wireless Connection to Allow Users to Receive Market Data Feeds from Third Party Markets) and to Reflect Changes to the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule Related to These Services

December 23, 2015.

I. Introduction

On October 23, 2015, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend the co-location services offered by the Exchange to include a means for co-located Users to receive market data feeds from third party markets through a wireless connection. The proposed rule change was published in the **Federal Register** on November 12, 2015.[4] No comment letters were received in response to the Notice. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to change the co-location services offered by the Exchange to include a means for Users to receive market data feeds from third party markets (the ''Third Party Data'') through a wireless connection.[5] In addition, the proposed rule change reflects changes to the Exchange's Price List and the Fee Schedule related to these co-location services.

The Exchange proposes to offer the wireless connection to provide Users with an alternative means of connectivity for Third Party Data. As the Exchange notes, wireless connections involve beaming signals through the air between antennas that are within sight of one another.[6] Because the signals travel a straight, unimpeded line, and because light waves travel faster through air than through glass (fiber optics), wireless messages have lower latency than messages travelling through fiber optics.[7]

Under the proposed rule change, the Exchange would utilize a network vendor to provide a wireless connection to the Third Party Data through wireless connections from the Exchange access centers in Secaucus and Carteret, New Jersey, to its data center in Mahwah, New Jersey, through a series of towers equipped with wireless equipment.[8] A User that chooses this optional service would be able to receive data feeds from NASDAQ and BATS Exchange, Inc. over a wireless connection. To receive Third Party Data, the User would enter into a contract with the relevant third party market, which would charge the User the applicable market data fees for the Third Party Data. The Exchange would charge the User fees for the wireless connection for the Third Party Data.[9]

A User would be charged a $5,000 non-recurring initial charge for each wireless connection and a monthly recurring charge (''MRC'') that would vary depending upon the feed that the User opts to receive. If a User purchased two wireless connections, it would pay two non-recurring initial charges. The MRC for a wireless connection to each of BATS Pitch BZX Gig shaped data, DirectEdge EDGX Gig shaped data, and NASDAQ BX Totalview-ITCH data will be $6,000; the MRC for a wireless connection of NASDAQ Totalview-ITCH data will be $8,500; and the MRC for a wireless connection of NASDAQ Totalview-ITCH and BX Totalview-ITCH data will be $12,000. The

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 76366 (November 5, 2015), 80 FR 70047 (November 12, 2015) (''Notice'').

[5] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR–NYSEMKT–2015–67). As specified in the Price List and the Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC and NYSE Arca, Inc. *See* Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR–NYSEMKT–2013–67).

[6] *See* Notice, *supra* note 4 at 70048.

[7] *See id.*

[8] The NASDAQ Stock Market LLC (''NASDAQ'') offers a similar wireless service. *See* Securities Exchange Act Release No. 68735 (January 25, 2013), 78 FR 6842 (January 31, 2013) (SR–NASDAQ–2012–119) (approving a proposed rule change to establish a new optional wireless connectivity for co-located clients).

[9] A User would only receive the Third Party Data for which it had entered into a contract. For example, a User that contracted with NASDAQ for the NASDAQ Totalview-ITCH data feed but did not contract to receive any other Third Party Data would receive only the NASDAQ Totalview-ITCH data feed through its wireless connection.

Exchange proposes to waive the first month's MRC, to allow Users to test the receipt of the feed(s) for a month before incurring any MRCs.

The wireless connections would include the use of one port for connectivity to the Third Party Data. A User will only require one port to connect to the Third Party Data, irrespective of how many of the five wireless connections it orders. If a User that has more than one wireless connection wishes to use more than one port to connect to the Third Party Data,[10] the Exchange proposes to make such additional ports available for a monthly fee per port of $3,000.

The Exchange represents that there is limited bandwidth available on the wireless connection for data feeds from third parties. As a result, the Exchange has decided to offer as Third Party Data only the data feeds that are in high demand from Users. Although constrained by bandwidth with respect to the number of feeds it can carry, the Exchange represents that the wireless network offered by the Exchange can be made available to an unlimited number of Users.

The wireless connection would provide Users with an alternative means of connectivity for Third Party Data. Currently, Users can receive Third Party Data through other methods, including, for example, from another User, through a telecommunications provider, or over the internet protocol (''IP'') network.[11] In addition, Users can receive Third Party Data from wireless networks offered by third party vendors. The Exchange represents that there are currently at least four third party vendors that offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center. The Exchange states that its proposed wireless connection would traverse wireless connections through a series of towers equipped with wireless equipment, including a pole on the grounds of the data center.[12] The Exchange states that access to such pole or the roof is not required for third parties to establish wireless networks that can compete with Exchange's proposed service and, in particular, represents that based on the information available to it, the proposed wireless connection would provide data at the same or similar speed, and at the same or similar cost, as existing wireless networks, thereby enhancing competition.[13]

The wireless connection to the Third Party Data is expected to be available no later than March 1, 2016. The Exchange will announce the date that the wireless connection to the Third Party Data will be available through a customer notice.

III. Discussion 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.[14] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[15] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[17] which requires that the rules of the exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that the Exchange's proposal to provide this additional connectivity option is consistent with the requirement of Section 6(b)(5) of the Act. The Commission believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the Exchange makes wireless connectivity available to all Users on an equal basis. All Users that voluntarily select this service option will be charged the same amount for the same services, and there would be no differentiation among Users with regard to the fees charged for the service. Further, the Exchange represents that Users of the new wireless connection would not receive Third Party Data that is not available to all Users. In addition, the Exchange represents that Users that do not opt to utilize the Exchange's wireless connections would still be able to obtain Third Party Data through other methods, such as from wireless networks offered by third party vendors, other Users, through telecommunications providers, or over the IP network.

The Commission also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act.[18] All Users that voluntarily select this service option will be charged the same amount for the same services, and there would be no differentiation among Users with regard to the fees charged for the service. The Commission notes the Exchange's representation that the fees associated with providing the wireless connections are reasonable because the Exchange will incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for initial installation and monitoring, support and maintenance of such services. The Exchange states that the costs associated with the wireless connections are incrementally higher than fiber optics-based solutions due to the expense of the wireless equipment, cost of installation and testing and ongoing maintenance of the network, and that the fees also reflect the benefit received by Users in terms of lower latency over the fiber optics option. In addition, the Exchange believes that the proposed waiver of the first month's MRC is reasonable as it would allow Users to test the receipt of the feed(s) for a month before incurring any monthly recurring fees and may act as an incentive to Users to utilize the new service.

The Commission also finds that consistent with Section 6(b)(8) of the Act the proposed rule change does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange states that Users currently can receive Third Party Data from competing wireless networks offered by third party vendors, including at least four third party vendors that offer Users wireless network connections using

[10] For example, a User with two wireless connections for Third Party Data may opt to purchase an additional port in order to route the options and equity data it receives to different cabinets.

[11] The IP network is a local area network available in the data center. *See* Securities Exchange Act Release No. 74220 (February 6, 2015), 80 FR 7894 (February 12, 2015) (SR–NYSEMKT–2015–08) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

[12] *See* Notice, *supra* note 4 at 70050.

[13] *See* Notice, *supra* note 4 at 70049–50.

[14] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(8).

[18] 15 U.S.C. 78f(b)(4).

wireless equipment installed on towers and buildings near the data center. The Exchange represents, based on the information available to it, that the proposed wireless connection would provide data at the same or similar speed, and at the same or similar cost, as existing wireless networks, thereby enhancing competition.[19] The Exchange also notes that the proposed wireless connection would compete not just with other wireless connections, but also with fiber optic networks, which may be more attractive to some Users as they are more reliable and less susceptible to weather conditions. For these reasons, the Commission does not believe that the proposed rule change imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule change (SR–NYSEMKT–2015–85) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32811 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76767; File No. SR–FINRA–2015–056]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt FINRA Rule 2030 and FINRA Rule 4580 To Establish ''Pay-To-Play'' and Related Rules

December 24, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act,'' ''Exchange Act'' or ''SEA'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 16, 2015, Financial Industry Regulatory Authority, Inc. filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. 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

FINRA is proposing to adopt FINRA Rules 2030 (Engaging in Distribution and Solicitation Activities with Government Entities)[3] and 4580 (Books and Records Requirements for Government Distribution and Solicitation Activities) to establish ''pay-to-play''[4] and related rules that would regulate the activities of member firms that engage in distribution or solicitation activities for compensation with government entities on behalf of investment advisers.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA 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, FINRA 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. FINRA 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

Background & Discussion

In July 2010, the SEC adopted Rule 206(4)–5 under the Investment Advisers Act of 1940 (''Advisers Act'') addressing pay-to-play practices by investment advisers (the ''SEC Pay-to-Play Rule'').[5] The SEC Pay-to-Play Rule prohibits an investment adviser from providing advisory services for compensation to a government entity for two years after the adviser or its covered associates make a contribution to an official of the government entity, unless an exception or exemption applies. In addition, it prohibits an investment adviser from soliciting from others, or coordinating, contributions to government entity officials or payments to political parties where the adviser is providing or seeking to provide investment advisory services to a government entity.

The SEC Pay-to-Play Rule also prohibits an investment adviser and its covered associates from providing or agreeing to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of the investment adviser unless the person is a ''regulated person.'' A ''regulated person'' includes a member firm, provided that: (a) FINRA rules prohibit member firms from engaging in distribution or solicitation activities if political contributions have been made; and (b) the SEC finds, by order, that such rules impose substantially equivalent or more stringent restrictions on member firms than the SEC Pay-to-Play Rule imposes on investment advisers and that such rules are consistent with the objectives of the SEC Pay-to-Play Rule.[6] The SEC stated that this SEC ban on third-party solicitations would be effective nine months after the compliance date of a final rule adopted by the SEC by which municipal advisors must register under the Exchange Act.[7] The SEC adopted such a final rule on September 20, 2013, with a compliance date of July 1, 2014.[8]

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[19] *See supra* notes 12 and 13 and accompanying text.

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] FINRA published the proposed rule change as FINRA Rule 2390 in *Regulatory Notice* 14–50 (Nov. 2014) (''*Regulatory Notice* 14–50''). FINRA has determined that the proposed rule change is more appropriately categorized under the FINRA Rule 2000 Series relating to ''Duties and Conflicts.''

[4] ''Pay-to-play'' practices typically involve a person making cash or in-kind political contributions (or soliciting or coordinating others to make such contributions) to help finance the election campaigns of state or local officials or bond ballot initiatives as a quid pro quo for the receipt of government contracts.

[5] *See* Advisers Act Release No. 3043 (July 1, 2010), 75 FR 41018 (July 14, 2010) (Political Contributions by Certain Investment Advisers) (''SEC Pay-to-Play Rule Adopting Release''). *See also* Advisers Act Release No. 3221 (June 22, 2011), 76 FR 42950 (July 19, 2011) (Rules Implementing Amendments to the Investment Advisers Act of 1940); Advisers Act Release No. 3418 (June 8, 2012), 77 FR 35263 (June 13, 2012) (Political Contributions by Certain Investment Advisers; Ban on Third Party Solicitation; Extension of Compliance Date).

[6] *See* SEC Pay-to-Play Rule 206(4)–5(f)(9). A ''regulated person'' also includes SEC registered investment advisers and SEC-registered municipal advisors, subject to specified conditions.

[7] *See* Advisers Act Release No. 3418 (June 8, 2012), 77 FR 35263 (June 13, 2012).

[8] *See* Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468 (Nov. 12, 2013) (Registration of Municipal Advisors). On June 25, 2015, the SEC issued notice of the compliance date for its third party solicitation ban as July 31, 2015. *See* Advisers Act Release No. 4129 (June 25, 2015), 80 FR 37538 (July 1, 2015). In addition, staff of the Division of Investment Management added Question I.4 to its Staff Responses to Questions About the Pay to Play Rule stating, among other things, that until the later of (i) the effective date of a FINRA pay-to-play rule or (ii) the effective date of an MSRB pay-to-play rule, the Division of Investment Management would not recommend enforcement action to the

Based on this regulatory framework, FINRA is proposing a pay-to-play rule, Rule 2030, modeled on the SEC Pay-to-Play Rule that would impose substantially equivalent restrictions on member firms engaging in distribution or solicitation activities to those the SEC Pay-to-Play Rule imposes on investment advisers. FINRA is also proposing rules that would impose recordkeeping requirements on member firms in connection with political contributions.[9]

The proposed rules would establish a comprehensive regime to regulate the activities of member firms that engage in distribution or solicitation activities with government entities on behalf of investment advisers. FINRA believes that establishing requirements for member firms that are modeled on the SEC's Pay-to-Play-Rule is a more effective regulatory response to the concerns the SEC identified in the SEC Pay-to-Play Rule Adopting Release regarding third-party solicitations than an outright ban on such activity. For example, in the SEC Pay-to-Play Rule Adopting Release, the SEC stated that solicitors [10] or ''placement agents'' [11] have played a central role in actions that it and other authorities have brought involving pay-to-play schemes.[12] The SEC noted that in several instances, advisers allegedly made significant payments to placement agents and other intermediaries to influence the award of advisory contracts.[13] The SEC also acknowledged the difficulties that advisers face in monitoring or controlling the activities of their third-party solicitors.[14] Accordingly, the proposed rules are intended to enable member firms to continue to engage in distribution and solicitation activities with government entities on behalf of investment advisers while at the same time deterring member firms from engaging in pay-to-play practices.[15]

FINRA sought comment on the proposed rule change in *Regulatory Notice* 14–50.[16] As discussed further in Item II.C below, commenters were generally supportive of the proposed rule change, but also expressed some concerns. In considering the comments, FINRA has engaged in discussions with SEC staff. In addition, as discussed in Item II.B below, FINRA has engaged in an analysis of the potential economic impacts of the proposed rule change. As a result, FINRA has revised the proposed rule change as published in *Regulatory Notice* 14–50. In particular, as discussed in more detail in Item II.C, FINRA has determined not to propose a disclosure requirement for government distribution and solicitation activities at this time. In addition, FINRA has determined not to propose a disgorgement requirement as part of the pay-to-play rule. FINRA believes that these revisions will more closely align FINRA's proposed pay-to-play rule with the SEC Pay-to-Play Rule and help reduce cost and compliance burden concerns raised by commenters.

The proposed rule change, as revised in response to comments on *Regulatory Notice* 14–50, is set forth in further detail below.

Proposed Pay-to-Play Rule

A. Two-Year Time Out

Proposed Rule 2030(a) would prohibit a covered member from engaging in distribution [17] or solicitation [18] activities for compensation with a government entity on behalf of an investment adviser that provides or is seeking to provide investment advisory services to such government entity within two years after a contribution to an official of the government entity is made by the covered member or a covered associate (including a person who becomes a covered associate within two years after the contribution is made). As discussed in more detail below, the terms and scope of this prohibition are modeled on the SEC Pay-to-Play Rule.[19]

The proposed rule would not ban or limit the amount of political contributions a covered member or its covered associates could make. Instead, it would impose a two-year time out on engaging in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser after the covered member or its covered associates make a contribution to an official of the government entity. Consistent with the two-year time out in the SEC Pay-to-Play Rule, the two-year time out in the proposed rule is intended to discourage covered members from participating in pay-to-play practices by requiring a cooling-off period during which the effects of a political contribution on the selection process can be expected to dissipate.

Commission against an investment adviser or its covered associates under SEC Pay-to-Play Rule 206(4)–5(a)(2)(i) for the payment to any person to solicit a government entity for investment advisory services. *See https://www.sec.gov/divisions/investment/pay-to-play-faq.htm. See also infra Effective Date,* for a more detailed discussion regarding the effective date of FINRA Rules 2030 and 4580.

[9] In connection with the adoption of the SEC Pay-to-Play Rule, the Commission also adopted recordkeeping requirements related to political contributions by investment advisers and their covered associates. *See* Advisers Act Rule 204–2(a)(18) and (h)(1).

[10] ''Solicitors'' typically locate investment advisory clients on behalf of an investment adviser. *See* Advisers Act Release No. 2910 (Aug. 3, 2009), 74 FR 39840, 39853 n.137 (Aug. 7, 2009) (Political Contributions by Certain Investment Advisers).

[11] ''Placement agents'' typically specialize in finding investors (often institutional investors or high net worth investors) that are willing and able to invest in a private offering of securities on behalf of the issuer of such privately offered securities. *See id.*

[12] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41037 (discussing the reasons for proposing a ban on using third parties to solicit government business).

[13] *See id.*

[14] *See id.*

[15] In response to a request from SEC staff, FINRA previously indicated its intent to prepare rules for consideration by the SEC that would prohibit its member firms from soliciting advisory business from a government entity on behalf of an adviser unless the member firms comply with requirements prohibiting pay-to-play practices. *See* Letter from Andrew J. Donohue, Director, Division of Investment Management, SEC, to Richard G. Ketchum, Chairman & CEO, FINRA (Dec. 18, 2009), available at *http://www.sec.gov/comments/s7-18-09/s71809-252.pdf* (requesting whether FINRA would consider adopting a rule preventing pay-to-play activities by registered broker-dealers acting as legitimate placement agents on behalf of investment advisers). *See also* Letter from Richard G. Ketchum, Chairman & CEO, FINRA, to Andrew J. Donohue, Director, Division of Investment Management, SEC (Mar. 15, 2010), available at *http://www.sec.gov/comments/s7-18-09/s71809-260.pdf* (stating ''[w]e believe that a regulatory scheme targeting improper pay to play practices by broker-dealers acting on behalf of investment advisers is . . . a viable solution to a ban on certain private placement agents serving a legitimate function'').

[16] *See supra* note 3.

[17] As discussed in Item II.C below, FINRA is not eliminating the term ''distribution'' from the proposed rule as suggested by some commenters. Thus, subject to the limitations discussed in Item II.C, the proposed rule would apply to covered members engaging in distribution (as well as solicitation) activities with government entities. Specifically, the proposed rule would apply to distribution activities involving unregistered pooled investment vehicles such as hedge funds, private equity funds, venture capital funds, and collective investment trusts, and registered pooled investment vehicles such as mutual funds, but only if those registered pools are an investment option of a participant-directed plan or program of a government entity.

[18] Consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(11) defines the term ''solicit'' to mean: ''(A) With respect to investment advisory services, to communicate, directly or indirectly, for the purpose of obtaining or retaining a client for, or referring a client to, an investment adviser; and (B) With respect to a contribution or payment, to communicate, directly or indirectly, for the purpose of obtaining or arranging a contribution or payment.'' The determination of whether a particular communication would be a solicitation would depend on the facts and circumstances relating to such communication. As a general proposition, any communication made under circumstances reasonably calculated to obtain or retain an advisory client would be considered a solicitation unless the circumstances otherwise indicate that the communication does not have the purpose of obtaining or retaining an advisory client. *See also infra* note 40.

[19] *See* SEC Pay-to-Play Rule 206(4)–5(a)(1).

1. Covered Members

Proposed Rule 2030(g)(4) defines a ''covered member'' to mean ''any member except when that member is engaging in activities that would cause the member to be a municipal advisor as defined in Exchange Act Section 15B(e)(4), SEA Rule 15Ba1–1(d)(1) through (4) and other rules and regulations thereunder.'' As noted above, the SEC Pay-to-Play Rule includes within its definition of ''regulated person'' SEC-registered municipal advisors, subject to specified conditions.[20] Specifically, the SEC Pay-to-Play Rule prohibits an investment adviser from providing or agreeing to provide, directly or indirectly, payment to an SEC-registered municipal advisor unless the municipal advisor is subject to a Municipal Securities Rulemaking Board (''MSRB'') pay-to-play rule.[21]

A member firm that solicits a government entity for investment advisory services on behalf of an unaffiliated investment adviser may be required to register with the SEC as a municipal advisor as a result of such activity.[22] Under such circumstances, MSRB rules applicable to municipal advisors, including any pay-to-play rule adopted by the MSRB, would apply to the member firm.[23] On the other hand, if the member firm solicits a government entity on behalf of an affiliated investment adviser, such activity would not cause the firm to be a municipal advisor. Under such circumstances, the member firm would be a ''covered member'' subject to the requirements of proposed Rule 2030.[24]

2. Investment Advisers

The proposed rule would apply to covered members acting on behalf of any investment adviser registered (or required to be registered) with the SEC, or unregistered in reliance on the exemption available under Section 203(b)(3) of the Advisers Act for foreign private advisers, or that is an exempt reporting adviser under Advisers Act Rule 204–4(a).[25] Thus, it would not apply to member firms acting on behalf of advisers that are registered with state securities authorities instead of the SEC, or advisers that are unregistered in reliance on exemptions other than Section 203(b)(3) of the Advisers Act. The proposed rule's definition of ''investment adviser'' is consistent with the definition of ''investment adviser'' in the SEC Pay-to-Play Rule.[26]

3. Official of a Government Entity

An official of a government entity would include an incumbent, candidate or successful candidate for elective office of a government entity if the office is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser or has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser.[27] Government entities would include all state and local governments, their agencies and instrumentalities, and all public pension plans and other collective government funds, including participant-directed plans such as 403(b),[28] 457,[29] and 529 plans.[30]

Thus, the two-year time out would be triggered by contributions, not only to elected officials who have legal authority to hire the adviser, but also to elected officials (such as persons with appointment authority) who can influence the hiring of the adviser. As noted in the SEC Pay-to-Play Rule Adopting Release, a person appointed by an elected official is likely to be subject to that official's influences and recommendations. It is the scope of authority of the particular office of an official, not the influence actually exercised by the individual that would determine whether the individual has influence over the awarding of an investment advisory contract under the definition.[31]

4. Contributions

The proposed rule's time out provisions would be triggered by contributions made by a covered member or any of its covered associates. A contribution would include a gift, subscription, loan, advance, deposit of money, or anything of value made for the purpose of influencing the election for a federal, state or local office, including any payments for debts incurred in such an election. It would also include transition or inaugural expenses incurred by a successful candidate for state or local office.[32]

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[20] *See supra* note 6.

[21] *See* SEC Pay-to-Play Rule 206(4)–5(a)(2)(i)(A) and 206(4)–5(f)(9).

[22] *See* Exchange Act Section 15B(e)(9) and Rule 15Ba1–1(n) thereunder (defining ''solicitation of a municipal entity or obligated person'' to mean ''a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser . . . that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.'')

[23] On August 18, 2014, the MSRB issued a *Regulatory Notice* requesting comment on draft amendments to MSRB Rule G–37, on political contributions made by brokers, dealers and municipal securities dealers and prohibitions on municipal securities business, to extend the rule to cover municipal advisors. *See* MSRB *Regulatory Notice* 2014–15 (Aug. 2014). MSRB Rule G–37 was approved by the Commission in 1994 and, since that time, has prohibited brokers, dealers and municipal securities dealers engaging in municipal securities business from participating in pay-to-play practices. *See* Exchange Act Release No. 33868 (Apr. 7, 1994), 59 FR 17621 (Apr. 13, 1994) (Order Approving File No. SR–MSRB–94–2).

[24] FINRA notes that a person that is registered under the Exchange Act as a broker-dealer and municipal advisor, and under the Advisers Act as an investment adviser could potentially be a ''regulated person'' for purposes of the SEC Pay-to-Play Rule. Such a regulated person would be subject to the rules that apply to the services the regulated person is performing. *See also supra* note 23 (noting that brokers, dealers and municipal securities dealers engaging in municipal securities business are subject to MSRB Rule G–37).

[25] *See* proposed Rule 2030(g)(7).

[26] *See* SEC Pay-to-Play Rule 206(4)–5(a)(1). FINRA notes that, consistent with the SEC Pay-to-Play Rule, the proposed rule would not apply to state-registered investment advisers as few of these smaller firms manage public pension plans or other similar funds. *See also infra* note 98 and accompanying text.

[27] Consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(8) defines an ''official'' to mean ''any person (including any election committee for the person) who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a government entity, if the office: (A) Is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity; or (B) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity.''

[28] A 403(b) plan is a tax-deferred employee benefit retirement plan established under Section 403(b) of the Internal Revenue Code of 1986 (26 U.S.C. 403(b)).

[29] A 457 plan is a tax-deferred employee benefit retirement plan established under Section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457).

[30] A 529 plan is a ''qualified tuition plan'' established under Section 529 of the Internal Revenue Code of 1986 (26 U.S.C. 529). Consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(6) defines a ''government entity'' to mean ''any state or political subdivision of a state, including: (A) Any agency, authority or instrumentality of the state or political subdivision; (B) A pool of assets sponsored or established by the state or political subdivision or any agency, authority or instrumentality thereof, including but not limited to a ''defined benefit plan'' as defined in Section 414(j) of the Internal Revenue Code, or a state general fund; (C) A plan or program of a government entity; and (D) Officers, agents or employees of the state or political subdivision or any agency, authority or instrumentality thereof, acting in their official capacity.''

[31] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41029 (discussing the terms ''official'' and ''government entity'').

[32] Consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(1) defines a ''contribution'' to mean ''any gift, subscription, loan, advance, or deposit of money or anything of value made for: (A) The purpose of influencing any election for federal, state or local office; (B) Payment of debt incurred in connection with any such election; or (C) Transition or inaugural expenses of the successful candidate for state or local office.''

Consistent with the SEC Pay-to-Play Rule, FINRA would not consider a donation of time by an individual to be a contribution, provided the covered member has not solicited the individual's efforts and the covered member's resources, such as office space and telephones, are not used.[33] Similarly, FINRA would not consider a charitable donation made by a covered member to an organization that qualifies for an exemption from federal taxation under the Internal Revenue Code,[34] or its equivalent in a foreign jurisdiction, at the request of an official of a government entity to be a contribution for purposes of the proposed rule.[35]

5. Covered Associates

As stated in the SEC Pay-to-Play Rule Adopting Release, contributions made to influence the selection process are typically made not by the firm itself, but by officers and employees of the firm who have a direct economic stake in the business relationship with the government client.[36] Accordingly, consistent with the SEC Pay-to-Play Rule, under the proposed rule, contributions by each of these persons, which the proposed rule describes as ''covered associates,'' would trigger the two-year time out.[37]

Contributions by an executive officer of a covered member would trigger the two-year time out. As discussed in Item II.C below, commenters requested that FINRA define the term ''executive officer'' for purposes of the proposed pay-to-play rule. Accordingly, consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(5) defines an ''executive officer of a covered member'' to mean: ''(A) The president; (B) Any vice president in charge of a principal business unit, division or function (such as sales, administration or finance); (C) Any other officer of the covered member who performs a policy-making function; or (D) Any other person who performs similar policy-making functions for the covered member.'' Whether a person is an executive officer would depend on his or her function or activities and not his or her title. For example, an officer who is a chief executive of a covered member but whose title does not include ''president'' would nonetheless be an executive officer for purposes of the proposed rule.

In addition, a covered associate would include a political action committee, or PAC, controlled by the covered member or any of its covered associates as a PAC is often used to make political contributions.[38] Under the proposed rule, FINRA would consider a covered member or its covered associates to have ''control'' over a PAC if the covered member or covered associate has the ability to direct or cause the direction of governance or operations of the PAC.

6. ''Look Back''

Consistent with the SEC Pay-to-Play Rule, the proposed rule would attribute to a covered member contributions made by a person within two years (or, in some cases, six months) of becoming a covered associate. This ''look back'' would apply to any person who becomes a covered associate, including a current employee who has been transferred or promoted to a position covered by the proposed rule. A person would become a ''covered associate'' for purposes of the proposed rule's ''look back'' provision at the time he or she is hired or promoted to a position that meets the definition of a ''covered associate.''

Thus, when an employee becomes a covered associate, the covered member must ''look back'' in time to that employee's contributions to determine whether the time out applies to the covered member. If, for example, the contributions were made more than two years (or, pursuant to the exception described below for new covered associates, six months) prior to the employee becoming a covered associate, the time out has run. If the contribution was made less than two years (or six months, as applicable) from the time the person becomes a covered associate, the proposed rule would prohibit the covered member that hires or promotes the contributing covered associate from receiving compensation for engaging in distribution or solicitation activities on behalf of an investment adviser from the hiring or promotion date until the two-year period has run.

In no case would the prohibition imposed be longer than two years from the date the covered associate made the contribution. Thus, if, for example, the covered associate becomes employed (and engages in solicitation activities) one year and six months after the contribution was made, the covered member would be subject to the proposed rule's prohibition for the remaining six months of the two-year period. This ''look back'' provision, which is consistent with the SEC Pay-to-Play Rule, is designed to prevent covered members from circumventing the rule by influencing the selection process by hiring persons who have made political contributions.[39]

B. Prohibition on Soliciting and Coordinating Contributions

Proposed Rule 2030(b) would prohibit a covered member or covered associate from coordinating or soliciting[40] any

[33] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41030. The SEC also noted that a covered associate's donation of his or her time generally would not be viewed as a contribution if such volunteering were to occur during non-work hours, if the covered associate were using vacation time, or if the adviser is not otherwise paying the employee's salary (*e.g.,* an unpaid leave of absence). *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41030 n.157. FINRA would take a similar position in interpreting the proposed rule.

[34] Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) contains a list of charitable organizations that are exempt from Federal income tax.

[35] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41030 (discussing the scope of the term ''contribution'' under the SEC Pay-to-Play Rule). Note, however, proposed Rule 2030(e) providing that it shall be a violation of Rule 2030 for any covered member or any of its covered associates to do anything indirectly that, if done directly, would result in a violation of the rule.

[36] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41031.

[37] Consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(2) defines a ''covered associate'' to mean: ''(A) Any general partner, managing member or executive officer of a covered member, or other individual with a similar status or function; (B) Any associated person of a covered member who engages in distribution or solicitation activities with a government entity for such covered member; (C) Any associated person of a covered member who supervises, directly or indirectly, the government entity distribution or solicitation activities of a person in subparagraph (B) above; and (D) Any political action committee controlled by a covered member or a covered associate.''

[38] *See id.*

[39] Similarly, consistent with the SEC Pay-to-Play Rule, to prevent covered members from channeling contributions through departing employees, covered members must ''look forward'' with respect to covered associates who cease to qualify as covered associates or leave the firm. The covered associate's employer at the time of the contribution would be subject to the proposed rule's prohibition for the entire two-year period, regardless of whether the covered associate remains a covered associate or remains employed by the covered member. Thus, dismissing a covered associate would not relieve the covered member from the two-year time out. *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41033 (discussing the ''look back'' in that rule).

[40] Proposed Rule 2030(g)(11)(B) defines the term ''solicit'' with respect to a contribution or payment as ''to communicate, directly or indirectly, for the purpose of obtaining or arranging a contribution or payment.'' This provision is consistent with a similar provision in the SEC Pay-to-Play Rule. *See* SEC Pay-to-Play Rule 206(4)–5(f)(10)(ii). Consistent with the SEC Pay-to-Play Rule, whether a particular activity involves a solicitation or coordination of a contribution or payment for purposes of the proposed rule would depend on the facts and circumstances. A covered member that consents to the use of its name on fundraising literature for a candidate would be soliciting contributions for that candidate. Similarly, a covered member that sponsors a meeting or conference which features a government official as an attendee or guest speaker and which involves fundraising for the government official would be soliciting contributions for that government official. Expenses incurred by the covered member for hosting the event would be a contribution by the covered member, thereby

Continued

person or PAC to make any: (1) Contribution to an official of a government entity in respect of which the covered member is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser; or (2) payment [41] to a political party of a state or locality of a government entity with which the covered member is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser. This provision is modeled on a similar provision in the SEC Pay-to-Play Rule [42] and is intended to prevent covered members or covered associates from circumventing the proposed rule's prohibition on direct contributions to certain elected officials such as by ''bundling'' a large number of small employee contributions to influence an election, or making contributions (or payments) indirectly through a state or local political party.[43]

In addition, as discussed in Item II.C below, in response to a request for clarification from a commenter regarding the application of this provision of the proposed rule, FINRA notes that, consistent with guidance provided by the SEC in connection with SEC Pay-to-Play Rule 206(4)–5(a)(2), a direct contribution to a political party by a covered member or its covered associates would not violate the proposed rule unless the contribution was a means for the covered member to do indirectly what the rule would prohibit if done directly (for example, if the contribution was earmarked or known to be provided for the benefit of a particular government official).

C. Direct or Indirect Contributions or Solicitations

Proposed Rule 2030(e) further provides that it shall be a violation of Rule 2030 for any covered member or any of its covered associates to do anything indirectly that, if done directly, would result in a violation of the rule. This provision is consistent with a similar provision in the SEC Pay-to-Play Rule [44] and would prevent a covered member or its covered associates from funneling payments through third parties, including, for example, consultants, attorneys, family members, friends or companies affiliated with the covered member as a means to circumvent the proposed rule.[45] In addition, as discussed in Item II.C below, in response to a request for clarification from a commenter regarding the application of this provision of the proposed rule, FINRA notes that, consistent with guidance provided by the SEC in connection with SEC Pay-to-Play Rule 206(4)–5(d), proposed Rule 2030(e) would require a showing of intent to circumvent the rule in order for such persons to trigger the two-year time out.

D. Covered Investment Pools

Proposed Rule 2030(d)(1) provides that a covered member that engages in distribution or solicitation activities with a government entity on behalf of a covered investment pool [46] in which a government entity invests or is solicited to invest shall be treated as though the covered member was engaging in or seeking to engage in distribution or solicitation activities with the government entity on behalf of the investment adviser to the covered investment pool directly.[47] Proposed Rule 2030(d)(2) provides that an investment adviser to a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the government entity.[48]

Proposed Rule 2030(d) is modeled on a similar prohibition in the SEC Pay-to-Play Rule [49] and would apply the prohibitions of the proposed rule to situations in which an investment adviser manages assets of a government entity through a hedge fund or other type of pooled investment vehicle. Thus, the provision would extend the protection of the proposed rule to public pension plans that access the services of investment advisers through hedge funds and other types of pooled investment vehicles sponsored or advised by investment advisers as a funding vehicle or investment option in a government-sponsored plan, such as a ''529 plan.'' [50]

E. Exceptions and Exemptions

As discussed in more detail below, the proposed rule contains exceptions that are modeled on similar exceptions in the SEC Pay-to-Play Rule for *de minimis* contributions, new covered associates and returned contributions.[51]

In addition, proposed Rule 2030(f) includes an exemptive provision for covered members that is modeled on the

triggering the two-year ban on the covered member receiving compensation for engaging in distribution or solicitation activities with the government entity over which that official has influence. Such expenses may include, but are not limited to, the cost of the facility, the cost of refreshments, any expenses paid for administrative staff, and the payment or reimbursement of any of the government official's expenses for the event. The *de minimis* exception under proposed Rule 2030(c)(1) would not be available with respect to these expenses because they would have been incurred by the firm, not by a natural person. *See also* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41043 n.328, 329 (discussing the term ''solicit'' with respect to a contribution or payment).

[41] Consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(9) defines the term ''payment'' to mean ''any gift, subscription, loan, advance or deposit of money or anything of value.'' This definition is similar to the definition of ''contribution,'' but is broader, in the sense that it does not include limitations on the purposes for which such money is given (*e.g.,* it does not have to be made for the purpose of influencing an election). Consistent with the SEC Pay-to-Play Rule, FINRA is including the broader term ''payments,'' as opposed to ''contributions,'' to deter a covered member from circumventing the proposed rule's prohibitions by coordinating indirect contributions to government officials by making payments to political parties. *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41043 n.331 and accompanying text (discussing a similar approach with respect to restrictions on soliciting and coordinating contributions and payments).

[42] *See* SEC Pay-to-Play Rule 206(4)–5(a)(2).

[43] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41043 (discussing restrictions on soliciting and coordinating contributions and payments).

[44] *See* SEC Pay-to-Play Rule 206(4)–5(d).

[45] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41044 (discussing direct and indirect contributions or solicitations). This provision would also cover, for example, situations in which contributions by a covered member are made, directed or funded through a third party with an expectation that, as a result of the contributions, another contribution is likely to be made by a third party to ''an official of the government entity,'' for the benefit of the covered member. Contributions made through gatekeepers thus would be considered to be made ''indirectly'' for purposes of the rule.

[46] Consistent with the SEC Pay-to-Play Rule, proposed Rule 2030(g)(3) defines a ''covered investment pool'' to mean: ''(A) Any investment company registered under the Investment Company Act that is an investment option of a plan or program of a government entity, or (B) Any company that would be an investment company under Section 3(a) of the Investment Company Act but for the exclusion provided from that definition by either Section 3(c)(1), 3(c)(7) or 3(c)(11) of that Act.'' Thus, the definition includes such unregistered pooled investment vehicles as hedge funds, private equity funds, venture capital funds, and collective investment trusts. It also includes registered pooled investment vehicles, such as mutual funds, but only if those registered pools are an investment option of a participant-directed plan or program of a government entity.

[47] Consistent with the SEC Pay-to-Play Rule, under the proposed rule, if a government entity is an investor in a covered investment pool at the time a contribution triggering a two-year time out is made, the covered member must forgo any compensation related to the assets invested or committed by the government entity in the covered investment pool. *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41047.

[48] As discussed in Item II.C below, FINRA has added proposed Rule 2030(d)(2) in response to comments on *Regulatory Notice* 14–50 to clarify, for purposes of the proposed rule, the relationship between an investment adviser to a covered investment pool and a government entity that invests in the covered investment pool.

[49] *See* SEC Pay-to-Play Rule 206(4)–5(c).

[50] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41044 (discussing the applicability of the SEC Pay-to-Play Rule to covered investment pools).

[51] *See* SEC Pay-to-Play Rule 206(4)–5(b).

exemptive provision in the SEC Pay-to-Play Rule [52] that would allow covered members to apply to FINRA for an exemption from the proposed rule's two-year time out. Under this provision, FINRA would be able to exempt covered members from the proposed rule's time out requirement where the covered member discovers contributions that would trigger the compensation ban after they have been made, and when imposition of the prohibition would be unnecessary to achieve the rule's intended purpose. This provision would provide covered members with an additional avenue by which to seek to cure the consequences of an inadvertent violation by the covered member or its covered associates that falls outside the limits of one of the proposed rule's exceptions. In determining whether to grant an exemption, FINRA would take into account the varying facts and circumstances that each application presents.

1. De Minimis Contributions

Proposed Rule 2030(c)(1) would except from the rule's restrictions contributions made by a covered associate who is a natural person to government entity officials for whom the covered associate was entitled to vote [53] at the time of the contributions, provided the contributions do not exceed $350 in the aggregate to any one official per election. If the covered associate was not entitled to vote for the official at the time of the contribution, the contribution must not exceed $150 in the aggregate per election. Consistent with the SEC Pay-to-Play Rule, under both exceptions, primary and general elections would be considered separate elections.[54] These exceptions are based on the theory that such contributions are typically made without the intent or ability to influence the selection process of the investment adviser.

2. New Covered Associates

Proposed Rule 2030(c)(2) would provide an exception from the proposed rule's restrictions for covered members if a natural person made a contribution more than six months prior to becoming a covered associate of the covered member unless the covered associate engages in, or seeks to engage in, distribution or solicitation activities with a government entity on behalf of the covered member. This provision is consistent with a similar provision in the SEC Pay-to-Play Rule.[55] As stated in the SEC Pay-to-Play Rule Adopting Release, the potential link between obtaining advisory business and contributions made by an individual prior to his or her becoming a covered associate who is uninvolved in distribution or solicitation activities is likely more attenuated than for a covered associate who engages in distribution or solicitation activities and, therefore, should be subject to a shorter look-back period.[56] This exception is also intended to balance the need for covered members to be able to make hiring decisions with the need to protect against individuals marketing to prospective employers their connections to, or influence over, government entities the employer might be seeking as clients.[57]

3. Certain Returned Contributions

Proposed Rule 2030(c)(3) would provide an exception from the proposed rule's restrictions for covered members if the restriction is due to a contribution made by a covered associate and: (1) The covered member discovered the contribution within four months of it being made; (2) the contribution was less than $350; and (3) the contribution is returned within 60 days of the discovery of the contribution by the covered member.

Consistent with the SEC Pay-to-Play Rule, this exception would allow a covered member to cure the consequences of an inadvertent political contribution to an official for whom the covered associate is not entitled to vote. As the SEC stated in the SEC Pay-to-Play Rule Adopting Release, the exception is limited to the types of contributions that are less likely to raise pay-to-play concerns.[58] The prompt return of the contribution provides an indication that the contribution would not affect a government entity official's decision to award business. The 60-day limit is designed to give contributors sufficient time to seek the contribution's return, but still require that they do so in a timely manner. In addition, the relatively small amount of the contribution, in conjunction with the other conditions of the exception, suggests that the contribution was unlikely to have been made for the purpose of influencing the selection process. Repeated triggering contributions suggest otherwise. Thus, the proposed rule would provide that covered members with 150 or fewer registered representatives would be able to rely on this exception no more than two times per calendar year. All other covered members would be permitted to rely on this exception no more than three times per calendar year. In addition, a covered member would not be able to rely on an exception more than once with respect to contributions by the same covered associate regardless of the time period. These limitations are consistent with similar provisions in the SEC Pay-to-Play Rule.[59]

Proposed Recordkeeping Requirements

Proposed Rule 4580 would require covered members that engage in distribution or solicitation activities with a government entity on behalf of any investment adviser that provides or is seeking to provide investment advisory services to such government entity to maintain books and records that would allow FINRA to examine for compliance with its pay-to-play rule. This provision is consistent with similar recordkeeping requirements imposed on investment advisers in connection with the SEC Pay-to-Play Rule.[60] The proposed rule would require covered members to maintain a list or other record of:

- The names, titles and business and residence addresses of all covered associates;
- the name and business address of each investment adviser on behalf of which the covered member has engaged in distribution or solicitation activities with a government entity within the past five years (but not prior to the rule's effective date);
- the name and business address of all government entities with which the covered member has engaged in distribution or solicitation activities for

[52] *See* SEC Pay-to-Play Rule 206(4)–5(e).

[53] Consistent with the SEC Pay-to-Play Rule, for purposes of proposed Rule 2030(c)(1), a person would be ''entitled to vote'' for an official if the person's principal residence is in the locality in which the official seeks election. For example, if a government official is a state governor running for re-election, any covered associate who resides in that state may make a *de minimis* contribution to the official without causing a ban on the covered member being compensated for engaging in distribution or solicitation activities with that government entity on behalf of an investment adviser. If the government official is running for president, any covered associate in the country would be able to contribute the *de minimis* amount to the official's presidential campaign. *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41034 (discussing the applicability in the SEC Pay-to-Play Rule of the exception for *de minimis* contributions).

[54] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41034.

[55] *See* SEC Pay-to-Play Rule 206(4)–5(b)(2).

[56] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41034 (discussing the applicability of the ''look back'' in the SEC Pay-to-Play Rule).

[57] *See id.*

[58] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41035.

[59] *See* SEC Pay-to-Play Rule 206(4)–5(b)(3). The SEC Pay-to-Play Rule includes different allowances for larger and smaller investment advisers based on the number of employees they report on Form ADV.

[60] *See* Advisers Act Rule 204–2(a)(18) and (h)(1).

compensation [61] on behalf of an investment adviser, or which are or were investors in any covered investment pool on behalf of which the covered member has engaged in distribution or solicitation activities with the government entity on behalf of the investment adviser to the covered investment pool, within the past five years (but not prior to the rule's effective date); and

• all direct or indirect contributions made by the covered member or any of its covered associates to an official of a government entity, or direct or indirect payments to a political party of a state or political subdivision thereof, or to a PAC.

The proposed rule would require that the direct and indirect contributions or payments made by the covered member or any of its covered associates be listed in chronological order and indicate the name and title of each contributor and each recipient of the contribution or payment, as well as the amount and date of each contribution or payment, and whether the contribution was the subject of the exception for returned contributions in proposed Rule 2030.

Effective Date

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. FINRA intends to establish an effective date that is no sooner than 180 days following publication of the *Regulatory Notice* announcing Commission approval of the proposed rule change, and no later than 365 days following Commission approval of the proposed rule change. This transition period will provide member firms with time to identify their covered associates and government entity clients and to modify their compliance programs to address new obligations under the rules.

Proposed Rule 2030(a)'s prohibition on engaging in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser that provides or is seeking to provide investment advisory services to such government entity within two years after a contribution is made to the government entity, will not be triggered by contributions made prior to the effective date. Similarly, the prohibition will not apply to contributions made prior to the effective date by new covered associates to which the two years or, as applicable, six months ''look back'' applies.

As of the effective date, member firms must begin to maintain books and records in compliance with proposed Rule 4580. Member firms will not be required, however, to look back for the five years prior to the effective date of the proposed rule to identify investment advisers and government entity clients in accordance with proposed Rule 4580(a)(2) and (a)(3).

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[62] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

FINRA believes that the proposed rule change establishes a comprehensive regime to allow member firms to continue to engage in distribution or solicitation activities for compensation with government entities on behalf of investment advisers following the compliance date for the SEC's ban on third-party solicitations while deterring member firms from engaging in pay-to-play practices. In the absence of a FINRA pay-to-play rule, covered members will be prohibited from receiving compensation for engaging in distribution and solicitation activities with government entities on behalf of investment advisers. FINRA believes that establishing a pay-to-play rule modeled on the SEC Pay-to-Play Rule is a more effective regulatory response to the concerns identified by the SEC regarding third-party solicitations than an outright ban on such activity. At the same time, FINRA believes that the proposed two-year time out will deter member firms from engaging in pay-to-play practices and, thereby, protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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 discussed above, FINRA published *Regulatory Notice* 14–50 to request comment on the proposed rule change.[63] *Regulatory Notice* 14–50 included an analysis of the economic impacts of the proposed rule change and requested comment regarding the analysis. The assessment below includes a summary of the comments received regarding the economic impact of the proposed rule change as set forth in *Regulatory Notice* 14–50 as well as FINRA's responses to the comments.[64]

Economic Impact Assessment

A. Need for the Rule

As discussed above, the SEC Pay-to-Play Rule prohibits an investment adviser and its covered associates from providing or agreeing to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of the investment adviser unless the person is a ''regulated person.'' A ''regulated person'' includes a member firm, provided that: (a) FINRA rules prohibit member firms from engaging in distribution or solicitation activities if political contributions have been made; and (b) the SEC finds, by order, that such rules impose substantially equivalent or more stringent restrictions on member firms than the SEC Pay-to-Play Rule imposes on investment advisers and that such rules are consistent with the objectives of the SEC Pay-to-Play Rule. Thus, FINRA must propose its own pay-to-play rule to enable member firms to continue to engage in distribution and solicitation activities for compensation with government entities on behalf of investment advisers.

B. Regulatory Objective

The proposed rule change would establish a comprehensive regime to regulate the activities of member firms that engage in distribution or solicitation activities with government entities on behalf of investment advisers. FINRA aims to enable member firms to continue to engage in such activities for compensation while at the same time deterring member firms from engaging in pay-to-play practices.

C. Economic Baseline

The baseline used to evaluate the impact of the proposed rule change is the regulatory framework under the SEC Pay-to-Play Rule and the MSRB pay-to-play rules.[65] In the absence of the proposed rules, some member firms currently engaging in distribution or solicitation activities with government

[61] As discussed in Item II.C below, FINRA has added ''for compensation'' to proposed Rule 4580(a)(3) to clarify that, consistent with the SEC recordkeeping requirements, FINRA's proposed recordkeeping requirements would apply only to government entities that become clients.

[62] 15 U.S.C. 78*o*–3(b)(6).

[63] *See supra* note 3.

[64] All references to commenters are to comment letters as listed in Exhibit 2b and as further discussed in Item II.C of this filing.

[65] *See supra* note 23 (discussing MSRB Rule G–37).

entities on behalf of investment advisers may not be able to receive payments from investment advisers for engaging in such activities. Since a ''regulated person'' also includes SEC-registered investment advisers and SEC-registered municipal advisors that would be subject to MSRB pay-to-play rules, member firms dually-registered with the SEC as investment advisers or municipal advisors may be able to engage in distribution or solicitation activities for compensation with government entities on behalf of investment advisers.[66]

The member firms that would have to cease their distribution or solicitation activities for compensation with government entities on behalf of investment advisers may bear direct losses as a result of the loss of this business. In addition, the absence of a FINRA pay-to-play rule that the SEC finds by order is substantially equivalent to or more stringent than the SEC Pay-to-Play Rule may impact investment advisers and public pension plans.

Specifically, without such a rule, there could be a decrease in the number of third-party solicitors which may reduce the competition in the market for solicitation services. Some investment advisers may need to search for and hire new solicitors as a result of the absence of a FINRA pay-to-play rule to continue their solicitation activities. Due to the potentially limited capacity of third-party solicitors, investment advisers may encounter difficulties in retaining solicitors or delays in solicitation services. These changes would likely increase the costs to investment advisers that rely on third-party solicitors to obtain government clients.

To the extent that higher costs may reduce the number of investment advisers competing for government business, public pension plans may face more limited investment opportunities. In such an instance, there may be an opportunity cost to a government entity either as it may not invest its assets optimally, or when seeking capital due to limitations on its access to funding.

D. Economic Impacts

1. Benefits

The proposed rule change would enable member firms to continue to engage in distribution or solicitation activities for compensation with government entities on behalf of investment advisers within the regulatory boundaries of the proposed rule change. The proposed rule change would prevent a potentially harmful disruption in the member firms' solicitation business, and accordingly may help member firms avoid some of the likely losses associated with the absence of such a rule change. The proposed rule change may also help promote competition by allowing more third-party solicitors to participate in the market for solicitation services, which may in turn reduce costs to investment advisers and improve competition for advisory services.

The proposed rule change is intended to establish a comprehensive regime to allow member firms to continue to engage in distribution or solicitation activities with government entities on behalf of investment advisers while deterring member firms from engaging in pay-to-play practices. FINRA believes the proposed rules would curb fraudulent conduct resulting from pay-to-play practices and, therefore, help promote fair competition in the market and protect public pension funds and investors. FINRA also believes the proposed rules would likely reduce the search costs of government entities and increase their ability to efficiently allocate capital, and thereby would promote capital formation.

2. Costs

FINRA recognizes that covered members that engage in distribution or solicitation activities with government entities on behalf of investment advisers would incur costs to comply with the proposed rules on an initial and ongoing basis. Member firms would need to establish and maintain policies and procedures to monitor contributions the firm and its covered associates make and to ensure compliance with the proposed requirements. In addition, member firms that wish to engage in distribution or solicitation activities with government entities may face hiring constraints as a result of the two-year (or, in some cases, six months) ''look back'' provision.[67]

The compliance costs would likely vary across member firms based on a number of factors such as the number of covered associates, business models of member firms and the extent to which their compliance procedures are automated, whether the covered member is (or is affiliated with) an investment adviser subject to the SEC Pay-to-Play Rule, and whether the covered member is a registered municipal securities dealer and thus subject to MSRB pay-to-play rules.[68] A small covered member with fewer covered associates may expend fewer resources to comply with the proposed rules than a large covered member. Covered members subject to (or affiliated with entities subject to) the SEC Pay-to-Play Rule or MSRB pay-to-play rules may be able to borrow from or build upon compliance procedures already in place. For example, FINRA estimates that approximately 400 member firms are currently subject to the MSRB pay-to-play rules.

The potential burden arising from compliance costs associated with the proposed rules can be initially gauged from the SEC's cost estimates for the SEC Pay-to-Play Rule. The SEC has estimated that investment advisers would spend between 8 and 250 hours to establish policies and procedures to comply with the SEC Pay-to-Play Rule.[69] The SEC further estimated that ongoing compliance would require between 10 and 1,000 hours annually.[70] The SEC estimated compliance costs for firms of different sizes. The SEC assumed that a ''smaller firm'' would have fewer than five covered associates that would be subject to the SEC Pay-to-Play Rule, a ''medium firm'' would have between five and 15 covered associates, and a ''larger firm'' would have more than 15 covered associates.[71] The SEC estimated that the initial compliance costs associated with the SEC Pay-to-Play Rule would be approximately $2,352 per smaller firm, $29,407 per medium firm, and $58,813 per larger firm.[72] It also estimated that the annual, ongoing compliance expenses would be approximately $2,940 per smaller firm, $117,625 per medium firm, and $235,250 per larger firm.[73]

In addition, the SEC estimated the costs for investment advisers to engage outside legal services to assist in drafting policies and procedures. It estimated that 75 percent of larger advisory firms, 50 percent of medium firms, and 25 percent of smaller firms subject to the SEC Pay-to-Play Rule

[66] *See supra* note 24 (noting that a regulated person that is registered under the Exchange Act as a broker-dealer and municipal advisor, and under the Advisers Act as an investment adviser would be subject to the rules that apply to the services the regulated person is performing).

[67] FINRA notes, however, the availability of the exemptive provision in proposed Rule 2030(f) that would allow covered members to apply to FINRA for an exemption from the proposed rule's two-year time out.

[68] *See supra* note 23 (discussing MSRB Rule G–37).

[69] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41056.

[70] *See id.*

[71] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41055.

[72] *See supra* note 69.

[73] *See id.*

would engage such services.[74] The estimated cost included fees for approximately 8 hours of outside legal review for a smaller firm, 16 hours for a medium firm and 40 hours for a larger firm, at a rate of $400 per hour.[75]

The SEC estimated that the recordkeeping requirements of the SEC Pay-to-Play Rule would increase an investment adviser's burden by approximately 2 hours per year,[76] which would cost the adviser $118 per year based on the SEC's assumption of a compliance clerk's hourly rate of $59.[77] In addition, the SEC estimated that some small and medium firms would incur one-time start-up costs, on average, of $10,000, and larger firms would incur, on average, $100,000 to establish or enhance current systems to assist in their compliance with the recordkeeping requirements.[78]

FINRA requested comment on the economic impacts of the proposed rule change as set forth in *Regulatory Notice* 14–50, including on whether the proposed rule change would impose similar compliance costs on member firms as the SEC estimated for investment advisers. Several commenters raised cost and compliance burden concerns in connection with the disclosure requirements set forth in *Regulatory Notice* 14–50, stating among other things, that the disclosure requirements are ''overly burdensome and create difficult compliance challenges'' [79] and that FINRA's cost estimates in *Regulatory Notice* 14–50 ''do not accurately reflect the true compliance costs associated with the Proposed Rules, and particularly the costs associated with the disclosure requirements . . . .'' [80]

Monument Group stated that the vast majority of independent placement agents that would be subject to the proposed rules are small businesses, many of which are minority- or women-owned. Monument Group stated that these firms operate with focused staff and no revenues from other lines of business. Accordingly, Monument Group stated that incremental regulatory requirements that have little impact on larger firms can create significant resource and cost issues for these smaller firms. Specifically, Monument Group stated that the disclosure requirements would place significant and unique burdens on independent third-party private fund placement agents. Another commenter, 3PM, stated that the proposed rule change would add a new and significant burden on small firms in terms of the disclosure and recordkeeping requirements. 3PM also stated that not only would small firms be impacted by cost, but also by their limited personnel resources who would have to take on additional responsibilities to comply with the proposed rule change.

Monument Group requested that FINRA consider the already existing state, municipal and local lobbying registration, disclosure and reporting requirements and pay-to-play regimes in calculating the cost and competitive impact of the proposed rule change. Monument Group stated that the proposed rule change disproportionately affects FINRA-registered placement agents (as compared with other broker-dealers) and has the largest economic and anti-competitive effect on small independent firms.

As discussed above and in more detail in Item II.C below, after considering the comments, FINRA has determined not to propose a disclosure requirement for government distribution and solicitation activities at this time. FINRA believes that this determination will reduce substantially the cost and compliance burden concerns raised by commenters regarding the proposed rule change. FINRA however may consider a disclosure requirement for government distribution and solicitation activities as part of a future rulemaking and would consider the economic impact of any such revised proposed disclosure requirement as part of that rulemaking.

Although FINRA has determined to retain a recordkeeping requirement, FINRA notes that, in response to commenter concerns to *Regulatory Notice* 14–50 regarding the significant costs associated with maintaining lists of unsuccessful solicitations,[81] FINRA has modified the proposed rule such that covered members would only be required to maintain lists of government entities that become clients.[82]

Since the scope of the proposed rule after the modifications is substantially equivalent to the SEC Pay-to-Play Rule, FINRA believes that the SEC's cost estimates serve as a reasonable reference for the potential compliance costs on member firms. In response to the question on the costs of engaging outside legal services to assist in drafting policies and procedures to comply with the proposed rule, 3PM estimated that the majority of member firms would spend between $1,500 and $2,500 or approximately five to 10 hours of a professional consultant's time. In addition, 3PM estimated that a member firm would exert approximately 10 to 20 additional hours of compliance oversight in connection with the proposed rule each year. These estimates are slightly lower than the SEC's estimates discussed above.

The proposed rule is not expected to have competitive effects among member firms engaging in distribution or solicitation activities, since all member firms will be subject to the same prohibitions. Moreover, because the restrictions imposed by the proposed rule are substantially equivalent to the restrictions imposed by the SEC Pay-to-Play Rule, the proposed rule is not expected to create an uneven playing field between member firms and investment advisers. There may be a potential impact on the competition between member firms and municipal advisors depending on the differences between the proposed rule and the finalized MSRB rules regulating similar activities of municipal advisors.[83]

E. Regulatory Alternatives

Since the SEC requires that FINRA impose ''substantially equivalent or more stringent restrictions'' on member firms that wish to act as ''regulated persons'' than the SEC Pay-to-Play Rule imposes on investment advisers, FINRA believes it is appropriate (and achieves the right balance between the costs and benefits) to model the proposed rule change on the SEC Pay-to-Play Rule rather than impose a regulatory alternative, including a more stringent regulatory alternative, on such member firms.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In November 2014, FINRA published the proposed rule change for comment in *Regulatory Notice* 14–50. FINRA received 10 comment letters in response to *Regulatory Notice* 14–50. A copy of *Regulatory Notice* 14–50 is attached as Exhibit 2a to the proposed rule change that was filed with the Commission. A list of the comment letters received in response to *Regulatory Notice* 14–50 is attached as Exhibit 2b.[84] Copies of the

[74] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41057.

[75] *See id.*

[76] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41063.

[77] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41061 n.541.

[78] *See supra* note 76.

[79] Monument Group.

[80] SIFMA.

[81] *See, e.g.,* 3PM.

[82] *See* proposed Rule 4580(a)(3).

[83] *See supra* note 23.

[84] All references to commenters are to the comment letters as listed in Exhibit 2b to the proposed rule change.

comment letters received in response to *Regulatory Notice* 14–50 are attached as Exhibit 2c.

Most commenters expressed appreciation or support for FINRA's decision to propose a pay-to-play rule, noting the potential disruption of an SEC ban on third party solicitations if FINRA were not to propose and adopt a pay-to-play rule. The commenters raised, however, a number of concerns with the proposed pay-to-play rule, as well as the related proposed disclosure and recordkeeping requirements. A summary of the comments and FINRA's responses are discussed below.[85]

First Amendment Concerns

CCP expressed First Amendment concerns with the proposed rule change. Among other things, CCP raised vagueness and over-breadth concerns with a number of the provisions in the proposed rule change,[86] and asserted that the prohibition on soliciting and coordinating contributions is a ''grave infringement of the basic 'right to associate for the purpose of speaking.' ''

In light of CCP raising these constitutional concerns, FINRA notes that the proposed pay-to-play rule does not impose any restrictions on making independent expenditures, ban political contributions, or attempt to regulate State and local elections. FINRA acknowledges that the two-year time out provision may affect the propensity of covered members and their covered associates to make political contributions.[87] As discussed in *Regulatory Notice* 14–50 and as recognized by CCP, however, establishing requirements to regulate the activities of member firms that engage in distribution or solicitation activities with government entities on behalf of investment advisers is a more effective response to the requirements of the SEC Pay-to-Play Rule than an outright ban on such activity. If FINRA were not to have a pay-to-play rule, the result would be a ban on member firms soliciting government entities for investment advisory services for compensation on behalf of investment advisers.

Moreover, for an investment adviser and its covered associates to provide or agree to provide, directly or indirectly, payment to a member firm to solicit a government entity for investment advisory services on behalf of the investment adviser, the SEC must find that FINRA's pay-to-play rule imposes substantially equivalent or more stringent restrictions on member firms than the SEC Pay-to-Play Rule imposes on investment advisers and that FINRA's rule is consistent with the objectives of the SEC Pay-to-Play Rule. CCP suggested alternative approaches to the proposed pay-to-play rule that it argued would be ''less restrictive,'' but FINRA does not believe that CCP's suggested less restrictive alternatives would meet the SEC's requirements. Accordingly, FINRA has crafted its proposal such that it is substantially similar to the SEC's Pay-to-Play Rule.[88]

FINRA notes that the SEC modeled the SEC Pay-to-Play Rule on similarly designed MSRB Rule G–37, which the United States Court of Appeals for the District of Columbia Circuit upheld against a First Amendment challenge in *Blount* v. *SEC.*[89] As stated in the SEC Pay-to-Play Rule Adopting Release, the *Blount* opinion served as an important guidepost in helping the SEC shape the SEC Pay-to-Play Rule.[90] Similar to MSRB Rule G–37 and the SEC Pay-to-Play Rule, FINRA believes it has closely drawn its proposal to accomplish the goal of preventing quid pro quo arrangements while avoiding unnecessary burdens on the protected speech and associational rights of covered members and their covered associates. This analysis is further supported by the Court of Appeals for the District of Columbia Circuit's recent unanimous *en banc* decision in *Wagner* v. *FEC,* which relied on *Blount* to uphold against a First Amendment challenge a law barring campaign contributions by federal contractors.[91] As detailed below, the proposed rule is closely drawn in terms of the conduct it prohibits, the persons who are subject to its restrictions, and the circumstances in which it is triggered.

Proposed Pay-to-Play Rule

A. Two-Year Time Out

Consistent with *Regulatory Notice* 14–50, proposed Rule 2030(a) would impose a two-year time out on engaging in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser after the covered member or its covered associates make a contribution to an official of the government entity. NASAA stated that member firms should be prohibited from engaging in distribution or solicitation activities on behalf of an investment adviser directed at any government entity for a period of four years following any qualifying contribution by the member firm. In addition, NASAA stated that if a member firm has engaged in solicitation or distribution activities with a government entity on behalf of an investment adviser, the member firm should be prohibited from making any qualifying contributions to that government entity for a period of four years following the conclusion of the solicitation or distribution activities. FINRA has declined to make NASAA's suggested changes. The proposed two-year time out is consistent with the time-out period in the SEC's Pay-to-Play Rule, and FINRA believes that a two-year time out from the date of a contribution is sufficient to discourage covered members from engaging in pay-to-play practices.

1. Government Entity

Government entities would include all state and local governments, their agencies and instrumentalities, and all public pension plans and other collective government funds, including participant-directed plans such as 403(b),[92] 457,[93] and 529[94] plans. CAI urged FINRA or the SEC to provide additional guidance as to the criteria for determining whether an entity is an ''instrumentality'' under the proposed rule. CAI noted that its members have struggled to understand the contours of this term in the context of the SEC Pay-to-Play Rule. As stated in *Regulatory Notice* 14–50 and above, the definition of a ''government entity'' is consistent with the definition of that term in the SEC Pay-to-Play Rule. The SEC has not provided additional guidance regarding

[85] Comments that speak to the economic impacts of the proposed rule change are addressed in Item II.B above.

[86] *See* CCP (discussing, among other things, the proposed definitions of the terms ''official of a government entity,'' ''solicit'' and ''contribution,'' as well as the provision prohibiting any covered member or any of its covered associates from doing anything indirectly that, if done directly, would result in a violation of the proposed pay-to-play rule).

[87] CCP requested that FINRA state explicitly whether the proposed rule would permit contributions in support of independent expenditures. FINRA notes that, consistent with the SEC Pay-to-Play Rule, the proposed rule would not in any way impinge on a wide range of expressive conduct in connection with elections. For example, the rule would not impose any restrictions on activities such as making independent expenditures to express support for candidates, volunteering, making speeches, and other conduct. *See also* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41024 (discussing independent expenditures).

[88] In addition, FINRA notes that, to the extent there are interpretive questions regarding the application and scope of the provisions and terms used in its pay-to-play rule, FINRA will work with the industry to understand the interpretive questions and provide additional guidance where warranted.

[89] 61 F.3d 938 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

[90] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41023.

[91] *Wagner* v. *FEC,* No. 13–5162, 2015 U.S. App LEXIS 11625 (D.C. Cir. July 7, 2015).

[92] *See supra* note 28.

[93] *See supra* note 29.

[94] *See supra* note 30.

the meaning of the term ''instrumentality'' in connection with its Pay-to-Play Rule. Thus, at this time, FINRA declines to provide additional guidance as part of the proposed rule. FINRA recognizes, however, the concerns raised by CAI and will continue to discuss with the industry interpretive questions relating to the proposed rule change.

2. Solicitation

Consistent with *Regulatory Notice* 14–50, the proposed pay-to-play rule defines the term ''solicit'' to mean, with respect to investment advisory services, ''to communicate, directly or indirectly, for the purpose of obtaining or retaining a client for, or referring a client to, an investment adviser'' and, with respect to a contribution or payment, ''to communicate, directly or indirectly, for the purpose of obtaining or arranging a contribution or payment.'' [95] CAI sought confirmation that the proposed rule would not apply when a covered member communicates with a third party and has no intent to obtain a client for, or refer a client to, an investment adviser (in the context of investment advisory services) and there is no intent to obtain or arrange a contribution or payment (in the context of contributions to officials of government entities and payments to political parties).

As stated in *Regulatory Notice* 14–50 and above, the determination of whether a particular communication is a solicitation for investment advisory services or a contribution or payment would be dependent upon the specific facts and circumstances relating to such communication. As a general proposition, if there is no intent to obtain a client for, or refer a client to, an investment adviser (in the context of investment advisory services) or to obtain or arrange a contribution or payment (in the context of contributions to officials of government entities and payments to political parties), FINRA would not consider the communication to be a solicitation.[96]

3. Investment Advisers

The proposed pay-to-play rule would apply to covered members acting on behalf of any investment adviser registered (or required to be registered) with the SEC, or unregistered in reliance on the exemption available under Section 203(b)(3) of the Advisers Act for foreign private advisers, or that is an exempt reporting adviser under Advisers Act Rule 204–4(a).[97] NASAA and 3PM suggested that FINRA expand the definition of ''investment adviser'' to include state-registered investment advisers, stating, among other things, that it would further reduce the disruptions created by pay-to-play schemes. To remain consistent with the SEC Pay-to-Play Rule, FINRA has determined not to expand the scope of the proposed rule as suggested by commenters. FINRA notes that the SEC declined to make a similar change to its proposed rule, stating that it is their understanding that few of these smaller firms manage public pension plans or other similar funds.[98]

4. Covered Associates/Executive Officers

A ''covered associate'' includes any general partner, managing member or executive officer of a covered member, or other individual with a similar status or function.[99] SIFMA requested that FINRA define the term ''executive officer'' for purposes of the proposed rule. Consistent with the SEC Pay-to-Play Rule and for purposes of the FINRA pay-to-play rule only, FINRA has added proposed Rule 2030(g)(5) to define an ''executive officer of a covered member'' to mean: ''(A) The president; (B) Any vice president in charge of a principal business unit, division or function (such as sales, administration or finance); (C) Any other officer of the covered member who performs a policy-making function; or (D) Any other person who performs similar policy-making functions for the covered member.''

A covered associate also would include a PAC controlled by the covered member or any of its covered associates. FSI asserted that the restrictions on PAC contributions, and the definition of ''control'' with respect to covered associates are vague and potentially over-broad. For example, FSI stated that ''[i]t is unclear whether an employee or executive of a member firm that holds a position on a PAC board of directors or other advisory committee would have 'control' of the PAC under the Proposed Rules. It would also cover PACs that are not connected to the employee or executive's member firm.'' As stated in *Regulatory Notice* 14–50 and above, FINRA would consider a covered member or its covered associates to have ''control'' over a PAC if the covered member or covered associate has the ability to direct or cause the direction of governance or operations of the PAC. This position is consistent with the position taken by the SEC in connection with the SEC Pay-to-Play Rule.[100]

5. Distribution

a. Inclusion of Distribution Activities

Consistent with *Regulatory Notice* 14–50, proposed Rule 2030(a) would impose a two-year time out on engaging in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser after the covered member or its covered associates makes a contribution to an official of the government entity. Some commenters questioned the meaning of the term ''distribution'' in the context of the proposed rule. For example, SIFMA stated that it is their understanding ''that the phrase 'distribution and solicitation,' as used in the SEC Pay-to-Play Rule, is interpreted to mean 'the solicitation of investment advisory services.' '' CAI stated that ''[s]ince the term 'distribution' has no meaning in the context of an investment adviser and is inconsistent with the personal nature of the services provided by investment advisers, [it] strongly recommends that FINRA eliminate each and every reference to the word 'distribution' throughout the *Notice* and the Proposed Rules. . . . [I]t is not clear what activity the term 'distribution' is meant to cover that is not captured by the term 'solicitation.' ''

The SEC Pay-to-Play Rule prohibits an investment adviser and its covered associates from providing or agreeing to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of the investment adviser unless the person is a ''regulated person.'' [101] The SEC Pay-to-Play Rule defines a ''regulated person'' to include a member firm, provided that FINRA rules prohibit member firms from engaging in distribution or solicitation activities if political contributions have been made.[102] Thus, the SEC Pay-to-Play Rule requires FINRA to have a rule that prohibits member firms from engaging in distribution (as well as solicitation) activities if political contributions have been made.

Language in the SEC Pay-to-Play Rule Adopting Release further supports the inclusion of distribution activities by broker-dealers in a FINRA pay-to-play rule. For example, when discussing comments related to its proposed ban on using third parties to solicit government business, the SEC addressed

[95] Proposed Rule 2030(g)(11).

[96] *See supra* notes 18 and 40.

[97] *See* proposed Rule 2030(g)(7).

[98] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41026.

[99] *See supra* note 37 (defining the term ''covered associate'').

[100] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41032 (discussing PACs).

[101] *See* SEC Pay-to-Play Rule 206(4)–5(a)(2).

[102] *See* SEC Pay-to-Play Rule 206(4)–5(f)(9)(ii)(A).

commenters' concerns that the provision would interfere with traditional distribution arrangements of mutual funds and private funds by broker-dealers, by clarifying under what circumstances distribution payments would violate the SEC's Pay-to-Play Rule.[103]

Based on the SEC's definition of ''regulated person'' as well as its discussion regarding the treatment of distribution fees paid pursuant to a 12b–1 plan, FINRA believes its proposed rule must apply to member firms engaging in distribution activities. Accordingly, FINRA has not revised the proposed rule to remove references to the term ''distribution.'' [104]

b. Scope of Distribution Activities

ICI requested confirmation that, with respect to mutual funds, the proposed rule would be triggered only when a member firm solicits a government entity to include a mutual fund in a government entity's plan or program and not when the member is selling mutual fund shares to a government entity. FSI asked for clarification with respect to the treatment of traditional brokerage activities by a financial advisor as ''distribution or solicitation activities'' in the context of government entity plans.

As discussed above, the proposed pay-to-play rule would apply to distribution activities by covered members. FINRA notes, however, that based on the definition of a ''covered investment pool,'' the proposed rule would not apply to distribution activities related to registered investment companies that are not investment options of a government entity's plan or program.[105] Thus, the proposed rule would apply to distribution activities involving unregistered pooled investment vehicles such as hedge funds, private equity funds, venture capital funds, and collective investment trusts, and registered pooled investment vehicles such as mutual funds, but only if those registered pools are an investment option of a participant-directed plan or program of a government entity.[106]

CAI requested clarification that ''compensation'' in the context of covered investment pools does not include conventional compensation arrangements for the distribution of mutual funds, variable annuity contracts and other securities included within the definition of ''covered investment pool.'' Consistent with the SEC Pay-to-Play Rule, to the extent the mutual fund distribution fees are paid by the fund pursuant to a 12b–1 plan, such payments would not be prohibited under the proposed rule as they would not constitute payments by the fund's investment adviser. If, however, the adviser pays for the fund's distribution out of its ''legitimate profits,'' the proposed rule would generally be implicated.[107] For private funds, third parties are often compensated by the investment adviser or its affiliated general partner. Thus, such payments would be subject to the proposed rule. In addition, FINRA notes that structuring such a payment to come from the private fund for purposes of evading the rule would violate the rule.[108]

B. Prohibitions as Applied to Covered Investment Pools

1. General

In *Regulatory Notice* 14–50, proposed Rule 2390(e) (now proposed as Rule 2030(d)) provided that a covered member that engages in distribution or solicitation activities with a government entity on behalf of an investment adviser to a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though the covered member was engaging in or seeking to engage in distribution or solicitation activities with the government entity on behalf of the investment adviser directly. CAI raised concerns regarding the application of the prohibitions of the proposed rule to covered investment pools stating, among other things, ''that a broker-dealer that offers and sells interests in a mutual fund or private fund cannot be characterized as soliciting on behalf of the investment adviser to a covered investment pool.'' CAI reasoned that ''[t]here is no basis for this notion given the [SEC] staff's interpretation in the Mayer Brown no-action letter and the *Goldstein* case . . ., as well as the lack of any relationship between the selling firm and the investment adviser.'' [109]

After considering CAI's concerns, FINRA has modified the language of the proposed rule to recognize the relationship between the selling member and the covered investment

[103] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41040 n.298 (stating that ''[m]utual fund distribution fees are typically paid by the fund pursuant to a 12b–1 plan, and therefore generally would not constitute payment by the fund's adviser. As a result, such payments would not be prohibited [under the SEC Pay-to-Play Rule] by its terms. Where an adviser pays for the fund's distribution out of its 'legitimate profits,' however, the rule would generally be implicated. . . . For private funds, third parties are often compensated by the adviser or its affiliated general partner and, therefore, those payments are subject to the rule.'')

[104] In addition, FINRA notes that many of the concerns raised by commenters in connection with including distribution activities in the proposed rule related to the additional burden associated with the proposed disclosure requirements and such activities. As discussed further below, FINRA has determined not to propose a disclosure rule relating to government distribution and solicitation activities.

[105] Proposed Rule 2030(g)(3) defines a ''covered investment pool'' to mean: ''(A) Any investment company registered under the Investment Company Act that is an investment option of a plan or program of a government entity, or (B) Any company that would be an investment company under Section 3(a) of the Investment Company Act but for the exclusion provided from that definition by either Section 3(c)(1), 3(c)(7) or 3(c)(11) of that Act.''

[106] Although the proposed rule would not apply to distribution activities relating to all registered pooled investment vehicles, FINRA notes the language of proposed Rule 2030(e) that ''[i]t shall be a violation of this Rule for any covered member or any of its covered associates to do anything indirectly that, if done directly, would result in a violation of this Rule.''

[107] For a discussion of a mutual fund adviser's ability to use ''legitimate profits'' for fund distribution, *see* Investment Company Act of 1940 Release No. 11414 (Oct. 28, 1980), 45 FR 73898 (Nov. 7, 1980) (Bearing of Distribution Expenses by Mutual Funds) (explaining, in the context of the prohibition on the indirect use of fund assets for distribution, unless pursuant to a 12b–1 plan, ''[h]owever, under the rule there is no indirect use of fund assets if an adviser makes distribution related payments out of its own resources. . . . Profits which are legitimate or not excessive are simply those which are derived from an advisory contract which does not result in a breach of fiduciary duty under section 36 of the [Investment Company] Act.'').

[108] *See also* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41040 n.298 and accompanying text. CAI also asked FINRA to consider afresh the SEC's position in its Pay-to-Play Rule that payments originating with an investment adviser should be treated as a payment for solicitation, regardless of the purpose or context for the payment. As discussed above, for purposes of the proposed rule, FINRA is taking a position consistent with the SEC's position in its Pay-to-Play Rule.

[109] *See Goldstein* v. *SEC,* 451 F.3d 873 (D.C. Cir. 2006) and *Mayer Brown LLP,* SEC No-Action Letter (''*Mayer Brown* letter''), available at *https://www.sec.gov/divisions/investment/noaction/2008/mayerbrown072808-206.htm#P15_323.* In *Goldstein,* the court held that the SEC's ''Hedge Fund Rule,'' which would have given the SEC greater oversight over hedge funds, was invalid because it was arbitrary and in conflict with the purpose of the underlying statute in which the new rule was included. The court concluded that hedge fund investors are not clients of fund advisers for the purpose of the Adviser's Act registration requirement.

In the *Mayer Brown* letter, SEC staff stated that Rule 206(4)–3 generally does not apply to a registered investment adviser's cash payment to a person solely to compensate that person for soliciting investors or prospective investors for, or referring investors or prospective investors to, an investment pool managed by the adviser. The letter distinguishes between a person referring other persons to the adviser where the adviser manages only investment pools and is not seeking to enter into advisory relationships with these other persons (but rather the other persons will be investors or prospective investors in one or more of the investment pools managed by the adviser), versus referring other persons as prospective advisory clients. The letter notes that whether the rule applies will depend on the facts and circumstances.

pool, but also to clarify that for purposes of the proposed rule, a covered member engaging in distribution or solicitation activities on behalf of a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though the covered member was engaging in, or seeking to engage in, distribution or solicitation activities with the government entity on behalf of the investment adviser to the covered investment pool directly.[110]

As stated in *Regulatory Notice* 14–50, proposed Rule 2390(e) (now proposed as Rule 2030(d)) was modeled on a similar provision in the SEC Pay-to-Play Rule, Rule 206(4)–5(c),[111] and was intended to extend the protections of the proposed rule to government entities that access the services of investment advisers through hedge funds and other types of pooled investment vehicles sponsored or advised by investment advisers.[112] As noted by CAI, however, FINRA recognizes that without a provision corresponding more closely to SEC Pay-to-Play Rule 206(4)–5(c), there is nothing in the proposed rule that deems an investment adviser to a covered investment pool to have a direct investment advisory relationship with government entities investing in the pool. CAI noted that: ''Without such a provision, proposed rule 2390(e) would *not* apply the two year time out restriction in proposed rule 2390(a) to advisers to [covered investment pools]. This is because proposed Rule 2390(a) would *only* apply where an investment adviser 'provides or is seeking to provide investment advisory services to such government entity.' ''

Accordingly, FINRA has modified the proposed rule to include proposed Rule 2030(d)(2) that provides that for purposes of the proposed rule ''an investment adviser to a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the government entity.''

2. Two-Tiered Investment Products

CAI sought confirmation from FINRA that the proposed pay-to-play rule would not apply in the context of two-tiered investment products, such as variable annuities. CAI asserted, among other things, that ''[o]rdinarily, there is no investment adviser providing investment advisory services to the separate account supporting the variable annuity contract, although there are investment advisers providing investment advisory services to the underlying mutual funds or unregistered investment pools.'' CAI requested clarification that a covered member selling two-tiered investment products is not engaging in solicitation activities on behalf of the investment adviser and sub-advisers managing the underlying funds. FINRA notes that the SEC did not exclude specific products from the SEC Pay-to-Play Rule and, therefore, FINRA has determined not to exclude specific products from its proposed rule.

C. Disgorgement

In *Regulatory Notice* 14–50, FINRA proposed a ''disgorgement'' provision that, among other things, would have required that the covered member pay, in the order listed, any compensation or other remuneration received by the covered member pertaining to, or arising from, distribution or solicitation activities during the two-year time out to: (A) A covered investment pool in which the government entity was solicited to invest, as applicable; (B) the government entity; (C) any appropriate entity designated in writing by the government entity if the government entity or covered investment pool cannot receive such payments; or (D) the FINRA Investor Education Foundation, if the government entity or covered investment pool cannot receive such payments and the government entity cannot or does not designate in writing any other appropriate entity.

NASAA expressed support for FINRA's inclusion of a disgorgement provision for violations of the proposed rule. Most commenters, however, opposed the requirement.[113] SIFMA stated that ''[w]hile disgorgement is the almost universal remedy for violations of various pay-to-play rules, . . . making application of the remedy mandatory could have the deleterious effect of dissuading covered members from voluntary disgorgement of fees where such members discover pay-to-play violations themselves.'' ICI stated that ''including disgorgement as a penalty is not necessary given that the SEC and FINRA both have full authority to require disgorgement of fees, and indeed, disgorgement has been the penalty universally applied (along with additional penalties) in enforcement actions under existing pay-to-play rules, such as MSRB Rule G–37 and SEC Rule 206(4)–5.''

After considering the comments and, in particular, that FINRA has authority to require disgorgement of fees in enforcement actions, FINRA has determined not to include a disgorgement requirement in the proposed rule.

D. Prohibition on Soliciting and Coordinating Contributions

Consistent with *Regulatory Notice* 14–50, proposed Rule 2030(b) would prohibit a covered member or covered associate from coordinating or soliciting any person or PAC to make any: (1) Contribution to an official of a government entity in respect of which the covered member is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser; or (2) payment to a political party of a state or locality of a government entity with which the covered member is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser. As stated in *Regulatory Notice* 14–50 and above, this provision is modeled on a similar provision in the SEC Pay-to-Play Rule.[114]

CAI sought confirmation that the proposed prohibition on soliciting and coordinating contributions would not apply when a contribution is made to a political action committee, political party or other third party, where there is no knowledge or indication of how such contribution will be used. Similar to guidance provided in the context of SEC Pay-to-Play Rule 206(4)–5(a)(2), FINRA notes that a direct contribution to a political party by a covered member or its covered associates would not violate the proposed rule unless the contribution was a means for the covered member to do indirectly what the rule would prohibit if done directly (for example, if the contribution was earmarked or known to be provided for the benefit of a particular government official).[115]

[110] *See* proposed Rule 2030(d).

[111] SEC Pay-to-Play Rule 206(4)–5(c) provides that ''an investment adviser to a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the government entity.''

[112] In adopting this provision, the SEC noted a commenter's questioning of its authority to apply the rule in the context of covered investment pools in light of the opinion of the Court of Appeals for the District of Columbia Circuit in the *Goldstein* case. *See supra* note 109. The SEC concluded, however, that it has authority to adopt rules proscribing fraudulent conduct that is potentially harmful to investors in pooled investment vehicles pursuant to Section 206(4) of the Advisers Act and, therefore, adopted SEC Pay-to-Play Rule 206(4)–5(c) as proposed. *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41045 n.355.

[113] *See, e.g.,* SIFMA, CAI and ICI.

[114] *See* SEC Pay-to-Play Rule 206(4)–5(a)(2).

[115] *See also* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41044 n.337.

E. Direct or Indirect Contributions or Solicitations

Consistent with *Regulatory Notice* 14–50, proposed Rule 2030(e) provides that it shall be a violation of the proposed pay-to-play rule for any covered member or any of its covered associates to do anything indirectly that, if done directly, would result in a violation of the rule. CAI requested that FINRA incorporate a knowledge and support requirement into this provision of the proposed rule so that it would be violated only if a covered member has direct knowledge of, and takes measures to aid and support, activities undertaken by its affiliates. As stated in *Regulatory Notice* 14–50 and above, this provision is modeled on SEC Pay-to-Play Rule 206(4)–5(d). Consistent with guidance provided by the SEC in connection with that provision, FINRA has clarified that it would require a showing of intent to circumvent the rule for a covered member or its covered associates funneling payments through a third party to trigger the two-year time out.[116]

F. Exceptions

In *Regulatory Notice* 14–50, FINRA included exceptions to the prohibition in the proposed pay-to-play rule for *de minimis* contributions and returned contributions. CAI and CCP stated that they believe that the $350 and $150 *de minimis* contribution limits are unreasonably low. CAI stated that it believes the $350 amount for returned contributions is unnecessary because ''[i]f the contribution is returned as is required under the exception, then no harm will result as both the contributor and contributee are placed in the same position they would have been in had no contribution been made.''

FINRA has determined not to modify the proposed exceptions. As stated in *Regulatory Notice* 14–50 and above, the exceptions are modeled on similar exceptions in the SEC Pay-to-Play Rule for *de minimis* contributions and returned contributions.[117] Moreover, FINRA believes that it is necessary to keep the amounts at the levels as proposed in *Regulatory Notice* 14–50 to meet the requirement in the SEC Pay-to-Play Rule that the restrictions in FINRA's rule must be substantially equivalent to, or more stringent than, the restrictions in the SEC Pay-to-Play Rule.

Proposed Recordkeeping Requirements

A. Unsuccessful Solicitations

Proposed Rule 4580 would require covered members that engage in distribution or solicitation activities with a government entity on behalf of any investment adviser that provides or is seeking to provide investment advisory services to such government entity to maintain books and records that would allow FINRA to examine for compliance with its proposed pay-to-play rule. SIFMA requested that FINRA not extend the recordkeeping requirements to unsuccessful solicitations where the covered member does not receive compensation because maintaining such records would impose significant costs on covered members with little corresponding benefit.[118]

FINRA intends that the recordkeeping requirements of proposed Rule 4580 be consistent with similar recordkeeping requirements imposed on investment advisers in connection with the SEC Pay-to-Play Rule.[119] The SEC does not require investment advisers to maintain lists of government entities that do not become clients.[120] Accordingly, FINRA has added the term ''for compensation'' to proposed Rule 4580(a)(3) to clarify that the proposed Rule would not apply to unsuccessful solicitations.

B. Indirect Contributions

Consistent with *Regulatory Notice* 14–50, proposed Rule 4580(a)(4) would require a covered member to maintain books and records of all direct and indirect contributions made by the covered member or any of its covered associates to an official of a government entity, or direct or indirect payments to a political party of a state or political subdivision thereof or to a PAC. 3PM requested that FINRA eliminate the requirement to maintain a list of indirect contributions, arguing that ''requiring firms to . . . track and monitor indirect contributions could become extremely time consuming and costly for firms.'' CAI asserted that not all payments to political parties or PACs should have to be maintained. Instead, CAI stated that only payments to political parties or PACs where the covered member or covered associate: (i) Directs the political party or PAC to make a contribution to an official of a government entity which the covered member is soliciting on behalf of an investment adviser, or (ii) knows that the political party or PAC is going to make a contribution to an official of a government entity which the covered member is soliciting on behalf of an investment adviser, should have to be maintained.

As stated in the *Regulatory Notice* and above, the proposed recordkeeping requirements are intended to allow FINRA to examine for compliance with its proposed pay-to-play rule. Thus, the reference to indirect contributions in proposed Rule 4580(a)(4) is intended to include records of contributions or payments a covered member solicits or coordinates another person or PAC to make under proposed Rule 2030(b) (Prohibition on Soliciting and Coordinating Contributions).[121] In addition, payments to political parties or PACs can be a means for a covered member or covered associate to funnel contributions to a government official without directly contributing. Thus, FINRA is proposing to require a covered member to maintain a record of all payments to political parties or PACs as such records would assist FINRA in identifying situations that might suggest an intent to circumvent the rule.[122]

Proposed Disclosure Requirements

In *Regulatory Notice* 14–50, FINRA proposed Rule 2271 to require a covered member engaging in distribution or solicitation activities for compensation with a government entity on behalf of one or more investment advisers to make specified disclosures to the government entity regarding each investment adviser. Several commenters raised concerns regarding the proposed disclosure requirements.[123] For

[116] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41044 n.340.

[117] *See* SEC Pay-to-Play Rule 206(4)–5(b).

[118] *See also* CAI, 3PM and FSI (requesting that FINRA not apply the proposed recordkeeping requirements to unsuccessful solicitations of government entities).

[119] *See* Advisers Act Rule 204–2(a)(18) and (h)(1).

[120] *See* SEC Pay-to-Play Rule Adopting Release, 75 FR 41018, 41050.

[121] This interpretation is consistent with the SEC's interpretation of a similar provision in Advisers Act Rule 204–2(a)(18)(i).

[122] ICI stated that if FINRA applies the requirements of proposed Rule 4580(a)(4) to a member firm holding an omnibus account on behalf of another broker-dealer that solicited a government entity, and the omnibus dealer is unaware of the broker-dealer's solicitation activities, the omnibus dealer will likely be unable to maintain records required by proposed Rule 4580. As a potential way in which to address this concern, ICI referenced an SEC staff no-action relief letter that addresses a similar concern regarding the recordkeeping requirements related to the SEC Pay-to-Play Rule. *See* ICI referencing Investment Company Institute, SEC No-Action Letter dated September 12, 2011, available at *http://www.sec.gov/divisions/investment/noaction/2011/ici091211–204-incoming.pdf*. FINRA recognizes the concern raised by ICI and will address interpretive questions as needed regarding the application of the proposed recordkeeping requirements to covered members holding omnibus accounts on behalf of other broker-dealers that engage in distribution or solicitation activities with government entities.

[123] *See, e.g.,* SIFMA, Monument Group, ICI, IAA, FSI, CAI and 3PM.

example, commenters raised concerns regarding the scope and timing of the disclosure requirements [124] and that the requirements would be duplicative of existing federal and state investor protection-related disclosure requirements.[125] In addition, commenters raised concerns regarding the costs and compliance burdens associated with the proposed disclosure requirements.[126]

After considering the comments, FINRA has determined not to propose a disclosure rule at this time. FINRA will continue to consider whether such a rule would be appropriate. If FINRA determines to propose a disclosure rule at a later date, it would do so pursuant to FINRA's notice and comment rulemaking process.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2015–056 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–FINRA–2015–056. 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 FINRA. 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–FINRA–2015–056 and should be submitted on or before January 20, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[127]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32894 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[124] *See, e.g.,* SIFMA, Monument Group, ICI, IAA, CAI and 3PM.

[125] *See, e.g.,* SIFMA, Monument Group and FSI.

[126] *See, e.g.,* SIFMA, Monument Group and 3PM.

[127] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2015–0079]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions and an extension of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2015–0079].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than February 29, 2016. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Internet Direct Deposit Application—31 CFR 210—0960–0634. SSA requires all applicants and recipients of Social Security Old Age, Survivors, and Disability Insurance (OASDI) benefits, or Supplemental Security Income payments to receive these benefits and payments via direct deposit at a financial institution. SSA receives Direct Deposit/Electronic Funds Transfer (DD/EFT) enrollment information from OASDI beneficiaries and SSI recipients to facilitate DD/EFT of their funds with their chosen financial institution. We also use this information when an enrolled individual wishes to change their DD/EFT information. For the convenience of the respondents, we collect this information through several modalities, including an Internet application, in-office or telephone interviews, and our automated telephone system. In addition to using the direct deposit information to enable DD/EFT of funds to the recipient's chosen financial institution, we also use the information through our Direct Deposit Fraud Indicator to ensure the correct recipient receives the funds. Respondents are OASDI beneficiaries and SSI recipients requesting that we enroll them in the Direct Deposit program or change their direct deposit banking information.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Internet DD	507,214	1	10	84,536
Non-Electronic Services (FO, 800#-ePath, MSSICS, SPS, MACADE, POS, RPS)	3,317,351	1	12	663,470
Direct Deposit Fraud Indicator	54,016	1	2	1,801
Totals	3,878,581			749,807

2. Centenarian and Medicare Non-Utilization Project Development Worksheets: Face-to-Face Interview and Telephone Interview—20 CFR 416.204(b) and 422.135—0960–0780. SSA conducts interviews with centenary Title II beneficiaries and Title XVI recipients, and Medicare Non-Utilization Project (MNUP) beneficiaries age 90 and older to: (1) Assess if the beneficiaries are still living; (2) prevent fraud through identity misrepresentation; and (3) evaluate the well-being of the recipients. SSA field office personnel obtain the information through one-time, in-person interviews with the centenarians and MNUP beneficiaries. If the centenarians and MNUP beneficiaries have representatives or caregivers, SSA personnel invite them to the interviews. During these interviews, SSA employees make overall observations of the centenarians, MNUP beneficiaries, and their representative payees (if applicable). The interviewer uses the appropriate Development Worksheet as a guide for the interview, in addition to documenting findings during the interview. Non-completion of the Worksheets, or refusal of the interviews, will result in the suspension of the centenarians' or MNUP beneficiaries' payments. SSA conducts the interviews either over the telephone or through a face-to-face discussion with the respondents. Respondents are SSI recipients or Social Security beneficiaries 100 years old or older; MNUP beneficiaries; their representative payees; or their caregivers.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Centenarian Project—Title XVI Only*	240	1	15	60
MNUP—All Title II Responses	4,400	1	15	1,100
Totals	4,640			1,160

*Some cases are T2 rollovers from prior Centenarian workloads.

II. SSA submitted the information collection below to OMB for clearance. Your comments regarding the information collection would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than January 29, 2016. Individuals can obtain copies of the OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov.*

Protecting the Public and Our Personnel To Ensure Operational Effectiveness (RIN 0960–AH35), Regulation 3729I—20 CFR 422.905 and 422.906—0960–0796

Background

On September 2, 2011, the agency published interim final regulations and notifications processes for the restrictive access and alternative service process at 76 FR 54700. These regulations explain the process we follow when we restrict individuals from receiving in-person services in our field offices and provide them, instead, with alternative services. We published these rules to create a safer environment for our personnel and members of the public who use our facilities, while ensuring we continue to serve the American people with as little disruption to our operations as possible. Under our regulations at 20 CFR 422.905, an individual whom we restrict access to our facilities has the opportunity to appeal our decision within 60 days of the date of the restrictive access and alternative service notice. Under 20 CFR 422.906, if the individual does not appeal the decision within the 60 days; if we restrict the individual prior to the effective date of this regulation; or if the appeal results in a denial, the individual has another opportunity to request review of the restriction after a three-year period. We make this periodic review available to all restricted individuals once every three years.

Information Collection Description

The interim final restrictive access and alternative services rules contain two public reporting burdens:

- 20 CFR 422.905—after SSA issues a restrictive access and alternative service decision against an individual, the individual has 60 days to appeal the determination. Restricted individuals must submit a written appeal stating why they believe SSA should rescind the restriction and allow them to conduct business with us on a face-to-face basis in one of our offices. There is no printed form for this request; restricted individuals create their own written statement of appeal, and submit it to a sole decision-maker in the regional office of the region where the restriction originated. The individuals may also provide additional documentation to support their appeal.
- 20 CFR 422.906—three years after the original restrictive access and alternative service decision, restricted individuals may re-submit a written

appeal of the decision. The same criteria apply as for the original appeal: (1) It must be in writing; (2) it must go to a sole decision-maker in the regional office of the region where the restriction originated for review; and (3) it may accompany supporting documentation.

Respondents for this collection are individuals appealing their restrictions from in-person services at SSA field offices.

Type of Request: Extension of an OMB-approved information collection.

Regulation section	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
20 CFR 422.905	75	1	15	19
20 CFR 422.906	75	1	20	25
Totals	150			44

Dated: December 24, 2015.

Naomi R. Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2015–32849 Filed 12–29–15; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–15–75]

Petition for Exemption; Summary of Petition Received; Charles Franklin, Inc.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 19, 2016.

ADDRESSES: Send comments identified by docket number FAA–2015–1022 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

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

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dan Ngo (202) 267–4264, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 23, 2015.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2015–1022.

Petitioner: Charles Franklin, Inc.

Section(s) of 14 CFR Affected: 61.56, 61.3, and 61.113.

Description of Relief Sought: The petitioner requests to amend Exemption No. 11831 to change Condition No. 13 to operate without an airman certificate.

[FR Doc. 2015–32856 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–15–73]

Petition for Exemption; Summary of Petition Received; Astraeus Aerial

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 19, 2016.

ADDRESSES: Send comments identified by docket number FAA–2014–0352 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the

public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dan Ngo (202) 267–4264, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 23, 2015.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2014–0352.

Petitioner: Astraeus Aerial.

Section(s) of 14 CFR Affected: 21 subpart H, 45.23(b), 61.113(a), 91.103, 91.109, 91.119, 91.121, 91.151, 91.203(a) & (b), 91.405(a), 91.409(a)(2), 91.417(a)&(b), 91.7(a), and 91.9(b)(2).

Description of Relief Sought: The petitioner requests to amend Exemption No. 11062 to conduct UAS commercial operations using augmented visual line of sight operations with a two-person pilot system. Using multiple controllers, one pilot maintains visual line of sight and the other manipulates the aircraft using first person viewing.

[FR Doc. 2015–32857 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–15–80]

Petition for Exemption; Summary of Petition Received; The Visual Arts Group, LLC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 19, 2016.

ADDRESSES: Send comments identified by docket number FAA–2015–0036 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

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

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael Cameron, (202) 267–4549. 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 23, 2015.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2015–0036.

Petitioner: The Visual Arts Group, LLC.

Section(s) of 14 CFR Affected: 21, and §§ 45.23(b), 61.113(a) and (b), 91.7, 91.9, (b)(2), 91.103(b), 91.109, 91.119, 91.121, 91.151(a), 91.203(a) and (b), 91.405(a), 91.407(a)(1), 91.409(a)(2), and 91.417(a) and (b).

Description of Relief Sought: The petitioner is requesting relief to launch its small multi rotor unmanned aircraft systems (sUAS) from a moving vessel such as golf carts, camera dollies and other slow moving vehicles customarily used on motion picture and TV sets for the purpose of transporting movie cameras during the filming process.

[FR Doc. 2015–32858 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2009–0289; FMCSA–2009–0290; FMCSA–2011–0300; FMCSA–2013–0190; FMCSA–2013–0191]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions of 107 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. FMCSA has statutory authority to exempt individuals from this rule if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: Each group of renewed exemptions are effective from the dates stated in the discussions below. Comments must be received on or before January 29, 2016.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No.

FMCSA–2009–0289; FMCSA–2009–0290; FMCSA–2011–0300; FMCSA–2013–0190; FMCSA–2013–0191, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the Federal Register on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the Federal Motor Carrier Safety Regulations 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 107 individuals listed in this notice have recently become eligible for a renewed exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. The drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

Exemption Decision

This notice addresses 107 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. These 107 drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. Therefore, FMCSA has decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

The exemptions are renewed subject to the following conditions: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual submit an annual ophthalmologist's or optometrist's report; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. The following groups of drivers received renewed exemptions in the month of January and are discussed below.

As of January 5, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 20 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (76 FR 71112; 77 FR 532):

Mark A. Aspden (MA)
Rodney C. Backus (NY)
Gary L. Breitenbach (SC)
Gerald R. Curran (PA)
Matthew G. Denisov (NC)
Shawn K. Fleming (PA)
Steven W. Gerling (IA)
Jackie D. Greenlee (MO)
Gregory L. Horton (GA)
Justin W. Jackson (OK)
David T. Kylander (MO)
Kevin A. Perdue (MD)
Michael E. Pleak (IN)
Sarah M. Powell (NM)
James G. Rahn (IA)
Christopher C. Stephenson (KS)
Ward A. Stone (WI)
Todd J. Timmerman (WI)
Richard L. White (MS)
Paul A. Wright (NY)

The drivers were included in Docket No. FMCSA–2011–0300. Their exemptions are effective as of January 5, 2016 and will expire on January 5, 2018.

As of January 11, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 24 individuals, have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (74 FR 55890; 75 FR 1449):

Eric M. Butz (OH)
Rita A. Cefaratti (CT)
Gerald F. Crowley (NY)
Scott J. Denham (MN)
Larry E. Dickerson (GA)
Lance W. Essex (OH)
David E. Ginter (PA)
William H. Goebel (IA)
Joseph L. Gray III (PA)
Ryan R. Harris (IA)
Carroll J. Hartsell (WV)
Keith M. Huels (AZ)
Daniel R. Jackson (PA)
Curtis W. Keelin, Jr. (WY)
Patrick J. Krueger (WI)
Tammy Lynn F. Manuel (SC)

Francisco J. Martinez (MA)
Andrew W. Myer (NE)
Chad A. Nelson (UT)
David W. Olson (AZ)
Mark E. Pascoe (WI)
Terry L. Riddell (IN)
Roger L. Summerfield (WI)
Jimmy P. Wright (TX)

The drivers were included in Docket No. FMCSA–2009–0289. Their exemptions are effective as of January 11, 2016 and will expire on January 11, 2018.

As of January 23, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (78 FR 65034; 79 FR 3917):

Clair H. Gilmore (WA)
Michael Kollos (MN)
Daniel T. Lindahl (WI)
James F. McSweeney (NH)
Eric W. Miller (IN)
William J. Rodgers (PA)
Mark A. Rosenau (MN)
Daniel B. Shaw (FL)
John C. Thomas (IN)
Richard Wasko (FL)
Douglas E. Wilhoit (PA)
Richard A. Wilk (OH)
Thomas A. Young (TX)

The drivers were included in Docket No. FMCSA–2013–0190. Their exemptions are effective as of January 23, 2016 and will expire on January 23, 2018.

As of January 28, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 25 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (74 FR 65836; 75 FR 4622):

Bob A. Bauer (WI)
Michael P. Berger (ND)
William D. Blosch (GA)
Victor M. Brunner (WI)
Tom L. Cooley (KS)
Wallace E. Crouse, Jr. (MA)
Robert G. Dohman, Jr. (ND)
Danny E. Edmondson (GA)
Andrew C. Everett (AZ)
Wendell G. Fordham (GA)
Eugene G. Friedman (NJ)
Donald W. Hansen (ND)
Joseph S. Hernandez (NM)
Jordan T. Johnston (IN)
Jere W. Kirkpatrick (OH)
Kyle A. Leach (NE)
Robert J. Lewis, Jr. (VT)
Stacy R. Oberholzer (PA)
Michael S. Ogle (GA)
Walter L. Patrick (TN)
Clifford A. Peters (IL)
Richard L. Piercefield, Sr. (MI)
Kevin A. Roginski (PA)
Bruce M. Stockton (MO)
Todd R. Vickers (MD)

The drivers were included in Docket No. FMCSA–2009–0290. Their exemptions are effective as of January 28, 2016 and will expire on January 28, 2018.

As of January 29, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 25 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (78 FR 68139; 79 FR 4807):

Dylan J. Bryan (IL)
Robert A. Collins (NJ)
Fred J. Combs (OH)
Edward C. DeFrancesco (CT)
Terrance J. Dusharm (MN)
Jonathan Eggers (MN)
Gilbert N. Fugate (IN)
Scott C. Garbiel (ME)
Charles D. Grant (GA)
William F. Hamann (KY)
Jerry J. Klosterman (OH)
Joseph E. Kolb (NY)
Matthew D. Lee (VA)
Craig A. Lemponen (OH)
Matthew P. Ludwig (NY)
Keith B. Masters (NH)
Eli J. Meekhof (MI)
Jeffrey A. Olson (IA)
Marvin H. Patterson III (SC)
Brandon C. Rhinehart (MD)
Donald R. Sine, Jr. (WV)
Dennis E. Taunton (ID)
Phillip A. Trent (VA)
Deborah D. Watson (MI)
Ronnie C. Webb (MT)

The drivers were included in Docket No. FMCSA–2013–0191. Their exemptions are effective as of January 29, 2016 and will expire on January 29, 2018.

Each of the 107 drivers in the aforementioned groups qualifies for a renewal of the exemption. They have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of the 107 drivers for a period of two years is likely to achieve a level of safety equal to that existing without the exemption. The drivers were included in docket numbers FMCSA–2009–0289; FMCSA–2009–0290; FMCSA–2011–0300; FMCSA–2013–0190; FMCSA–2013–0191.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 29, 2016.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 107 individuals from rule prohibiting persons with ITDM from operating CMVs in interstate commerce in 49 CFR 391.41(b)(3). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the medical condition of each applicant for an exemption from rule prohibiting persons with ITDM from operating CMVs in interstate commerce. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the

search box insert the docket numbers FMCSA–2009–0289; FMCSA–2009–0290; FMCSA–2011–0300; FMCSA–2013–0190; FMCSA–2013–0191 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, and to submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2009–0289; FMCSA–2009–0290; FMCSA–2011–0300; FMCSA–2013–0190; FMCSA–2013–0191 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to the proposed rulemaking.

Issued on: December 15, 2015.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2015–32863 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA 2015–0461]

Agency Information Collection Activities; Emergency Revision of a Currently-Approved Information Collection: Licensing Applications for Motor Carrier Operating Authority

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval. The FMCSA seeks emergency approval to revise an ICR titled, ''Licensing Applications for Motor Carrier Operating Authority,'' that is used by for-hire motor carriers of regulated commodities, motor passenger carriers, freight forwarders, property brokers, and certain Mexico-domiciled motor carriers to register their operations with the FMCSA.

DATES: Please send your comments to this notice by January 29, 2016. OMB must receive your comments by this date to act quickly on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2015–0461. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_submission@omb.eop.gov,* faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, West Building, 6th Floor, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Telephone: 202–385–2367; email *jeff.secrist@dot.gov.* Office hours are from 9:00 a.m. to 5:00 p.m., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Title: Licensing Applications for Motor Carrier Operating Authority.

OMB Control Number: 2126–0016.

Type of Request: Revision of a currently-approved information collection.

Respondents: Motor carriers, motor passenger carriers, freight forwarders, brokers, and certain Mexico-domiciled motor carriers.

Estimated Number of Respondents: 12,413.

Estimated Time per Response: 4 hours to complete Form OP–1 (MX); and 2 hours to complete Forms OP–1, OP–1(FF), OP–1(P) and OP–1(NNA).

Expiration Date: October 31, 2018.

Frequency of Response: Other (as needed).

Estimated Total Annual Burden: 24,853 hours [74,464 hours for Year 1 + 48 hours for Year 2 + 48 hours for Year 3 = 74,560 hours/3 year approval for ICR = 24,853 estimated average number of annual burden hours].

Background: The FMCSA is authorized to register certain for-hire Mexico-domiciled long-haul motor carriers of regulated commodities under the provisions of 49 U.S.C. 13902 and the North American Free Trade Agreement (NAFTA) motor carrier access provision. The Form OP–1(MX) is used by FMCSA to register those Mexico-domiciled motor carriers. It requests information on the applicant's identity, location, familiarity with safety requirements, and type of proposed operations.

FMCSA published a Final Rule titled, ''Unified Registration System,'' (78 FR 52608), dated August 23, 2013, that would incorporate all registration form requirements included in this ICR, except the Form OP–1(MX), into the Form MCSA–1 in the OMB Control Number 2126–0051, ''FMCSA Registration/Updates,'' ICR effective October 23, 2015. The Form OP–1(MX) was excluded from the Form MCSA–1 because its information collection requirements are beyond the scope of the Unified Registration System Final Rule. On October 5, 2015, FMCSA obtained OMB approval to eliminate all of the registration forms except the Form OP–1(MX) from this ICR.

This emergency ICR revision request is due to a Final Rule titled ''Unified Registration System,'' (80 FR 63695) dated October 21, 2015, which changed the effective and compliance dates of the 2013 Final Rule from October 23, 2015, to September 30, 2016. This change in the effective and compliance dates from the 2013 Final Rule is required to allow FMCSA additional time to complete the information technology (IT) systems work required to fully implement that rule. As a result, FMCSA seeks emergency approval to continue using the Licensing Applications for Motor Carrier Operating Authority Forms (OP–1(NNA), OP–1(FF), OP–1, and OP–1(P)) through September 30, 2016, as these forms will be needed to support registration requirements.

Public Comments Invited: FMCSA requests that you comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA to perform its functions, (2) the accuracy of the estimated burden, (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information, and (4) ways that the

burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority delegated in 49 CFR 1.87 on: December 22, 2015.

G. Kelly Regal,

Associate Administrator, Office of Research and Information Technology.

[FR Doc. 2015–32865 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–OST–2015–0255]

Agency Information Collection Activities: Request for Comments; Clearance of a New Information Collection(s): Voluntary Web-Based Questionnaire of Disadvantaged Business Enterprise Firms

AGENCY: Office of the Secretary, U.S. Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. 3501 *et seq.*), this notice announces the U.S. Department of Transportation's (DOT) intention to request the Office of Management and Budget's (OMB) approval for the utilization of the Voluntary Web-Based Questionnaire of Disadvantaged Business Enterprise Firms. The questionnaire will be for the use of firms certified as a Disadvantaged Business Enterprise (DBE). DBE's that choose to participate will be asked to provide information regarding the nature of their business and bidding history, and perceived barriers/challenges that may have prevented them from receiving a contract or successfully competing in DOT's DBE program. A link to the survey will be made available by DOT's Departmental Office of Civil Rights for use by the Department's state and local recipients, which can in turn post this link on their own Web sites. The information collected will be used to assist DOT in measuring whether the DBE program is achieving its objectives.

DATES: Comments on this notice must be received by February 29, 2016.

ADDRESSES: You may submit comments [identified by Docket No. DOT–OST–2015–XXXX] through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Marc D. Pentino, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC, 20590; 202–366–4648; *marc.pentino@dot.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: XXXX—NEW.

Title: Voluntary Web-Based Questionnaire of Disadvantaged Business Enterprise Firms.

Form Numbers: None.

Type of Review: OMB Approval.

Background: The DOT's Operating Administrations distribute substantial funds each year to finance construction projects initiated by state and local governments, public transit and airport agencies. The DOT has the important responsibility of ensuring that firms competing for DOT-assisted contracts for these projects are not disadvantaged by unlawful discrimination. The DOT's most important tool for meeting this requirement has been its DBE program, which originally began in 1980 as a minority/women's business enterprise program established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs. The DBE program was reauthorized by Congress several times since its inception; most recently in the ''Moving Ahead for Progress in the 21st Century Act'' or the ''MAP–21,'' (Pub. L. 112–141, July 6, 2012, 126 Stat. 405), which funded surface transportation programs for highways, highway safety, and transit at over $105 billion for fiscal years 2013 and 2014. Section 1101(b) of the Act describes Congress's findings regarding the continued need for the DBE program due to the discrimination and related barriers that pose significant obstacles for minority and women-owned businesses seeking federally-assisted surface transportation work. The information requested will assist DOT in measuring whether the DBE program is achieving its objectives to create a level playing field on which DBEs can compete fairly or assist in the development of DBE firms to compete successfully in the marketplace.

Respondents: There are approximately 33,000 Disadvantaged Business Enterprises in the United States. Responses from this pool of businesses will vary due to the voluntary nature of the collection.

Estimated Number of Respondents: The DOT estimates less than 10% of firms will submit information, or approximately 3,000 businesses.

Estimated Total Burden on Respondents: 10 minutes per respondent.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the proper performance of DOT's DBE program; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. All responses to the notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC, on December 10, 2015.

Stephanie Jones,

Senior Counselor to the Secretary, Chief Opportunities Officer, and Acting Director, Departmental Office of Civil Rights.

[FR Doc. 2015–32859 Filed 12–29–15; 8:45 am]

BILLING CODE 4910–9X–P

FEDERAL REGISTER

Vol. 80 Wednesday,
No. 250 December 30, 2015

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 405 and 414

Medicare Program; Prior Authorization Process for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405 and 414

[CMS–6050–F]

RIN 0938–AR85

Medicare Program; Prior Authorization Process for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies

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

ACTION: Final rule.

SUMMARY: This final rule establishes a prior authorization program for certain durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) items that are frequently subject to unnecessary utilization. This rule defines unnecessary utilization and creates a new requirement that claims for certain DMEPOS items must have an associated provisional affirmed prior authorization decision as a condition of payment. This rule also adds the review contractor's decision regarding prior authorization of coverage of DMEPOS items to the list of actions that are not initial determinations and therefore not appealable.

DATES: These regulations are effective February 29, 2016.

FOR FURTHER INFORMATION CONTACT:
Maria Ciccanti, (410) 786–3107.
Jennifer McCormick, (410) 786–2852.
Lynne Zaccaria, (410) 786–2485.

SUPPLEMENTARY INFORMATION:

I. Executive Summary and Background

A. Executive Summary

1. Purpose and Legal Authority

The purpose of this final rule is to implement a new prior authorization program aimed at reducing unnecessary utilization and aberrant billing of certain DMEPOS items. Section 1834(a)(15) of the Social Security Act (the Act) authorizes the Secretary to develop and periodically update a list of DMEPOS that the Secretary determines, on the basis of prior payment experience, are frequently subject to unnecessary utilization and to develop a prior authorization process for these items. This final rule implements that authority by interpreting ''frequently subject to unnecessary utilization,'' by specifying a list of items that meet our criteria, and by establishing a prior authorization process.

2. Summary of the Major Provisions

The following provisions are addressed in this final rule:

- Establishment of a prior authorization process for DMEPOS items that are frequently subject to unnecessary utilization. We define ''unnecessary utilization'' as the furnishing of items that do not comply with one or more of Medicare's coverage, coding, and payment rules. We believe a prior authorization process will ensure beneficiaries receive medically necessary care while minimizing the risk of improper payments, and will therefore protect both beneficiaries and the Medicare program.
- Creation of a Master List of certain DMEPOS items potentially subject to prior authorization. The final rule will create an initial Master List that includes items that meet the following criteria:

++ Appear on the DMEPOS Fee Schedule list.

++ Meet either of the following criteria:

—Identified in a General Accountability Office (GAO) or Department of Health and Human Services Office of Inspector General (OIG) report that is national in scope and published in 2007 or later as having a high rate of fraud or unnecessary utilization.

—Listed in the 2011 or later Comprehensive Error Rate Testing (CERT) program's Annual Medicare Fee-For-Service (FFS) Improper Payment Rate Report Durable Medical Equipment (DME) Report's Service Specific Overpayment Rate Appendix.

We note that, in the proposed rule, this report was titled as stated in the previous sentence. However, for the purposes of this final rule, we are changing the name to the CERT Annual Medicare Fee-For-Service (FFS) Improper Payment Rate Report DME and/or DMEPOS Service Specific Report(s). The Annual Medicare Fee-For-Service (FFS) Improper Payment Rate Report DME and/or DMEPOS Service Specific Report(s) will hereafter be referred to as the CERT DME and/or DMEPOS Service Specific Report(s). We believe that changing the term to Report(s) (rather than Appendix) and removing the Overpayment Rate wording could limit possible future confusion if the CERT DME and/or DMEPOS Service Specific report(s) are reported in the narrative rather than the appendices or if the name of the report changes in future annual publications.

++ Have an average purchase fee of $1,000 or greater (adjusted annually for inflation) or an average monthly rental fee schedule of $100 or greater (adjusted annually for inflation). (These dollar amounts are referred to as the payment threshold).

- Maintenance of the Master List of certain DMEPOS items potentially subject to prior authorization is conducted based on the following:

++ The Master List is self-updating annually. That is, items on the DMEPOS Fee Schedule that meet the payment threshold are added to the list when the item is listed in a future OIG or GAO report of a national scope or listed in a future CERT DME and/or DMEPOS Service Specific Report(s).

++ Items remain on the Master List for 10 years from the date the item was added to the Master List.

++ Items are updated on the Master List when the Healthcare Common Procedure Coding System (HCPCS) codes representing an item have been discontinued and cross-walked to an equivalent item.

++ Items are removed from the list sooner than 10 years if the purchase amount drops below the payment threshold (currently an average purchase fee of $1,000 or greater or an average monthly rental fee schedule of $100 or greater).

++ Items that age off the Master List because they have been on the list for 10 years can remain on or be added back to the Master List if a subsequent GAO/OIG, or CERT DME and/or DMEPOS Service Specific Report(s) identifies the item to be frequently subject to unnecessary utilization.

++ Items already on the Master List that are identified by a GAO/OIG, or CERT DME and/or DMEPOS Service Specific Report(s) will remain on the list for 10 years from the publication date of the new report(s).

++ We will notify the public annually of any additions and deletions from the Master List by posting the notification in the **Federal Register** and on the CMS Prior Authorization Web site.

- The Required Prior Authorization List—Presence on the Master List will not automatically require prior authorization. In order to balance minimizing provider and supplier burden with our need to protect the Medicare program, we are initially implementing prior authorization for a subset of items on the Master List (hereafter referred to as ''Required Prior Authorization List'').
- The Prior Authorization Process—This provision requires that prior to furnishing the item and prior to submitting the claim for processing, a prior authorization requester must submit evidence that the item complies

with all applicable Medicare coverage, coding, and payment rules. After receipt of all applicable required Medicare documentation, CMS or one of its review contractors will conduct a medical review and communicate a decision that provisionally affirms or non-affirms the request. We will issue specific prior authorization guidance in subregulatory communications.

- A provisional affirmation prior authorization decision is a condition of payment. We are finalizing the provision to automatically deny payment for a claim for an item on the Required Prior Authorization List that is submitted without a provisional affirmation prior authorization decision.
- A prior authorization decision is not a payment decision, and thus a prior authorization decision is not appealable. We have added new section 405.926(t) to our regulations to specify that a review contractor's prior determination of coverage is not an initial determination.

3. Summary of Costs, Benefits, and Transfers

The overall economic cost of this final rule is approximately $1.3 million in the first year. The 5 year cost is approximately $57 million and the 10 year cost is approximately $212 million, mostly driven by the increased number of items subjected to prior authorization after the first year. Additional administrative paperwork costs to private sector providers and suppliers and an increase in Medicare spending to conduct reviews combine to create the financial impact. However, this impact is offset by some savings. We believe there are likely to be other benefits and cost savings that result from the DMEPOS prior authorization requirement. However, many of those benefits are difficult to quantify. For instance, we expect to see savings in the form of reduced unnecessary utilization, fraud, waste, and abuse, including a reduction in improper Medicare FFS payments (note that not all improper payments are fraudulent).

The overall benefits of this final rule include a change in billing practices that also enhances the coordination and collaboration of care between the primary care provider and the supplier to provide the most appropriate DMEPOS item to meet the needs of the beneficiary. The provider and supplier community will benefit from the increased education and outreach that is planned during year 1 of the prior authorization program.

Savings, net of premium offsets, to the Medicare program due to reductions in payments to DMEPOS suppliers are estimated to be $10 million in 2016, potentially rising over time to between $10 million and $110 million in 2025, yielding a 10-year annualized amount of $10 to $68.1 million with a 7 percent discount rate or $10 to $71.4 million with a 3 percent discount rate.

B. Background

1. Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)

The term ''durable medical equipment (DME)'' is defined in section 1861(n) of the Social Security Act (the Act). It is also referenced in the definition of ''medical and other health services'' in section 1861(s)(6) of the Act. Furthermore, the term is defined in 42 CFR 414.202 as equipment furnished by a supplier or a home health agency (HHA) that—

- Can withstand repeated use;
- Effective with respect to items classified as DME after January 1, 2012, has an expected life of at least 3 years;
- Is primarily and customarily used to serve a medical purpose;
- Generally is not useful to an individual in the absence of an illness or injury; and
- Is appropriate for use in the home.

Section 1861(s)(9) of the Act provides for the coverage of leg, arm, back, and neck braces; and artificial legs, arms, and eyes, including replacement if required because of a change in the patient's physical condition. As indicated by section 1834(h)(4)(C) of the Act, together with certain shoes described in section 1861(s)(12) of the Act, these items are often referred to as ''orthotics and prosthetics.'' Under section 1834(h)(4)(B) of the Act, the term ''prosthetic devices'' does not include parenteral and enteral nutrition, supplies and equipment, and implantable items payable under section 1833(t) of the Act.

Examples of durable medical equipment include hospital beds, oxygen tents, and wheelchairs. Prosthetic devices are included in the definition of ''medical and other health services'' in section 1861(s)(8) of the Act. Prosthetic devices are defined as devices (other than dental) which replace all or part of an internal body organ, including replacement of such devices. Examples of prosthetic devices include cochlear implants, electrical continence aids, electrical nerve stimulators, and tracheostomy speaking valves.

Medicare pays for DMEPOS items only if the beneficiary's medical record contains sufficient documentation of the beneficiary's medical condition to support the need for the type and quantity of items ordered. In addition, other conditions of payment must be satisfied for the claim to be paid. These conditions of payment vary by item, but are specified in statute and in CMS regulations. They are further detailed in our manuals and in local and national coverage determinations. Among other things, there must be a valid order for the item obtained from a physician or, when permitted, an eligible professional.

Once Medicare coverage, coding, and payment rules are satisfied, the supplier dispenses the item to the beneficiary. In general, items are delivered directly to the beneficiary or to an authorized representative, delivered to the beneficiary by shipping or delivery service, or delivered to a nursing facility on behalf of the beneficiary. The supplier is required to maintain proof of delivery in its files in keeping with the supplier standards contained in 42 CFR 424.57(c). The claim is then submitted to the Medicare Administrative Contactor (MAC) for payment. If a claim is denied, the beneficiary or supplier may appeal the MAC's decision. Claims may also be selected for pre- or post-payment review. As discussed in the following section, the prior authorization process will require applicable documentation to be submitted for review before an item is delivered to the beneficiary.

2. DMEPOS Payment Rules—Advance Determination of Coverage

Section 1834(a)(15) of the Act authorizes the Secretary to develop and periodically update a list of DMEPOS items that the Secretary determines, on the basis of prior payment experience, are frequently subject to unnecessary utilization and to develop a prior authorization process for these items.

This final rule implements that authority by interpreting ''frequently subject to unnecessary utilization,'' specifying a list of items that meet our criteria, and establishing a prior authorization process.

3. Improper Payments for DMEPOS Items

Medicare pays for DMEPOS items only if the beneficiary's medical record contains sufficient documentation of the beneficiary's medical condition to support the need for the type and quantity of items ordered. In addition, all required documentation elements outlined in Medicare policies must be present for the claim to be paid.

Payment made for the furnishing of an item that does not meet one or more of Medicare's coverage, coding, and

payment rules is an improper payment. The CERT program measures improper payments in the Medicare FFS program. CERT is designed to comply with the Improper Payments Elimination and Recovery Act of 2010 (IPERA) (Pub. L. 111–204).

For the 2014 CERT reporting period, approximately 5.1 billion dollars was improperly paid for DMEPOS items. This represents a 53.1 percent improper payment rate for DMEPOS and represents 10.4 percent of the overall improper payment rate.[1] Ninety-two percent of DMEPOS improper payments were due to insufficient documentation.[2]

Given that for the 2014 reporting period, 92 percent of the DMEPOS improper payment rate is attributed to insufficient documentation, we believe we must develop a mechanism for DMEPOS to have sufficient associated documentation before the item is furnished and before the claim is submitted for payment. We believe a prior authorization program can accomplish this by reviewing many of the required documentation elements outlined in applicable Medicare policies before the item is furnished and before the claim is submitted for payment.

Prior authorization has the added benefit of providing a supplier some assurance of payment for items receiving a provisional affirmation decision. (However, as described later in this section, certain requirements—such as proof of delivery—can only be evaluated after the claim has been submitted). In addition, beneficiaries will have information regarding coverage prior to receiving the item, and will benefit by knowing in advance of receiving an item, if they will incur financial liability for non-covered items. If a supplier does not submit all of the required documentation with its first prior authorization request, it will be notified of the missing documentation and may resubmit its request. We proposed that requesters be permitted to submit a prior authorization request an unlimited number of times.

We note claims for which there is a provisional affirmation prior authorization decision will be afforded some protection from future audits, both pre- and post-payment. However, review contractors may audit claims if potential fraud, inappropriate utilization or changes in billing patterns are identified. In addition, IPERA requires all federal agencies to evaluate their programs for improper payments. The CMS CERT program reviews a stratified, random sample of claims annually to identify and measure improper payments. It is possible for a DMEPOS claim subject to prior authorization to fall within the sample. In this situation, the subject claim would not be protected from the CERT audit. While implementing a new prior authorization program will require suppliers to modify their processes, we believe suppliers can minimize disruption to their business processes by learning in advance what information or documentation is required for coverage of specific items. We will partner with the supplier, provider, and beneficiary community to make sure they have all the information about the new program needed to submit a prior authorization request. We believe that some assurance of payment and some protection from future audits may ultimately reduce burdens associated with denied claims and appeals.

4. Access to Care

Of the approximately 37 million beneficiaries enrolled in the Medicare FFS program in 2013, 11 million had a DMEPOS claim.[3] Beneficiaries utilized approximately 91,000 DME suppliers.[4] For 2014, there were approximately 37.5 million beneficiaries enrolled in the Medicare FFS program and 10 million had a DMEPOS claim. Beneficiaries utilized approximately 90,000 DME suppliers.[5]

We have experience in implementing a prior authorization program that enables beneficiaries to receive a needed DME item, without access issues or barriers to care. We have monitored the beneficiary experience in The Medicare Prior Authorization of Power Mobility Devices (PMDs) Demonstration, which began in 2012. Prior to implementation, we spoke to numerous Medicare beneficiary groups that expressed support for the demonstration. Feedback from beneficiaries has been largely positive. We are not aware of any access issue or barriers to care created by the prior authorization process for PMDs.

The Medicare Prior Authorization of PMDs Demonstration was initially implemented in California, Illinois, Michigan, New York, North Carolina, Florida, and Texas. Since implementation, we have observed a decrease in expenditures for PMDs in the demonstration states and non-demonstration states. Based on claims processed from September 1, 2012 through November 14, 2014, monthly expenditures for the PMD codes included in the demonstration decreased from $12 million to $3 million in the demonstration states and from $20 million in September 2012 to $6 million in June 2014 in the non-demonstration states. Subsequently, we expanded the demonstration to 12 additional states on October 1, 2014, and on July 15, 2015, we extended the demonstration for all 19 states until August 31, 2018.[6] In 2013, there were approximately 91,000 national DMEPOS suppliers which may have adjusted their billing practices nationwide as a result of the demonstration (not just in the demonstration states that included 16,000 suppliers). This may have led to the savings documented in both the demonstration and non-demonstration states. As stated previously, savings were realized in both the demonstration and non-demonstration states. The decrease in spending may be due only in part to the demonstration, as other changes in policies regulating the provision of DMEPOS also took effect during this time. In addition, suppliers may have also started complying with CMS policies based on their experiences with prior authorization in the demonstration states.[7]

We promote a high quality health care system by aiming for better care at lower costs and for improved health outcomes. Crucial to this is maintaining beneficiary access to quality care. We

[1] The Medicare Fee-For-Service 2014 Improper Payments Report: *https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/CERT/CERT-Reports-Items/Medicare-FeeforService-2014-Improper-Payments-Report.html?DLPage=1&DLEntries=10&DLSort=0&DLSortDir=descending Accessed July 30,* 2015.

[2] The Supplementary Appendices for the Medicare Fee-for-Service 2014 Improper Payment Report retrieved January 2015 from *http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/CERT/CERT-Reports-Items/Downloads/AppendicesMedicareFee-for-Service 2014ImproperPaymentsReport.pdf?agree=yes&next=Accept.*

[3] CY 2013 Data from OnePI Business Objects, NCH DMEPOS claims, obtained January 16, 2015: All NCH DMEPOS Claims dated between January 1, 2013 to December 31, 2013: 10,680,646 unique beneficiaries.

[4] CMS Fast Facts retrieved January 2015 from *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Fast-Facts/index.html.*

[5] CMS Fast Facts retrieved October 2015 from *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Fast-Facts/index.html* and CY 2014 Data from OnePI Business Objects, NCH DMEPOS claims, obtained October 15, 2015: All NCH DMEPOS Claims dated between January 1, 2014 to December 31, 2014.

[6] *https://www.federalregister.gov/articles/2015/07/15/2015-17365/medicare-program-extension-of-medicare-prior-authorization-for-power-mobility-devices-pmds.*

[7] Medicare Prior Authorization of Power Mobility Devices Demonstration Status Update retrieved January 2015 from *http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical Review/Downloads/PMDDemoDecemberStatus update12302014.pdf.*

believe the Medicare Prior Authorization of PMDs Demonstration shows that by collaborating with beneficiaries and beneficiary advocacy groups, we can develop a prior authorization program that contributes to higher quality health care at lower costs without compromising access to care. This final rule creates a prior authorization program that supports our goals and makes sure beneficiaries are not hindered from accessing necessary DMEPOS items and services when they need them.

II. Provisions of the Proposed Rule and Analysis of and Responses to Public Comments

In the May 28, 2014 **Federal Register** (79 FR 30511 through 30531), we published a proposed rule titled ''Medicare Program; Prior Authorization Process for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies Items.'' In response to the publication of that proposed rule, we received 1,009 comments from the prosthetics and orthotics community, beneficiaries (including amputees) and beneficiary advocacy groups, professional and trade organizations, physicians and other clinicians, suppliers, and other interested parties.

In the following sections of this final rule, we include a summary of the provisions of the May 28, 2014 proposed rule, the public comments received, our responses, and our final decisions.

A. Proposed Prior Authorization for Certain DMEPOS Items

In § 414.234(a), we proposed that ''prior authorization'' be defined as a process through which a request for provisional affirmation of coverage is submitted to CMS or its contractors for review before the item is furnished to the beneficiary and before the claim is submitted for processing. We also proposed that ''provisional affirmation'' be defined as a preliminary finding that a future claim meets Medicare coverage, coding, and payment rules.

We also proposed in § 414.234(a) that ''unnecessary utilization'' be defined as the furnishing of items that do not comply with one or more of Medicare's coverage, coding, and payment rules. In accordance with section 1834(a)(15)(A) of the Act, we proposed to use ''prior payment experience'' to establish which items are ''frequently'' subject to unnecessary utilization. The Government Accountability Office (GAO), the Department of Health and Human Services' (HHS) Office of Inspector General (OIG), and CMS through CERT reports publish analyses of prior payment data and identify Medicare DMEPOS items that have high improper payment rates. We proposed that since the findings in these reports are the result of analysis of prior payment experience, we would use these reports to establish which items are frequently subject to unnecessary utilization. We discuss the use of GAO, OIG, and CERT reports to establish Master List inclusion criteria in section II.B. of this final rule.

We strive in every case to pay the right amount to a legitimate provider, for covered, correctly coded, and correctly billed services provided to an eligible beneficiary. We believe that a prior authorization process for DMEPOS items frequently subject to unnecessary utilization can help suppliers comply with Medicare's coverage, coding, and payment rules by having the required information and documentation reviewed before the item is furnished and before the claim is submitted. In addition, claims for which there is a provisional affirmation prior authorization decision will be afforded some protection from future audits. The review contractors may continue to audit claims if potential fraud, inappropriate utilization or changes in billing patterns are identified. In addition, IPERA requires all federal agencies to evaluate their programs for improper payments. The CMS CERT program reviews a stratified, random sample of claims annually to identify and measure improper payments. It is possible for a DMEPOS claim subject to prior authorization to fall within the sample. In this situation, the subject claim would not be protected from the CERT audit. In addition, OIG's authority to audit claims is not impacted by the protection from future audits provided by the provisional affirmation prior authorization decision.

When unnecessary utilization (as defined by this final rule) of a covered Medicare service, item or device is identified, we have a responsibility to evaluate the errors and develop processes to mitigate or reduce the unnecessary utilization. This is sometimes difficult since we must not only safeguard the Medicare program, but we must also safeguard beneficiaries' full access to the covered care they need. We believe using a prior authorization process would help to make sure items frequently subject to unnecessary utilization are furnished in compliance with applicable Medicare coverage, coding, and payment rules before they are delivered. This would safeguard against unnecessary utilization while also protecting beneficiaries' access to medically necessary items. We believe this is an effective way to reduce or prevent improper payments for unnecessary DMEPOS items while preserving beneficiary access to quality care and services.

The following summarizes comments on our proposed definitions of ''prior authorization,'' ''provisional affirmation,'' and ''unnecessary utilization'' at § 414.234(a).

Comment: While some commenters agreed with the proposed definition of ''unnecessary utilization,'' the majority disagreed. We defined unnecessary utilization as the furnishing of items that do not comply with one or more of Medicare's coverage, coding, and payment rules. We did not receive any suggestions for alternate definitions of unnecessary utilization. However, several commenters noted that unnecessary utilization is not a question of beneficiaries receiving unnecessary DMEPOS items but instead a lack of provider or supplier clarity on how to document medical necessity, and that the lack of documentation does not equal unnecessary utilization.

Response: We acknowledge ''unnecessary utilization'' may be interpreted from several perspectives. Our proposed definition is constructed for the purpose of implementing Medicare coverage and payment policies. A DMEPOS item may be medically necessary for a particular beneficiary, but without sufficient documentation to support compliance with Medicare coverage and payment policies, we cannot confirm whether Medicare payment for a particular item is appropriate. Furthermore, if the provider or supplier has not complied with Medicare coverage, coding or payment rules, we do not have authority to make payment. Accordingly, we interpret and define the phrase ''unnecessary utilization'' to mean the furnishing of items that do not comply with one or more of Medicare's coverage, coding, and payment rules.

We are finalizing the definitions of ''prior authorization,'' ''provisional affirmation,'' and ''unnecessary utilization'' at § 414.234(a) as proposed. In addition, we are finalizing the use of GAO, OIG, and CERT reports to establish prior payment history. Public comments and our responses pertaining to the use of GAO, OIG, and CERT reports are described in section II.B. of this final rule.

B. Proposed Criteria for Inclusion on the Master List of DMEPOS Items Frequently Subject to Unnecessary Utilization (Master List)

1. Inclusion Criteria

In the May 28, 2014 proposed rule (79 FR 30516 through 30519), we proposed a Master List of initial items that, based on proposed criteria, are frequently subject to unnecessary utilization, hereafter referred to as the ''Master List.'' We solicited public comments on the proposed inclusion criteria and the proposed Master List maintenance process. We proposed to include an item on the initial Master List if the item appears on the DMEPOS Fee Schedule list, meets one of the two criteria described later in this section, and has an average purchase fee of $1,000 or greater or an average rental fee schedule of $100 or greater. We refer to these dollar amounts as the payment threshold. We stated that having the payment threshold for DMEPOS items included on the Master List would allow us to focus our limited resources on items for which prior authorization will result in the largest potential savings for the Medicare program. The DMEPOS Fee Schedule is updated annually and lists Medicare allowable pricing for DMEPOS, including the full payment amount for capped rental items. For administrative simplicity, we proposed that we would not annually adjust the average purchase fee of $1,000 or greater or the average monthly rental fee schedule of $100 or greater threshold for inflation. Under our proposal, any changes to this threshold would be proposed through notice and comment rulemaking.

In addition to the payment threshold, we proposed that the item must meet one of the two following criteria:

- The item is identified in a GAO or HHS OIG report that is national in scope and published in 2007 or later as having a high rate of fraud or unnecessary utilization.
- The item is listed in the 2011 or later published CERT program's Annual Medicare Fee-For-Service (FFS) Improper Payment Rate Report Durable Medical Equipment (DME) Service Specific Overpayment Rate Appendix.

We proposed using reports dated from 2007 or later because the GAO and OIG do not always repeat analysis of specific items annually. We believed it necessary to look back a number of years to capture findings on a variety of DMEPOS items. The GAO audits agency operations to determine whether federal funds are being spent efficiently and effectively as well as identifies areas where Medicare may be vulnerable to fraud and improper payments. Section 1834(a)(15) of the Act directs the Secretary to use prior payment experience as a basis for identifying DMEPOS items frequently subject to unnecessary utilization. We believe utilizing GAO evaluations that identify DMEPOS items as having a high rate of fraud or unnecessary utilization accomplishes this directive because GAO's analysis includes an evaluation of paid claims history.

The OIG provides independent and objective oversight that promotes economy, efficiency, and effectiveness in the programs and operations of HHS. OIG's mission to protect the integrity of HHS programs is carried out through a network of audits, investigations, and inspections. The OIG audits and evaluates the performance of HHS programs and their participants. In some cases, OIG reports disclose aberrant billing utilization data or high incidences of improper payments for particular items or services.

Because the CERT program reviews a representative random sample of claims each year, we are using the most recent published report at the time of the writing of this final rule which is the 2014 CERT Report. We believe limiting this criterion to items listed in the 2011 or later CERT DME and/or DMEPOS Service Specific Report(s) (and also meeting the payment threshold) accomplishes the directive of section 1834(a)(15) of the Act. Interested parties can access the CERT reports at: *https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/CERT/CERT-Reports.html.*

We proposed that nationwide findings by OIG or by GAO of potentially high rates of fraud, unnecessary utilization, or aberrant or improper billings, and CERT reports of the incidence and rates of improper payments are good indicators that an item is ''frequently subject to unnecessary utilization'' as set out in section 1834(a)(15) of the Act. The use of GAO, OIG, and CERT reports to establish which items are frequently subject to unnecessary utilization are discussed in detail in section II.B. of the proposed rule (79 FR 30513).

2. Maintenance of the Master List

In the May 28, 2014 proposed rule (79 FR 30514), we described the proposed Master List maintenance process. We proposed the following:

- The Master List is self-updating annually. That is, items on the DMEPOS Fee Schedule that meet the payment threshold are added to the list when the item is listed in a future OIG or GAO report of a national scope or a future CERT DME and/or DMEPOS Service Specific Report(s).
- Items remain on the Master List for 10 years from the date the item was added to the Master List.
- Items are updated on the Master List when the Healthcare Common Procedure Coding System (HCPCS) code representing an item has been discontinued and cross-walked to an equivalent item.
- Items are removed from the list sooner than 10 years if the purchase amount drops below the payment threshold (an average purchase fee of $1,000 or greater or an average monthly rental fee schedule of $100 or greater).
- Items age off the Master List because they have been on the list for 10 years and can remain on or be added back to the Master List if a subsequent GAO/OIG or CERT DME and/or DMEPOS Service Specific Report(s) identifies the item to be frequently subject to unnecessary utilization.
- Items already on the Master List that are identified by a GAO/OIG, or CERT DME and/or DMEPOS Service Specific Report(s) will remain on the list for 10 years from the date of the new report.
- We notify the public annually of any additions and deletions from the Master List by posting the notification in the **Federal Register** and on the CMS Prior Authorization Web site.

In the proposed rule we stated that we selected a 10-year timeframe because we believe 10 years without a finding that the item has a potentially high rate of fraud, unnecessary utilization or aberrant or improper billing makes the original placement no longer current.

We received the following comments on the proposed Master List inclusion criteria and Master List maintenance process in section 414.234(b) and our responses follow:

Comment: A few commenters suggested we apply the Secretary's authority from section 1834(a)(15)(B) of the Act rather than apply the Secretary's authority from section 1834(a)(15)(A) of the Act, which is the basis for this final rule. Section 1834(a)(15)(B) of the Act allows the Secretary to develop a list of suppliers that have had a substantial number of claims denied on the basis of the application of section 1862(a)(1) or that have a pattern of overutilization resulting from the business practice of the supplier.

Response: We conducted an analysis of the improper payment rate for DMEPOS items listed on the CERT DME and/or DMEPOS Service Specific Report(s) as well as findings from 2007 or later GAO/OIG reports and found that the errors generally did not trend to

specific suppliers. We found that the root cause of the improper payments was lack of appropriate documentation and the issue was widespread. The list of DMEPOS items focuses our efforts on the root cause of improper payments—inadequate documentation. In addition, several suppliers have indicated they prefer some assurance of payment, which prior authorization affords. By focusing on items rather than aberrant suppliers, more suppliers will benefit from documentation education and some assurance of payment that prior authorization provides.

Comment: Some commenters stated that the proposed payment threshold was too low; other commenters stated that there should be a separate threshold for specific items on the proposed Master List. For example, several commenters suggested that the payment threshold should be 167 percent of the Medicare average purchase price for the proposed prosthetic codes on the proposed Master List. Other commenters expressed concerns regarding the threshold and competitive bidding, stating that some DMEPOS items in some competitive bidding areas and in 19 of the largest states for traditional Medicare are under this $100 rental-rate threshold. Commenters requested that CMS clarify which geographical areas and fee schedules were used to calculate the proposed threshold. Commenters were also concerned that the proposed threshold may cause suppliers to deny Medicare beneficiaries their DMEPOS supplies. Several commenters were concerned that CMS proposed no annual adjustment in payment threshold for inflation. Commenters also suggested that any changes to the threshold should be done through public notice and comment.

Response: We conducted a return on investment analysis and found that we realize savings when items with an average rental price of $100 monthly or an average payment price of $1,000 are subject to prior authorization. If we went to higher thresholds, we noted that many of the DMEPOS items known to have an associated high improper payment rate would not be included. If we went to lower thresholds, we did not realize the expected savings to support implementation of a prior authorization. For example, applying a payment threshold of several thousand dollars would not capture many of the DMEPOS items known to have associated high improper payments such as continuous positive airway pressure (CPAP). While pricing for Competitive Bidding areas may differ, we did not use particular geographical areas to determine the payment and rental threshold. Instead, we selected the payment threshold after evaluating the average payment and rental fees for all the states on the Medicare DMEPOS fee schedule.[8] We calculated the average payment and rental fees by averaging the sum of all the states' fees and then dividing the sum by the total number of states, including the District of Columbia, Puerto Rico, and the Virgin Islands.

We believed using the payment threshold as described would allow us to focus our limited resources on the more expensive DMEPOS items frequently subject to unnecessary utilization. However, we agree with the commenters who believed a fixed-payment threshold would not be appropriate in future years. While there were several price points suggested, we have decided that the best solution would be to keep the current payment threshold, but adjust it annually for inflation. The DMEPOS Fee Schedule is updated every year and announced in November with an effective date of January 1. In accordance with the statutory sections 1834(a)(14) and 1886(b)(3)(B)(xi)(II) of the Act, the DMEPOS fee schedule amounts are updated annually by the percentage increase in the consumer price index for all urban consumers (United States city average) or CPI–U for the 12-month period ending with June of the previous year, adjusted by the change in the economy-wide productivity equal to the 10-year moving average of changes in annual economy-wide private non-farm business multifactor productivity (MFP). For example, for CY 2015, the MFP adjustment is 0.6 percent and the CPI–U percentage increase is 2.1 percent. Thus, the 2.1 percentage increase in the CPI–U is reduced by the 0.6 percentage increase in the MFP resulting in a net increase of 1.5 percent for the update factor. For CY 2015, the update factor of 1.5 percent was applied to the applicable CY 2014 DMEPOS fee schedule amounts.

In response to public comment, we will make an annual inflation adjustment to the payment threshold. This adjustment will be the same percentage as the DMEPOS fee schedule annual adjustments. This adjustment will apply to the Master List maintenance process as well. Specifically, items already on the Master List with an average rental price that drops below $100 (adjusted for inflation) or average purchase price that drops below $1,000 (adjusted for inflation) will be removed from the list.

We disagree with the commenter that stated that the payment threshold may cause suppliers to deny Medicare beneficiaries their DMEPOS items. The payment threshold does not establish a new price for the DMEPOS; rather it establishes the criteria to initiate a prior authorization process. The PMD demonstration has shown that unnecessary utilization has decreased while beneficiaries have continued to receive a PMD when medically necessary.[9] However, we do believe that the proposed prior authorization timelines, 10 business days for an initial prior authorization decision to be returned to the requester, may create some access or barriers to care. To address this, we are not finalizing the proposed prior authorization timelines. This is discussed further in section II.E. of this final rule. Finally, while the payment threshold would adjust annually for inflation, a change to the threshold base would require new rulemaking.

Comment: Some commenters disagreed with the use of the OIG/GAO reports as Master List inclusion criteria. For example, several commenters stated that the OIG/GAO reports are arbitrary and were not open for public comment. Other commenters expressed concern with the age of the OIG/GAO reports used. Many commenters believed that the OIG data analysis misrepresented utilization and Medicare spending for certain items on the list especially lower-limb prostheses.

Some commenters disagreed with the use of the CERT 2011 report or later as Master List inclusion criteria stating that some items on the 2011 do not appear on later reports, indicating that policy or other factors have already reduced the improper payment rate for those items. Others believed that the sample size for the CERT reports is too small to conclude improper payment rates. Several commenters recommended that CMS consider using more recent CERT reports as well as internal data sources. Other commenters stated that CMS should look into the reasons for the high error rates for the proposed Master list items, such as, overly complex regulations, a need for targeted education to medical professionals and suppliers, and the misapplication of policies by CERT personnel.

[8] Medicare DMEPOS Fee Schedule. Accessed 10/13/15: *https://www.cms.gov/Medicare/Medicare-Fee-for-ServicePayment/DMEPOSFeeSched/DMEPOS-Fee-Schedule-Items/DME15-A.html?DLPage=1&DLEntries=10&DLSort=2&DLSortDir=descending.*

[9] *https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/Downloads/PMDDemoDecemberStatusupdate12302014.pdf.* Accessed 10/13/15.

Response: The mission of the OIG and GAO is to protect the integrity and improve the efficiency of HHS programs, including Medicare. We disagree with the commenter who stated that the OIG/GAO report topics selected were arbitrary. For example, the OIG publishes their work plan annually. Some of their reports are statutorily required, while others are based on known program vulnerabilities. Some other reports are based on congressional requests which are sometimes made public. Disagreements with the findings of their reports are outside the scope of this final rule. We proposed using reports dated from 2007 or later because GAO/OIG do not always repeat an analysis of specific items annually and it is necessary to look back a number of years to capture findings on a variety of DMEPOS items.

We disagree with the commenter that stated the CERT sample was too small. The CERT sample is stratified so that the sample and its findings are representative of the universe of Medicare FFS claims; we believe using stratification provides greater precision and that using these tools provides validity to the criteria. In addition to these criteria, we may choose to take current claims data into consideration when determining which Master List item(s) will be on the Required Prior Authorization List.

Items appearing on earlier CERT reports but not later ones will stay on the Master List for 10 years from their inclusion date. While some commenters believed an item no longer appearing in the CERT report should be dropped from the Master List, we believe the item should remain on the list to assure that the improved billing practice is sustained over time.

In response to the commenters who stated that we should look into the reasons for the high error rates for the proposed Master list items, such as: Having overly complex regulations; lacking targeted education to medical professionals and suppliers; and misapplying policies, we conduct analyses on the root causes for high improper payment rates, including CMS policies, and auditor application of the policies to their reviews. Medicare review contractors undergo frequent education and inter-rater reliability assessments to assure consistency in review approaches. Inter-rater reliability assessment is a performance measurement tool used to assess the level of consistency among medical review staff and adherence to organizational standards. It is used to promote quality and consistency in reviews. Where findings indicate that the problem may be overly complex CMS policies, we initiate policy revision. A recent example is the substantially increased improper payment rate for home health services published in the 2013 Annual CERT report. In response, we published a final rule in November 2014 that simplified the home health service face-to-face documentation requirements because most of the increased errors were related to the face-to-face documentation.

We believe using both the CERT report and the OIG/GAO reports allow us to create safeguards for a broader category of items.

Comment: Some commenters disagreed with a self-updating Master List. Several commenters suggested that the public should have input regarding the Master List updates. Commenters also suggested that the Master List be updated more frequently (that is, quarterly). Some recommended that the 10-year timeframe for removal of items from the Master List is too long and arbitrary.

Response: We respectfully disagree. We believe an annual update aligns best with the annual publication of the fee schedule. A more frequent update would be administratively burdensome to suppliers, providers, and CMS. We are finalizing the Master List maintenance procedure; all new items that meet the inclusion criteria will be added to the Master List on an annual basis.

We recognize commenters requested public input on Master List updates. However, we respectfully disagree. We believe by the nature of the criteria, the Master List is inherently self-updating. We note that there will be no discretion about which items are added or updated because it will be based on the inclusion criteria about which the public provided comment. However, inclusion on the Master List does not mean that the item will automatically be subject to prior authorization. (Only a subset of the Master List items will be selected and added to the ''Required Prior Authorization List.'' This is further discussed in section II.D. of this final rule.) We believe 10 years without a finding that the item has a potentially high rate of fraud, unnecessary utilization or aberrant or improper billing makes the original placement no longer current. We recognize some commenters believe 10 years is too long, but this timeframe will enable us to have a thorough and complete Master List. However, we may choose to take current claims data into consideration when determining which items will be on the Required Prior Authorization List.

We are finalizing the Master List inclusion criteria and Master List maintenance process as proposed in section 414.234(b). Section 1834(a)(15)(A) of the Act requires us to use ''prior payment history'' when identifying DMEPOS items frequently subject to unnecessary utilization. We believe using past and future GAO and OIG reports as well as CERT DME data is a way to meet this requirement.

We are finalizing the Master List inclusion criteria and Master List maintenance process as proposed in section 414.234(b). In addition, we are finalizing the proposed payment threshold, but are including an annual adjustment for inflation as stated in revised section 414.234(b)(1). The adjusted payment threshold will apply to the inclusion criteria as well as the Master List maintenance process. We are also finalizing our proposal to notify the public annually of any additions and deletions from the Master List by posting the notification in the **Federal Register** and on the CMS Prior Authorization Web site, as stated in section 414.234(f)(2).

C. Proposed List of DMEPOS Items Frequently Subject to Unnecessary Utilization (Master List)

In the May 28, 2014 proposed rule (79 FR 30516 through 30519), we proposed a Master List of Items Frequently Subject to Unnecessary Utilization. There have been several reports that were national in scope and published by the HHS OIG since 2007 identifying DMEPOS items that meet the payment threshold and are frequently subject to unnecessary utilization. They are as follows:

- An August 2011 OIG report titled ''Questionable Billing by Suppliers of Lower Limb Prostheses'' found that between 2005 and 2009, Medicare spending for lower limb prostheses increased 27 percent, from $517 million to $655 million.[10] During the same time period, the number of Medicare beneficiaries receiving lower limb prostheses decreased by 2.5 percent, from almost 76,000 to about 74,000. The report cited several examples of unnecessary utilization.

One finding, billing for prostheses when the beneficiary had no claims from the referring physician, raised questions about whether the physician ever evaluated the beneficiary and whether the billed devices were medically necessary. Another finding related to billing for a high percentage

[10] OIG, Questionable Billing By Suppliers Of Lower Limb Prostheses. OEI–02–10–00170, August 2011.

of beneficiaries with no history of an amputation or missing limb also raised questions about medical necessity. These findings based on prior payment history indicate that certain lower limb prostheses are frequently subject to questionable utilization.

• A July 2011 OIG report titled ''Most Power Wheelchairs in the Medicare Program Did Not Meet Medical Necessity Guidelines'' found that 61 percent of power wheelchairs provided in the first half of 2007 were medically unnecessary or lacked sufficient documentation to determine medical necessity.[11] This 61 percent accounted for $95 million of the $189 million allowed DMEPOS claims in that period of time.

There were two previous OIG reports based on the same sample of claims that found noncompliance problems with documentation requirements and coding requirements (''Medicare Power Wheelchair Claims Frequently Did Not Meet Documentation Requirements'' [12] and ''Miscoded Claims for Power Wheelchairs in the Medicare Program.'' [13]). Across both reports, it was found that 80 percent of claims did not meet Medicare requirements for the sample period of 2007.

• An August 2009 OIG report titled ''Inappropriate Medicare Payment for Pressure Reducing Support Surfaces,'' found that 86 percent of claims for group 2 pressure reducing support surfaces did not meet Medicare coverage criteria for the first half of 2007.[14] This amounted to an estimated $33 million in improper payments during that time.

• A June 2007 OIG report titled ''Medicare Payments for Negative Pressure Wound Therapy Pumps in 2004'' found that 24 percent of negative pressure wound therapy pumps did not meet Medicare coverage criteria in 2004.[15] This amounted to an estimated $21 million in improper payments. Furthermore, the report found that in 44 percent of the claims with medical records and supplier prepared statement, the information on the supplier prepared statement was not supported by the medical record.

In Tables 1 through 4, we provide the 2011 through 2014 Annual Medicare FFS Improper Payment Rate Report DME and/or DMEPOS Service Specific Reports. These tables illustrate the overpayment rates for specified DMEPOS items and the corresponding overpayment amounts. Items from these tables are included on the Master List if they meet the payment threshold. The listed DMEPOS items and the information in the ''projected dollars overpaid'' column were provided by the CERT program. CERT includes DMEPOS items on this list if the items have 30 or more claims sampled and are in the top 20 services by descending projected overpayment amount. Any services that have less than 30 claims are wrapped up into the ''Less than 30 Claims'' line. Numbers are projected to the universe (or population) using a weighting system that accounts for both the volume of a stratified service and expenditures. Each claim is individually weighted based upon the strata it was sampled in and the jurisdiction it was processed in. Dollar amounts are then multiplied by this weight value.

TABLE 1—2011 ANNUAL MEDICARE FFS IMPROPER PAYMENT RATE REPORT DME SERVICE SPECIFIC OVERPAYMENT RATE APPENDIX

Service billed to DME (HCPCS)	Number of claims in sample	Number of lines in sample	Dollars overpaid in sample	Total dollars paid in sample	Projected dollars overpaid	Overpayment rate (percent)
All Codes With Less Than 30 Claims ..	1,769	2,742	$300,255	$531,107	$2,212,120,825	57.8
Oxygen concentrator (E1390)	1,258	1,293	148,631	193,810	1,133,180,723	77.7
Blood glucose/reagent strips (A4253)	1,457	1,466	126,344	150,622	929,031,554	84.4
Hosp bed semi-electr w/Matt (E0260)	227	232	19,078	21,779	135,908,667	88.5
Budesonide non-comp unit (J7626)	72	74	13,555	24,420	106,061,471	57.9
Tacrolimus oral per 1 MG (J7507)	68	72	16,147	31,803	104,040,006	52.4
Lancets per box (A4259)	852	858	12,940	15,323	99,822,219	84.8
Cont airway pressure device (E0601)	303	318	12,665	21,987	98,014,011	60.1
Portable gaseous 02 (E0431)	634	658	12,774	16,517	97,194,278	77.4
Diab shoe for density insert (A5500) ...	125	136	11,949	15,420	88,965,667	78.2
Multi den insert direct form (A5512)	78	84	9,561	11,631	71,586,004	81.8
Enteral feed supp pump per d (B4035)	67	68	8,452	14,853	66,560,532	58.2
RAD w/o backup non-inv Intfc (E0470)	68	75	9,264	13,079	64,412,596	69.8
CPAP full face mask (A7030)	81	81	8,336	12,774	64,248,424	65.6
Nasal application device (A7034)	145	145	9,043	14,366	62,469,031	62.0
High strength ltwt whlchr (K0004)	84	88	7,870	8,315	61,980,799	94.9
Disp fee inhal drugs/30 days (Q0513)	386	389	7,590	12,210	57,749,018	62.0
Multi den insert custom mold (A5513)	45	52	7,333	9,366	54,355,934	80.5
Lightweight wheelchair (K0003)	114	115	6,995	7,503	52,201,255	92.6
Mycophenolate mofetil oral (J7517)	43	43	7,669	12,566	49,929,224	64.1
All Other Codes	3,482	4,795	125,245	194,402	943,311,918	65.9
Combined	8,110	13,784	881,693	1,333,852	6,553,144,155	67.4

[11] OIG, Most Power Wheelchairs In The Medicare Program Did Not Meet Medical Necessity Guidelines. OEI–04–09–00260, July 2011.

[12] OIG, Medicare Power Wheelchair Claims Frequently Did Not Meet Documentation Requirements. OEI–04–07–00401, December 2009.

[13] OIG, Miscoded Claims for Power Wheelchairs in the Medicare Program, OEI–04–07–00403, July 2009.

[14] OIG, Inappropriate Medicare Payments for Pressure Reducing support Surfaces. OEI–02–07–00420, August 2009.

[15] OIG, Medicare Payments for Negative Pressure Wound Therapy Pumps in 2004. OEI–02–05–00370, June 2007.

TABLE 2—2012 ANNUAL MEDICARE FFS IMPROPER PAYMENT RATE REPORT DME SERVICE SPECIFIC OVERPAYMENT RATE APPENDIX

Service billed to DME (HCPCS)	Number of claims in sample	Number of lines in sample	Dollars overpaid in sample	Total dollars paid in sample	Projected dollars overpaid	Overpayment rate (percent)
All Codes With Less Than 30 Claims ..	2,354	3,738	$1,256,083	$2,231,572	$1,536,420,429	51.9
Oxygen concentrator (E1390)	1,286	1,317	156,295	194,294	1,168,366,128	80.9
PWC gp 2 std cap chair (K0823)	999	1,002	513,426	553,349	201,693,896	97.3
Hosp bed semi-electr w/matt (E0260)	283	289	23,544	27,437	137,852,967	87.2
Lancets per box (A4259)	742	748	10,761	13,088	98,992,634	83.1
Tacrolimus oral per 1 MG (J7507)	58	63	12,118	23,120	97,807,986	54.3
Portable gaseous 02 (E0431)	590	608	12,296	15,203	96,375,515	80.9
Cont airway pressure device (E0601)	210	213	7,914	14,860	80,812,581	50.0
Budesonide non-comp unit (J7626)	100	105	13,453	24,905	78,369,581	54.1
Neg press wound therapy pump (E2402)	39	39	17,464	47,731	72,189,807	51.0
Enteral feed supp pump per d (B4035)	91	92	10,283	19,145	70,291,185	54.8
Nasal application device (A7034)	121	122	8,030	12,254	70,244,578	65.3
Diab shoe for density insert (A5500) ...	97	102	8,271	11,594	68,920,996	73.2
RAD w/o backup non-inv intfc (E0470)	68	75	9,166	13,213	63,658,439	69.6
Disp fee inhal drugs/30 days (Q0513)	413	413	7,392	13,068	58,594,189	57.0
CPAP full face mask (A7030)	75	75	7,308	11,524	57,481,278	59.3
High strength ltwt whlchr (K0004)	80	83	7,826	8,016	56,257,539	97.7
Lightweight wheelchair (K0003)	99	110	6,250	6,821	55,809,106	94.2
Multi den insert direct form (A5512)	61	63	6,805	8,548	55,671,152	79.4
All Other Codes	5,311	9,107	1,735,735	2,669,607	1,380,908,350	64.4
Combined	10,117	19,627	3,933,943	6,048,632	6,412,968,806	66.0

TABLE 3—2013 ANNUAL MEDICARE FFS IMPROPER PAYMENT RATE REPORT DME SERVICE SPECIFIC OVERPAYMENT RATE APPENDIX

Service billed to DME (HCPCS)	Number of claims in sample	Number of lines in sample	Dollars overpaid in sample	Total dollars paid in sample	Projected dollars overpaid	Overpayment rate (percent)
Oxygen concentrator (E1390)	1,212	1,262	$136,312	$181,075	$983,768,125	75.6
All Codes With Less Than 30 Claims ..	2,147	3,235	545,968	1,053,401	867,058,104	37.4
Blood glucose/reagent strips (A4253)	1,131	1,148	85,298	114,282	791,786,761	75.1
PWC gp 2 std cap chair (K0823)	734	747	181,940	212,803	201,643,982	85.4
Hosp bed semi-electr w/matt (E0260)	364	386	28,235	34,055	137,106,877	84.1
Tacrolimus oral per 1MG (J7507)	70	71	11,920	26,692	88,099,443	43.4
Cont airway pressure devce (E0601) ..	118	126	4,255	8,732	84,740,816	48.8
Lancets per box (A4259)	607	615	8,409	11,030	82,958,405	76.3
Portable gaseous 02 (E0431)	525	567	9,876	13,516	78,011,911	73.2
Enteral feed supp pump per d (B4035)	90	90	11,685	18,809	69,222,164	61.7
Diab shoe for density Insert (A5500) ...	82	90	7,384	9,580	65,194,062	78.3
Nasal application device (A7034)	78	79	4,808	8,022	59,780,922	56.8
Budesonide non-compUnit (J7626)	136	141	13,136	33,672	59,537,844	39.0
CPAP full face mask (A7030)	62	62	5,982	9,206	53,974,803	66.0
Lightweight wheelchair (K0003)	67	69	4,291	4,606	53,344,568	95.5
Standard wheelchair (K0001)	74	79	2,736	3,016	52,628,676	92.5
High strength ltwt whlchr (K0004)	80	91	7,419	9,046	51,690,372	90.9
LSO sag-coro rigid frame pre (L0631)	62	62	28,990	48,450	51,310,493	60.4
Multi den insert direct form (A5512)	45	48	5,649	6,623	49,722,593	86.0
Disp fee inhal drugs/30 Days (Q0513)	424	426	7,062	13,398	47,738,353	53.1
All Other Codes	7,274	13,747	3,982,290	7,804,614	1,736,897,848	55.4
Combined	11,204	23,141	5,093,646	9,624,629	5,666,217,120	58.2

TABLE 4—2014 ANNUAL MEDICARE FFS IMPROPER PAYMENT RATE REPORT DMEPOS SERVICE SPECIFIC OVERPAYMENT RATE APPENDIX

Service billed to DME (HCPCS)	Number of claims in sample	Number of lines in sample	Dollars overpaid in sample	Total dollars paid in sample	Projected dollars overpaid	Overpayment rate (percent)
All Codes W Less Than 30 Claims	2,451	3,594	$669,407	$1,753,102	$933,768,888	51.9
Oxygen concentrator (E1390)	1,044	1,081	93,657	152,154	783,718,989	61.2
Blood glucose/reagent strips	962	979	52,086	91,761	569,440,653	57.1
PWC gp 2 std cap chair (K0823)	581	587	124,754	155,463	154,185,886	80.6
Hosp bed semi-electr w/matt (E0260)	228	232	16,834	19,626	117,275,279	83.4
Cont airway pressure device (E0601)	104	111	2,875	8,197	75,196,567	34.3
Enteral feed supp pump per d (B4035)	79	82	11,389	17,282	69,895,164	64.3

TABLE 4—2014 ANNUAL MEDICARE FFS IMPROPER PAYMENT RATE REPORT DMEPOS SERVICE SPECIFIC OVERPAYMENT RATE APPENDIX—Continued

Service billed to DME (HCPCS)	Number of claims in sample	Number of lines in sample	Dollars overpaid in sample	Total dollars paid in sample	Projected dollars overpaid	Overpayment rate (percent)
CPAP full face mask (A7030)	66	66	6,083	10,595	63,826,897	51.8
Portable gaseous 02 (E0431)	446	463	6,527	10,981	59,862,194	59.3
Lancets per box (A4259)	518	523	4,937	8,633	59,652,076	57.8
Nasal application device (A7034)	73	73	3,971	6,814	58,848,469	57.1
NDC 00004–1101–51 Capecitabi (WW093)	38	38	19,149	86,881	56,535,421	22.8
Arformoterol non-compunit (J7605)	71	72	8,132	21,217	53,572,352	48.8
Diab shoe for density insert (A5500)	77	85	6,203	8,790	52,941,678	68.0
EF spec metabolic noninherit (B4154)	53	56	13,512	18,333	52,564,481	78.2
RAD w/o backup non-inv intfc (E0470)	54	56	5,612	9,227	51,504,678	58.9
Lightweight wheelchair (K0003)	61	61	3,704	3,852	50,812,414	97.3
Budesonide non-comp unit (J7626)	101	103	7,748	27,022	50,266,076	27.8
High strength ltwt whlchr (K0004)	60	60	5,400	5,543	46,672,538	96.5
Standard wheelchair (K0001)	70	72	2,228	2,497	46,021,996	87.1
All Other Codes	7,286	19,766	5,123,515	14,266,388	1,686,721,479	48.1
Combined	10,979	28,170	6,187,724	16,684,357	5,093,284,175	53.1

We received the following comments with regard to items that were included on the proposed Master List and our responses follow.

Comment: Several commenters recommended that any DMEPOS items needed for chronic/lifelong conditions should not require prior authorization (for example, missing a limb). Many commenters stated lower-limb prosthetic(s) (LLP) or items used in the prosthesis process (that is, gel liners) should be exempt from the Master List due to concerns regarding complex functional criteria documentation requirements and because of possible numerous changes in the beneficiary's functional capabilities throughout their lifetime.

Some commenters noted that certain contractor local coverage determinations are based, in part, on the pricing, data analysis, and coding (PDAC) contractor assignment of functional levels for specific prosthetics and their components. Commenters went on to state that there are no studies showing that specific prosthetic components are inappropriate for any functional level. With this, some commenters expressed concern that even if the beneficiary had the appropriate functional level, he or she may still be denied prior authorization thus, they state, LLPs should not be included on the Master List.

Several commenters were concerned because prostheses can change frequently when the beneficiary changes (for example, weight changes) and many prostheses are customized. Commenters were concerned that with the advent of the prior authorization program, subsequent limbs would not receive a provisional affirmative decision.

Many commenters expressed concerns that including LLPs on the proposed Master List would cause a delay in care, increased complications, comorbidities, higher out-of-pocket costs, and poor clinical outcomes. Some commenters recommended a private insurance company handle the prior authorization of all LLPs on the proposed Master List.

Some commenters noted that success of the prior authorization of PMD demonstration should not be applied to the prior authorization developed by this final rule since PMDs are ''commodities'' while many other DMEPOS items (such as LLPs) are not.

Response: Timely beneficiary access to care is of utmost concern to us. Regarding the comment that prior authorization of the PMD demonstration should not influence how or why we apply prior authorization to other DMEPOS items, we want to assure the public that we understand that clinical considerations differ with each DMEPOS item. For example, we realize some LLPs are required soon after surgery and we do not want to delay care or rehabilitation. Prior authorization is not meant to be a barrier to care; it is a process to make sure products and services provided meet applicable Medicare coverage, coding, and payment rules prior to the service being furnished.

We disagree with the suggestion that any item needed for chronic or life-long conditions be exempt from the Master List. Most of the Master List items are used for chronic or life-long medical conditions and documentation requirements for these items remains unchanged. We believe we can address access issues by designing a prior authorization process that is nimble and efficient when an item is needed quickly. In section II.E. of this final rule, we discuss in more detail the proposed timelines for the prior authorization process and our final decision regarding timelines.

Regarding some commenters' concern that a beneficiary may not receive the appropriate LLP because of functional requirements criteria or because the beneficiary's functional capabilities have changed, we again reassure commenters that we support a beneficiary's access to the appropriate prosthetic. The submitted medical documentation must support the request for payment of the subject LLP. As noted previously, we will issue specific guidance regarding the prior authorization timelines in subregulatory guidance. One reason for this is to create timelines/processes that are logical for each DMEPOS item selected for prior authorization. For example, timelines and contractor processes for prior authorization of LLPs may be uniquely different than for other DMEPOS items. We disagree with the commenter who suggested that we use a private insurance company to process prior authorizations for LLPs. Any entity doing work on behalf of the government is an agent of the government and must abide by all applicable Medicare coverage, coding, and payment rules when making payment determinations. We recognize that the Pricing, Data Analysis, and Coding (PDAC) contractor developed the functional levels of LLPs. However, longstanding documentation requirements based on PDAC assignment have not changed and will also apply to documentation

requirements for the prior authorization process.

Finally, we do not understand how a prior authorization program could increase beneficiary out-of-pocket expenses for LLPs. The same coverage, coding, and payment rules apply. A beneficiary will still have access to medically necessary LLPs and his or her costs should not change due to prior authorization processes.

Comment: Several commenters recommended using a clinical threshold to identify when an expedited review request is justified for respiratory and oxygen items on the Master List. Suggested examples included when a patient's respiratory disturbance index is greater than 20, the oxygen saturation falls below 80 percent or complex cardiac arrhythmias accompany obstructive episodes. If clinical laboratories and studies show less severe obstructive sleep apnea, the recommendation was that the standard prior authorization process, not the expedited process, should be used.

Some commenters requested that we include all oxygen and respiratory devices, while many commenters requested that we exclude all of them. Commenters recommended that CMS exclude respiratory assistive devices from the prior authorization requirement because of the administrative burden to furnish medical documentation before the device is given to the beneficiary. Specifically, a commenter expressed concern regarding the impact of a prior authorization process on the commercial driver community. Commenters noted that those commercial drivers who have a diagnosis of obstructive sleep apnea must undergo a clearance process that requires the beneficiary to utilize a respiratory assistive device prior to obtaining commercial driver clearance. Commenters were concerned that the proposed prior authorization process would prolong the process of obtaining the clearance necessary to perform their job duties. Other commenters believe that the proposed prior authorization timeline would give beneficiaries the impression that respiratory therapy is not mandatory; which would then lead to more costly treatment(s) of obstructive sleep apnea.

Response: We disagree with the suggestion to exclude all oxygen and respiratory devices, and we have included respiratory devices that meet the inclusion criteria on the finalized Master List. Again, not all items on the Master List will require prior authorization. We recognize that the original proposed prior authorization process timeframes may have caused some commenters to suggest excluding all oxygen and respiratory devices. The original proposed prior authorization process timeframes, as discussed in section II.E. of this final rule, may have presented a barrier to timely care in certain circumstances. We will take these comments into consideration when developing the prior authorization timeframes. We will issue the timeframes in subregulatory guidance. We believe that by doing so, we create flexibility to quickly modify the timeframes if issues are identified. For more information on the prior authorization processes, including timeframes, see section II.E. of this final rule.

Comment: Several commenters were concerned that for some Master List items, the proposed prior authorization program would discourage suppliers from working with Medicare beneficiaries. These commenters believed that this would leave beneficiaries unable to find suppliers, resulting in a potential for increased beneficiary liability and out-of-pocket expenses.

Some commenters recommended that the beneficiary should be liable if a supplier did not obtain a prior authorization. Other commenters recommended that CMS use its authority to suspend or cease any prior authorization program if patient access is jeopardized. In addition, commenters requested that CMS clarify the Advance Beneficiary Notice of Non-Coverage (ABN) process and the proposed prior authorization process.

Response: We appreciate the concerns about access but disagree that the Master List creates access issues or barriers to care. Since we are not finalizing the proposed prior authorization process timeframes as discussed in section II.E. of this final rule, we believe we can address beneficiary access and care delivery issues by creating a prior authorization process that safeguards beneficiary access to care and avoids creating any barriers for beneficiaries and suppliers. We will issue the timeframes in subregulatory guidance, as discussed in section II.E. of this final rule. Additionally, we are finalizing our authority to suspend or cease prior authorization for the entire list or individual items at any time, as discussed at the end of this section.

In the May 28, 2014 proposed rule, we included a discussion of Medicare's ABN and liability policies. This discussion can be found under section II.F. of this final rule. However, interested persons can find more information regarding Medicare's ABN process at this site: *http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/abn_booklet_icn006266.pdf.*

Comment: Some commenters recommended adding more items to the proposed Master List, including, but not limited to, oxygen and all oxygen equipment, enteral and parenteral nutrients and supplies, all manual wheelchairs, all hospital beds, all bi-level respiratory devices and ventilators, and knee and back braces. Some commenters recommended including items on the proposed Master List regardless of the payment threshold for which there is proven disregard for medical necessity requirements or do not have associated LCDs or NCDs. Other commenters suggested narrowing the criteria for the proposed Master List.

Response: We are finalizing the items on the Master List as proposed with two modifications, discussed at the end of this section. The statutory basis and definition of DMEPOS items for this final rule, combined with our analysis, require us to include only those items that, based on prior payment experience, are subject to frequent overutilization. We believe this will allow us to focus finite resources on the higher cost items more frequently subject to over utilization.

Comment: Some commenters believe that all items on the Master List will be subject to the prior authorization requirements. A commenter stated that the HCPCS codes on the proposed Master List had errors, but did not list which HCPCS code(s) were in error.

Response: The criteria discussed previously determine inclusion on the Master List. As such, we have updated the Master List from what was published in the May 28, 2014 proposed rule to reflect the most current application of these criteria. As discussed earlier, updating the Master List for this final rule required us to review the 2015 DMEPOS fee schedule as well as OIG/GAO/CERT reports published after the proposed rule was published. Consequently, we added one item to the Master List: E1390: Oxygen concentrator (mistakenly left off the proposed Master List). Aside from the omission of HCPCS code E1390, we did not find additional errors in the listed HCPCS codes in the proposed Master List.

Regarding the commenters who believe that all items on the Master List will be subject to the prior authorization requirements, we would like to clarify that only a subset of the Master List items will be selected and added to the ''Required Prior Authorization List.''

This is further discussed in section II.D. of this final rule.

We are finalizing the Master List as proposed with two modifications. First, we are adding oxygen concentrator (E1390) since it meets the criteria and should have been added to the proposed Master List. The addition is bolded and italicized for easy reference on the Master List (Table 5). Second, we are removing five proposed items from the list that did not meet the 2015 DMEPOS Fee Schedule list criteria of $1,000 or greater average purchase fee schedule or an average rental fee schedule of $100 or greater. These items include the following:

- Custom shaped protective cover, above knee (L5705).
- Custom shaped protective cover, knee disarticulation (L5706).
- Addition, exoskeletal knee-shin system, polycentric, friction swing and stance phase control (L5718).
- Addition, exoskeletal knee-shin system, single axis, pneumatic swing, friction stance phase control (L5722).
- Addition, endoskeletal knee-shin system, polycentric, mechanical stance phase lock (L5816).

DMEPOS items meeting the proposed criteria are listed in the Final Master List, which is found in Table 5.

TABLE 5—FINAL MASTER LIST OF DMEPOS ITEMS SUBJECT TO FREQUENT UNNECESSARY UTILIZATION FOR PRIOR AUTHORIZATION

[Items added to the proposed Master List are bolded and italicized]

HCPCS	Description
E0193	Powered air flotation bed (low air loss therapy).
E0260	Hosp bed semi-electr w/matt.
E0277	Powered pres-redu air mattrs.
E0371	Nonpowered advanced pressure reducing overlay for mattress, standard mattress length and width.
E0372	Powered air overlay for mattress, standard mattress length and width.
E0373	Nonpowered advanced pressure reducing mattress.
E0470	Respiratory assist device, bi-level pressure capability, without backup rate feature, used with noninvasive interface, e. g. , nasal or facial mask (intermittent assist device with continuous positive airway pressure device).
E0601	Continuous Airway Pressure (CPAP) Device.
E1390	***Oxygen Concentrator***.
E2402	Negative pressure wound therapy electrical pump, stationary or portable.
K0004	High strength, lightweight wheelchair.
K0813	Power wheelchair, group 1 standard, portable, sling/solid seat and back, patient weight capacity up to and including 300 pounds.
K0814	Power wheelchair, group 1 standard, portable, captains chair, patient weight capacity up to and including 300 pounds.
K0815	Power wheelchair, group 1 standard, sling/solid seat and back, patient weight capacity up to and including 300 pounds.
K0816	Power wheelchair, group 1 standard, captains chair, patient weight capacity up to and including 300 pounds.
K0820	Power wheelchair, group 2 standard, portable, sling/solid seat/back, patient weight capacity up to and including 300 pounds.
K0821	Power wheelchair, group 2 standard, portable, captains chair, patient weight capacity up to and including 300 pounds.
K0822	Power wheelchair, group 2 standard, sling/solid seat/back, patient weight capacity up to and including 300 pounds.
K0823	Power wheelchair, group 2 standard, captains chair, patient weight capacity up to and including 300 pounds.
K0824	Power wheelchair, group 2 heavy duty, sling/solid seat/back, patient weight capacity 301 to 450 pounds.
K0825	Power wheelchair, group 2 heavy duty, captains chair, patient weight capacity 301 to 450 pounds.
K0826	Power wheelchair, group 2 very heavy duty, sling/solid seat/back, patient weight capacity 451 to 600 pounds.
K0827	Power wheelchair, group 2 very heavy duty, captains chair, patient weight capacity 451 to 600 pounds.
K0828	Power wheelchair, group 2 extra heavy duty, sling/solid seat/back, patient weight capacity 601 pounds or more.
K0829	Power wheelchair, group 2 extra heavy duty, captains chair, patient weight 601 pounds or more.
K0835	Power wheelchair, group 2 standard, single power option, sling/solid seat/back, patient weight capacity up to and including 300 pounds.
K0836	Power wheelchair, group 2 standard, single power option, captains chair, patient weight capacity up to and including 300 pounds.
K0837	Power wheelchair, group 2 heavy duty, single power option, sling/solid seat/back, patient weight capacity 301 to 450 pounds.
K0838	Power wheelchair, group 2 heavy duty, single power option, captains chair, patient weight capacity 301 to 450 pounds.
K0839	Power wheelchair, group 2 very heavy duty, single power option sling/solid seat/back, patient weight capacity 451 to 600 pounds.
K0840	Power wheelchair, group 2 extra heavy duty, single power option, sling/solid seat/back, patient weight capacity 601 pounds or more.
K0841	Power wheelchair, group 2 standard, multiple power option, sling/solid seat/back, patient weight capacity up to and including 300 pounds.
K0842	Power wheelchair, group 2 standard, multiple power option, captains chair, patient weight capacity up to and including 300 pounds.
K0843	Power wheelchair, group 2 heavy duty, multiple power option, sling/solid seat/back, patient weight capacity 301 to 450 pounds.
K0848	Power wheelchair, group 3 standard, sling/solid seat/back, patient weight capacity up to and including 300 pounds.
K0849	Power wheelchair, group 3 standard, captains chair, patient weight capacity up to and including 300 pounds.
K0850	Power wheelchair, group 3 heavy duty, sling/solid seat/back, patient weight capacity 301 to 450 pounds.
K0851	Power wheelchair, group 3 heavy duty, captains chair, patient weight capacity 301 to 450 pounds.
K0852	Power wheelchair, group 3 very heavy duty, sling/solid seat/back, patient weight capacity 451 to 600 pounds.
K0853	Power wheelchair, group 3 very heavy duty, captains chair, patient weight capacity 451 to 600 pounds.
K0854	Power wheelchair, group 3 extra heavy duty, sling/solid seat/back, patient weight capacity 601 pounds or more.
K0855	Power wheelchair, group 3 extra heavy duty, captains chair, patient weight capacity 601 pounds or more.
K0856	Power wheelchair, group 3 standard, single power option, sling/solid seat/back, patient weight capacity up to and including 300 pounds.
K0857	Power wheelchair, group 3 standard, single power option, captains chair, patient weight capacity up to and including 300 pounds.
K0858	Power wheelchair, group 3 heavy duty, single power option, sling/solid seat/back, patient weight 301 to 450 pounds.
K0859	Power wheelchair, group 3 heavy duty, single power option, captains chair, patient weight capacity 301 to 450 pounds.

TABLE 5—FINAL MASTER LIST OF DMEPOS ITEMS SUBJECT TO FREQUENT UNNECESSARY UTILIZATION FOR PRIOR AUTHORIZATION—Continued

[Items added to the proposed Master List are bolded and italicized]

HCPCS	Description
K0860	Power wheelchair, group 3 very heavy duty, single power option, sling/solid seat/back, patient weight capacity 451 to 600 pounds.
K0861	Power wheelchair, group 3 standard, multiple power option, sling/solid seat/back, patient weight capacity up to and including 300 pounds.
K0862	Power wheelchair, group 3 heavy duty, multiple power option, sling/solid seat/back, patient weight capacity 301 to 450 pounds.
K0863	Power wheelchair, group 3 very heavy duty, multiple power option, sling/solid seat/back, patient weight capacity 451 to 600 pounds.
K0864	Power wheelchair, group 3 extra heavy duty, multiple power option, sling/solid seat/back, patient weight capacity 601 pounds or more.
L5010	Partial foot, molded socket, ankle height, with toe filler.
L5020	Partial foot, molded socket, tibial tubercle height, with toe filler.
L5050	Ankle, symes, molded socket, sach foot.
L5060	Ankle, symes, metal frame, molded leather socket, articulated ankle/foot.
L5100	Below knee, molded socket, shin, sach foot.
L5105	Below knee, plastic socket, joints and thigh lacer, sach foot.
L5150	Knee disarticulation (or through knee), molded socket, external knee joints, shin, sach foot.
L5160	Knee disarticulation (or through knee), molded socket, bent knee configuration, external knee joints, shin, sach foot.
L5200	Above knee, molded socket, single axis constant friction knee, shin, sach foot.
L5210	Above knee, short prosthesis, no knee joint ('stubbies'), with foot blocks, no ankle joints, each.
L5220	Above knee, short prosthesis, no knee joint ('stubbies'), with articulated ankle/foot, dynamically aligned, each.
L5230	Above knee, for proximal femoral focal deficiency, constant friction knee, shin, sach foot.
L5250	Hip disarticulation, canadian type; molded socket, hip joint, single axis constant friction knee, shin, sach foot.
L5270	Hip disarticulation, tilt table type; molded socket, locking hip joint, single axis constant friction knee, shin, sach foot.
L5280	Hemipelvectomy, canadian type; molded socket, hip joint, single axis constant friction knee, shin, sach foot.
L5301	Below knee, molded socket, shin, sach foot, endoskeletal system.
L5312	Knee disarticulation (or through knee), molded socket, single axis knee, pylon, sach foot, endoskeletal system.
L5321	Above knee, molded socket, open end, sach foot, endoskeletal system, single axis knee.
L5331	Hip disarticulation, canadian type, molded socket, endoskeletal system, hip joint, single axis knee, sach foot.
L5341	Hemipelvectomy, canadian type, molded socket, endoskeletal system, hip joint, single axis knee, sach foot.
L5400	Immediate post surgical or early fitting, application of initial rigid dressing, including fitting, alignment, suspension, and one cast change, below knee.
L5420	Immediate post surgical or early fitting, application of initial rigid dressing, including fitting, alignment and suspension and one cast change 'ak' or knee disarticulation.
L5500	Initial, below knee 'ptb' type socket, non-alignable system, pylon, no cover, sach foot, plaster socket, direct formed.
L5505	Initial, above knee—knee disarticulation, ischial level socket, non-alignable system, pylon, no cover, sach foot, plaster socket, direct formed.
L5510	Preparatory, below knee 'ptb' type socket, non-alignable system, pylon, no cover, sach foot, plaster socket, molded to model.
L5520	Preparatory, below knee 'ptb' type socket, non-alignable system, pylon, no cover, sach foot, thermoplastic or equal, direct formed.
L5530	Preparatory, below knee 'ptb' type socket, non-alignable system, pylon, no cover, sach foot, thermoplastic or equal, molded to model.
L5535	Preparatory, below knee 'ptb' type socket, non-alignable system, no cover, sach foot, prefabricated, adjustable open end socket.
L5540	Preparatory, below knee 'ptb' type socket, non-alignable system, pylon, no cover, sach foot, laminated socket, molded to model.
L5560	Preparatory, above knee—knee disarticulation, ischial level socket, non-alignable system, pylon, no cover, sach foot, plaster socket, molded to model.
L5570	Preparatory, above knee—knee disarticulation, ischial level socket, non-alignable system, pylon, no cover, sach foot, thermoplastic or equal, direct formed.
L5580	Preparatory, above knee—knee disarticulation ischial level socket, non-alignable system, pylon, no cover, sach foot, thermoplastic or equal, molded to model.
L5585	Preparatory, above knee—knee disarticulation, ischial level socket, non-alignable system, pylon, no cover, sach foot, prefabricated adjustable open end socket.
L5590	Preparatory, above knee—knee disarticulation ischial level socket, non-alignable system, pylon no cover, sach foot, laminated socket, molded to model.
L5595	Preparatory, hip disarticulation-hemipelvectomy, pylon, no cover, sach foot, thermoplastic or equal, molded to patient model.
L5600	Preparatory, hip disarticulation-hemipelvectomy, pylon, no cover, sach foot, laminated socket, molded to patient model.
L5610	Addition to lower extremity, endoskeletal system, above knee, hydracadence system.
L5611	Addition to lower extremity, endoskeletal system, above knee—knee disarticulation, 4 bar linkage, with friction swing phase control.
L5613	Addition to lower extremity, endoskeletal system, above knee—knee disarticulation, 4 bar linkage, with hydraulic swing phase control.
L5614	Addition to lower extremity, exoskeletal system, above knee—knee disarticulation, 4 bar linkage, with pneumatic swing phase control.
L5616	Addition to lower extremity, endoskeletal system, above knee, universal multiplex system, friction swing phase control.
L5639	Addition to lower extremity, below knee, wood socket.
L5643	Addition to lower extremity, hip disarticulation, flexible inner socket, external frame.
L5649	Addition to lower extremity, ischial containment/narrow m-l socket.
L5651	Addition to lower extremity, above knee, flexible inner socket, external frame.
L5681	Addition to lower extremity, below knee/above knee, custom fabricated socket insert for congenital or atypical traumatic amputee, silicone gel, elastomeric or equal, for use with or without locking mechanism, initial only (for other than initial, use code l5673 or l5679).

TABLE 5—FINAL MASTER LIST OF DMEPOS ITEMS SUBJECT TO FREQUENT UNNECESSARY UTILIZATION FOR PRIOR AUTHORIZATION—Continued

[Items added to the proposed Master List are bolded and italicized]

HCPCS	Description
L5683	Addition to lower extremity, below knee/above knee, custom fabricated socket insert for other than congenital or atypical traumatic amputee, silicone gel, elastomeric or equal, for use with or without locking mechanism, initial only (for other than initial, use code l5673 or l5679).
L5700	Replacement, socket, below knee, molded to patient model.
L5701	Replacement, socket, above knee/knee disarticulation, including attachment plate, molded to patient model.
L5702	Replacement, socket, hip disarticulation, including hip joint, molded to patient model.
L5703	Ankle, symes, molded to patient model, socket without solid ankle cushion heel (sach) foot, replacement only.
L5707	Custom shaped protective cover, hip disarticulation.
L5724	Addition, exoskeletal knee-shin system, single axis, fluid swing phase control.
L5726	Addition, exoskeletal knee-shin system, single axis, external joints fluid swing phase control.
L5728	Addition, exoskeletal knee-shin system, single axis, fluid swing and stance phase control.
L5780	Addition, exoskeletal knee-shin system, single axis, pneumatic/hydra pneumatic swing phase control.
L5781	Addition to lower limb prosthesis, vacuum pump, residual limb volume management and moisture evacuation system.
L5782	Addition to lower limb prosthesis, vacuum pump, residual limb volume management and moisture evacuation system, heavy duty.
L5795	Addition, exoskeletal system, hip disarticulation, ultra-light material (titanium, carbon fiber or equal).
L5814	Addition, endoskeletal knee-shin system, polycentric, hydraulic swing phase control, mechanical stance phase lock.
L5818	Addition, endoskeletal knee-shin system, polycentric, friction swing, and stance phase control.
L5822	Addition, endoskeletal knee-shin system, single axis, pneumatic swing, friction stance phase control.
L5824	Addition, endoskeletal knee-shin system, single axis, fluid swing phase control.
L5826	Addition, endoskeletal knee-shin system, single axis, hydraulic swing phase control, with miniature high activity frame.
L5828	Addition, endoskeletal knee-shin system, single axis, fluid swing and stance phase control.
L5830	Addition, endoskeletal knee-shin system, single axis, pneumatic/swing phase control.
L5840	Addition, endoskeletal knee/shin system, 4-bar linkage or multiaxial, pneumatic swing phase control.
L5845	Addition, endoskeletal, knee-shin system, stance flexion feature, adjustable.
L5848	Addition to endoskeletal knee-shin system, fluid stance extension, dampening feature, with or without adjustability.
L5856	Addition to lower extremity prosthesis, endoskeletal knee-shin system, microprocessor control feature, swing and stance phase, includes electronic sensor(s), any type.
L5857	Addition to lower extremity prosthesis, endoskeletal knee-shin system, microprocessor control feature, swing phase only, includes electronic sensor(s), any type.
L5858	Addition to lower extremity prosthesis, endoskeletal knee shin system, microprocessor control feature, stance phase only, includes electronic sensor(s), any type.
L5930	Addition, endoskeletal system, high activity knee control frame.
L5960	Addition, endoskeletal system, hip disarticulation, ultra-light material (titanium, carbon fiber or equal).
L5964	Addition, endoskeletal system, above knee, flexible protective outer surface covering system.
L5966	Addition, endoskeletal system, hip disarticulation, flexible protective outer surface covering system.
L5968	Addition to lower limb prosthesis, multiaxial ankle with swing phase active dorsiflexion feature.
L5973	Endoskeletal ankle foot system, microprocessor controlled feature, dorsiflexion and/or plantar flexion control, includes power source.
L5979	All lower extremity prosthesis, multi-axial ankle, dynamic response foot, one piece system.
L5980	All lower extremity prostheses, flex foot system.
L5981	All lower extremity prostheses, flex-walk system or equal.
L5987	All lower extremity prosthesis, shank foot system with vertical loading pylon.
L5988	Addition to lower limb prosthesis, vertical shock reducing pylon feature.
L5990	Addition to lower extremity prosthesis, user adjustable heel height.

In addition, we are finalizing our proposal to notify the public annually of any additions and deletions from the Master List by posting the notification in the **Federal Register** and on the CMS Prior Authorization Web site as described in § 414.234(b)(2). We are also finalizing our proposal to suspend or cease prior authorization for the entire list or individual items at any time as described in § 414.234(f)(1).

D. Process for Selecting Items From the Master List To Be Subject to the Prior Authorization Program

In the May 28, 2014 proposed rule (79 FR 30519), we stated that an item's presence on the Master List would not automatically require prior authorization. We proposed implementing the prior authorization program by limiting the number of items from the Master List that would be subject to prior authorization. We stated that by implementing prior authorization for a subset of Master List items, we would minimize provider and supplier burden while safeguarding the Medicare program. This subset of Master List items is hereafter referred to as the ''Required Prior Authorization List'' as described in § 414.234 (c). We proposed that we would inform the public of the Required Prior Authorization List in the **Federal Register** with 60-day notice before implementation.

Additionally, we proposed a prior authorization program for eligible items that may be implemented nationally or locally. For example, we noted that OIG and GAO reports and the CERT DME and/or DMEPOS Service Specific Report(s) often include regional data, and we proposed that we could elect to limit the prior authorization requirement to a particular region of the country if claims data show that unnecessary utilization of the selected item(s) is concentrated in a particular region. Alternately, we proposed that we may elect to implement prior authorization nationally if claims data show that unnecessary utilization of the selected item(s) is widespread and

occurring across multiple geographic areas.

We also proposed to have the authority to suspend or cease the prior authorization program generally, or for a particular item or items at any time, without undertaking a separate rulemaking. An example of when we may elect to exercise this authority, described in the proposed rule, is suspending or ceasing the prior authorization program due to new payment policies, which may render the prior authorization requirement obsolete or remove the item from Medicare coverage. If we suspend or cease the prior authorization requirement, we proposed we would post notification of the suspension on the CMS Prior Authorization Web site, contractor Web sites, publications, and bulletins and include the date of suspension.

The proposed rule did not announce the first items on the Required Prior Authorization List. In the proposed rule, we requested public comment on the: (1) Number of items selected for initial implementation; (2) number of future items selected for implementation; and (3) frequency in which we would select the items.

We noted in the May 28, 2014 proposed rule (79 FR 30520) that the proposed Master List contains DMEPOS items currently included in the CMS Prior Authorization of PMD Demonstration, and that we would not require prior authorization for PMDs under this rule, at least until the demonstration was complete. We proposed that the finalized rule would not affect the current Prior Authorization of PMD Demonstration.

In the following discussion, we summarize the comments and our responses for section II.D. of this final rule along with our final decision applicable to this section.

Comment: Commenters requested clarification regarding the definition of implementing a prior authorization program locally and nationally.

Response: Locally is a geographical area such as a state or jurisdiction; nationally is nationwide, as in all states/jurisdictions. As such, we may elect to establish a prior authorization program for a certain Master List item for a particular state, or a particular MAC jurisdiction, or nationally, as authorized by section 1834(a)(15) of the Social Security Act and as stated in new § 414.234(c)(1)(ii) of our regulations.

Comment: A commenter recommended that CMS implement prior authorization for all items on the proposed Master List at the same time with a nationwide rollout. Others suggested that CMS implement a pilot for select items locally, in a small region. Some commenters expressed their objection to CMS's decision to not identify in the proposed rule which Master List item(s) would initially be subject to prior authorization. Another commenter believed the Required Prior Authorization List process should include a notice for public input in the **Federal Register**. Others believed the proposed **Federal Register** 60-day public notice of items selected for the Required Prior Authorization List was not a long enough notice for suppliers to accommodate a change in their business practice. Commenters did not provide specific recommendations on the number of items to move from the Master List to the Required Prior Authorization List for initial implementation or in the future. Most commenters wanted the least amount of burden possible, but did not indicate what number of items would minimize the burden. A commenter suggested adding an undetermined number of items to the Required Prior Authorization List quarterly. Some commenters expressed concern that undue burden may be created if too many Master List items are added to the Required Prior Authorization List at once. Other commenters found having two lists, the Master List and the Required Prior Authorization List, confusing.

Response: We appreciate commenters' suggestion that we pilot prior authorization in a small region before fully implementing the program and we will take it under advisement. We do not agree with the suggestion to initially implement all Master List items nationally or to add items to the Required Prior Authorization List on a regular quarterly basis. We believe doing so may create undue burden for suppliers and beneficiaries. For instance, if we update the Required Prior Authorization List in January and we quickly learn that the proposed timeline for an item newly added to the list is problematic, we would want to change that as quickly as possible. Waiting until the next quarter would be potentially harmful to beneficiaries. However, we also recognize that it may be difficult for suppliers and beneficiaries to keep up with changes if there are frequent additions to the list.

We point out that the public commented on the Master List items, which we published as part of the proposed rule. Thus we disagree with the commenters that believed the Required Prior Authorization List (a subset of the Master List) process should include another public comment. We are finalizing our proposal to implement the prior authorization program locally or nationally or to suspend or cease the prior authorization requirement program generally or for a particular item or items at any time without undertaking a separate rulemaking. Providing subregulatory guidance will allow us to implement the prior authorization program in such a way that if we encounter problems, we can quickly halt the program as a whole, or for a particular item.

We are aware that some suppliers believe they need more than 60-day notice to prepare for prior authorization of a selected item on the Required Prior Authorization List. However, while the notice in the **Federal Register** will be published 60 days before the start of prior authorization for a particular item, CMS will be communicating to the community in a variety of ways before posting the 60-day notice. For example, we may conduct Open Door Forum calls or the MACs may host informational webinars. We believe that through education and community interaction before the 60-day notice, suppliers will be well informed of the upcoming prior authorization program requirements and can be ready 60 days after the official posting of the public notice.

We agree with commenters who believed initially implementing prior authorization for all items on the Master List creates undue burden for suppliers and physicians. In response to commenters that expressed their objections to CMS's decision to not identify in the proposed rule which Master List item(s) would initially be subject to prior authorization, we believe a number of factors will guide our selection. For example, CMS may consider factors such as geographic location, item utilization or cost, system capabilities, administrative burden, emerging trends, vulnerabilities identified in official agency reports, or other data analysis. Therefore, we may initially elect to require prior authorization on only one item in a small region and quickly suspend the requirement if we find there are unintended effects.

In response to a commenter who believed having two lists was too confusing, we believe having two lists is necessary. The Required Prior Authorization List is selected from the Master List of Items Frequently Subject to Unnecessary Utilization. The Required Prior Authorization List is defined as a subset of Master List items subject to prior authorization.

We believe having the two lists minimizes burdens associated with implementation of prior authorization. For example, CMS may elect to

implement prior authorization a limited number of items. Having only one list would require us to implement prior authorization on all items on the list. As we mentioned previously, we believe implementing prior authorization for the entire list would create undue burden for suppliers, physicians, and beneficiaries. In addition, it would create administrative burden for the review contractor. We believe implementing prior authorization on a subset of the items on the Master List allows us to closely monitor the prior authorization program for each selected item and make changes, if needed.

Comment: Public comments were solicited on the number of items selected for initial implementation of the prior authorization requirement and potential impact on the burden to the DMEPOS community. However, commenters did not provide a recommendation for a certain number of items. Instead, commenters expressed their concerns in more general terms. For example, most commenters recommended the least amount of burden possible, but did not indicate what number of items would minimize the burden. Other commenters believe that the public should be given the opportunity to comment on each item we select from the Master List and move to the Required Prior Authorization List. A commenter suggested adding an undetermined number of items to the Required Prior Authorization List quarterly. Some commenters believe that CMS should ''pilot'' the program in a small area before going national. Commenters believe that by doing so, CMS could identify and address any unforeseen challenges before implementing nationally.

Response: Earlier in this final rule, we reminded commenters that both the final rule and the Act gives us the authority to select the item, implement the prior authorization requirement for that item locally or nationally, and suspend or cease the prior authorization process generally or for a particular item. We believe that this authority allows us to be quickly responsive to any general implementation issue(s) that may surface, or issues related to the prior authorization implementation for a specific item.

We are finalizing our proposal to select an item(s) from the Master List and include it on the Required Prior Authorization List, to implement the prior authorization program locally or nationally, and to suspend or cease the prior authorization requirement program generally, or for a particular item without undertaking a separate rulemaking. We are also finalizing our authority to determine the number of item(s) selected upon initial implementation, determine the number of items selected for future implementation, and determine the frequency with which we would select the item(s).

Lastly, we are finalizing the proposal that we inform the public of the Required Prior Authorization List in the **Federal Register** with 60-day notice before implementation.

Comment: Some commenters suggested each item selected for prior authorization be time limited (a beginning and ending date) for the prior authorization requirements; other commenters suggested that items be subject to prior authorization for the duration of the capped rental period.

Response: We will take these comments into consideration. The length of time a prior authorization requirement is valid for a particular item may be dependent on the item chosen for prior authorization. We believe these operational logistics are more appropriately addressed in CMS guidance.

Comment: Some commenters stated that the proposed rule fails to outline factors or any methodology that CMS will use when selecting Master List items for the Required Prior Authorization List. Other commenters stated that no limits are placed on the number of items to move from the Master List to the Required Prior Authorization List. Commenters stated that without this information, the decision-making process is unclear and fails to provide adequate notice for physicians and other stakeholders.

Response: We solicited comments on the number of items we should implement initially and in the future, as well as the frequency in which we move the items from the Master List to the Required Prior Authorization list. We did not receive specific recommendations on the number of items to move from the Master List to the Required Prior Authorization List for initial implementation or in the future, except for a few commenters who recommended we implement all of the items at the same time. In addition to the inclusion criteria discussed previously, future policies, regulations or response to stakeholder needs may be factored into the Master List item selection(s). While we are not finalizing any methodology or criteria for selection of items to be included on the Required Prior Authorization List, CMS may consider factors such as geographic location, item utilization or cost, system capabilities, administrative burden, emerging trends, vulnerabilities identified in official agency reports, or other data analysis. Such exemplary factors are not being provided to create a definitive list or set of pre-determined considerations, nor to indicate whether such factors could be reviewed in singular or aggregate, nor to indicate the level of priority to be applied to a specific item(s). Rather, they are cited for the limited purpose of notifying stakeholders of the types of factors CMS may take into consideration to create the Required Prior Authorization List.

We note that all provisions finalized in this rule apply in competitive bidding areas because CMS conditions of payment apply under the Medicare DMEPOS Competitive bidding Program.

E. The Proposed Prior Authorization Process

As described in the May 28, 2014 proposed rule (79 FR 30520), the proposed prior authorization process would not create new or change existing clinical documentation requirements. As proposed, it would require the same information necessary to support Medicare payment, just earlier in the process. This process allows the review contractor to confirm, to the extent possible, that all relevant coverage, coding, and clinical documentation requirements are met before the item is furnished to the beneficiary and before the claim is submitted for payment.

We proposed that prior to furnishing the item and prior to submitting the claim for processing, a prior authorization requester would submit evidence that the item complies with all applicable Medicare coverage, coding, and payment rules. Information regarding Medicare coverage, coding, and payment rules for DMEPOS items is found in the Act, our regulations, National Coverage Determinations (NCDs), Local Coverage Determinations (LCD), CMS manuals and transmittals, as well as Durable Medical Equipment Medicare Administrative Contractors' (DME MAC) Web sites. All Medicare coverage, coding, and payment rules would apply. Medicare coverage, coding, and payment rules applicable to items on the Required Prior Authorization List would also be posted on the CMS Prior Authorization Web site. Furthermore, we proposed we would not change existing requirements regarding the entity responsible for creating required clinical documentation. For example, clinical documentation that is required to be created by a practitioner would still be required to be created by the practitioner. Similarly, documentation requiring supplier origination (for

example, product description) would still be generated by the supplier.

We stated in the proposed rule that CMS or its review contractors would review the prior authorization request to determine whether the item ordered for the beneficiary complies with applicable Medicare coverage, coding, and payment rules. After receipt of all applicable required Medicare documentation, CMS or its review contractors would conduct a medical review and communicate a decision that provisionally affirms or non-affirms the request. We proposed that a provisional affirmation is a preliminary finding that a future claim meets Medicare's coverage, coding, and payment rules. Claims receiving a provisional affirmation may still be denied based on technical requirements that can only be evaluated after the claim has been submitted for formal processing. For example, a finding that a claim is a duplicate claim can only be made after the claim has been submitted for formal processing. Claims receiving a provisional affirmation may also be denied based on information not available at the time of a prior authorization request (that is, proof of delivery). A prior authorization request that is non-affirmed under section 1834(a)(15) of the Act is not an initial determination on a claim for payment for items furnished, and therefore, would not be appealable. We proposed making this distinction clear by adding a new paragraph (t) to § 405.926 stating that a review contractor's prior determination of coverage is not an initial determination.

In the May 28, 2014 proposed rule (79 FR 30520), we stated that claims associated with a non-affirmation decision, as well as claims for items subject to prior authorization but for which no prior authorization was requested, would be denied if submitted for processing. A requester who submits a claim for which there was a non-affirmation decision or for which no prior authorization request was obtained would be afforded full appeal rights on the claim.

We proposed that CMS or its review contractors would make reasonable efforts to communicate the decision within 10 days of receipt of all applicable information. However, we stated that final timelines for communicating a provisionally affirmed or non-affirmed decision to the requester would be described in CMS guidance and posted on the CMS Prior Authorization Web site. We proposed allowing unlimited resubmissions of prior authorization requests.

To address circumstances where applying the standard timeframe for making a prior authorization decision could seriously jeopardize the life or health of the beneficiary, we proposed a mechanism for an expedited review. We proposed that if CMS or its review contractors agree that using the standard timeframes for review places the beneficiary at risk as previously described, then we would allow an expedited review of the prior authorization request and communicate an expedited decision. In these situations, we stated that CMS or its review contractors would make reasonable efforts to communicate the decision within 2 business days of receipt of all applicable Medicare required documentation. We stated this process would be further defined in CMS guidance and posted on the CMS Prior Authorization Web site. We proposed that a prior authorization request for an expedited review would include documentation that shows that applying the standard timeframe for making a decision could seriously jeopardize the life or health of the beneficiary. For example, documentation could include medical records, supplier documentation, home health documentation or any other documentation deemed to support the necessity of an expedited review. We solicited public comment on whether the proposed process would meet our objective of maintaining beneficiary access to care and protecting the Medicare program without placing undue burden on practitioners and suppliers.

We proposed to permit a requester to resubmit a prior authorization request if the initial request was non-affirmed. Prior authorization requests would be reviewed, and a decision of a provisional affirmation or a non-affirmation would be communicated to the affected parties in the same manner as an initial request. We stated we would consider a request for the same beneficiary for the same HCPCS code in a 6-month period of time to be a resubmission. We proposed that a request outside of those parameters would be treated as a new initial request. We sought public comment on the number of resubmitted prior authorization requests allowed.

In the May 28, 2014 proposed rule, we suggested that Medicare or its review contractors make a reasonable effort to render a provisional affirmation or a non-affirmation decision within 10 days of receiving the initial request, 2 days for an expedited request or 20 days for a resubmission. We also sought public comment on suggested timeframes for provisional affirmation or non-affirmation decisions on resubmitted prior authorization requests. Furthermore, in the proposed rule, we stated additional information about timeframes for all decisions would be described in CMS guidance to its contractors. In the May 28, 2014 proposed rule, we included the following illustrations of possible prior authorization scenarios:

Scenario 1: A requester submits to CMS (or its review contractors) a prior authorization request along with all required documentation. CMS (or its review contractors) finds that the request meets all applicable Medicare requirements. CMS (or its review contractors) would communicate a provisional affirmation decision to the affected parties. The supplier would submit the claim following receipt of a provisional affirmation decision, and the claim would be paid, as long as all other requirements were met.

In the preceding example, the granted affirmation decision is provisional because payment decisions can only be made after all requirements are evaluated. For example, a claim could have received a provisional affirmation prior authorization decision. However, after submission, the claim could be denied due to technical payment reasons, such as the claim was a duplicate claim or the claim was for a deceased beneficiary. In addition, certain documentation needed in support of the claim, such as proof of delivery, are unavailable for review on a prior authorization request.

Scenario 2: A requester submits to CMS (or its review contractors) a prior authorization request. CMS (or its review contractors) conducts a medical review of submitted documentation and determines that the request and submitted documentation does not comply with one or more applicable Medicare coverage, coding, and payment rules. CMS (or its review contractors) communicates a decision that non-affirms the request. A non-affirmation is a preliminary finding that a future claim associated with the submitted documentation and prior authorization request would be denied if submitted because the associated request and submitted documentation did not meet one or more of Medicare's coverage, coding, and payment rules. The communication to the affected parties would identify which Medicare coverage, coding or payment rule(s) was not supported in the request and submitted documentation and thus served as the basis for the non-affirmation decision. The requester could resubmit the prior authorization

request. If the claim is submitted for payment without a provisional affirmation decision, it would be automatically denied. The supplier would assume liability if the item was furnished after receiving a non-affirmation decision, unless conditions for assigning liability to the beneficiary or Medicare are met. (For more information, see section 1879(h)(2) of the Act for assigned claims, section 1834(j)(4) of the Act for non-assigned claims, and our discussion in section II.F. of this final rule). A prior authorization request that is non-affirmed under section 1834(a)(15) of the Act is not an initial decision on a claim for payment for items furnished, and therefore would not be appealable. However, a claim for which a non-affirmation prior authorization decision was received, submitted, and subsequently denied could be appealed.

Scenario 3: A claim is submitted without a prior authorization decision. The claim would be denied because there was no prior authorization request, which is a condition of payment. The supplier is liable unless the conditions for assigning liability to the beneficiary or Medicare are met. (For more information, see section 1879(h)(2) of the Act for assigned claims, section 1834(j)(4) of the Act for non-assigned claims, and our discussion in section II.F. of this final rule).

We proposed to automatically deny payment for a claim for an item on the Required Prior Authorization List that is submitted without a provisional affirmation prior authorization decision. We believe that section 1834(a)(15) of the Act established an advanced determination process (that is, a prior authorization process) as a condition of payment for items on the list developed by the Secretary. We stated in the May 28, 2014 proposed rule that absent this potential penalty for noncompliance with the prior authorization process, section 1834(a)(15) of the Act would be rendered moot, as suppliers would not be required to seek an advance decision of coverage for these items. A mandatory prior authorization process for these items best ensures that CMS effectuates its goal of reducing unnecessary utilization for the items identified by the Secretary in accordance with section 1834(a)(15)(A) of the Act.

We proposed in § 414.234(c) that we would require, as a condition of payment for certain DMEPOS items frequently subject to unnecessary utilization, that a prior authorization request be submitted prior to the submission of a claim. We stated that the new requirement would reduce the unnecessary utilization and the resulting overpayment for certain DMEPOS items.

In addition, we proposed adding a new paragraph (t) to § 405.926 stating that a review contractor's prior determination of coverage is not an initial determination and is thus not appealable because the prior authorization decision is not an initial determination with respect to a claim for benefits under Part A or Part B. Section 405.926 contains the list of actions that are not initial determinations and thus not appealable. However, we noted that a requester who submits a claim for which there was a non-affirmation decision or for which no prior authorization request was obtained would be afforded appeal rights.

We believe that a prior authorization process is an effective way to address unnecessary utilization, particularly since most items frequently subject to unnecessary utilization are identified as such because of insufficient supporting documentation. Inherent in a prior authorization process is a review of supportive evidence for the medical necessity of the item. Traditionally, this review has involved the beneficiary's medical record.

In summary, we proposed the following prior authorization process:

- Prior to furnishing the item and prior to submitting the claim for processing, a prior authorization requester would submit evidence that the item complies with all coverage, coding, and payment rules.
- CMS or its review contractors would review the prior authorization request and accompanying documentation to determine whether the item ordered for the beneficiary complies with applicable Medicare coverage, coding, and payment rules.
- After receipt of all applicable required Medicare documentation, CMS or its review contractors would conduct a medical review and communicate a decision that provisionally affirms or non-affirms the request.
- For the initial prior authorization request, CMS or its review contractors would make reasonable efforts to communicate a provisionally affirmed or a non-affirmed decision within 10 business days of receipt of all applicable information.
- A requester may resubmit a prior authorization request if the initial request was non-affirmed. Unlimited resubmissions are permitted.
- For each resubmitted prior authorization request, CMS or its review contractors would make reasonable efforts to communicate a provisionally affirmed or a non-affirmed decision within 20 business days of receipt of all applicable information.
- For circumstances where applying the standard timeframe for making a prior authorization decision could seriously jeopardize the life or health of the beneficiary, an expedited review could be requested. For expedited reviews, CMS or its review contractors would expect the submitted documentation to include evidence that applying the standard timeframe for making a decision could seriously jeopardize the life or health of the beneficiary. If CMS or its review contractors agreed that applying the standard timeframe would jeopardize the life or health of the beneficiary, then CMS or its review contractors would make reasonable efforts to communicate a provisionally affirmed or a non-affirmed decision within 2 business days of receipt of all applicable information.

In the proposed rule, we specifically solicited public comment on the following:

- The number of resubmitted prior authorization requests allowed.
- The suggested timeframes for provisional affirmation or non-affirmation decisions on resubmitted prior authorization requests.
- Whether the proposed process would meet our objective of maintaining beneficiary access to care and protecting the Medicare program without placing undue burden on practitioners and suppliers.

Comment: Commenters stated that some items on the Master List were needed sooner than the proposed prior authorization process could permit. For example, commenters stated that electric hospital beds (E0260 on the Master List) were often ordered for beneficiaries the day they are discharged from the hospital. Commenters stated that the proposed expedited review process was still too long for a beneficiary being discharged from the inpatient setting and who required an electric bed to be in their home upon arrival. For example, the proposed expedited process timeframe was 2 business days. If the 2 business days were split by a weekend or a holiday, it could take up to 5 days for the review contractor to render a prior authorization decision. The vast majority of commenters stated that the suggested timeframes would create delays in care or access issues for beneficiaries. Some commenters believed the proposed timeframe created undue burden for suppliers and ordering physicians as well. Several commenters submitted detailed

suggestions on creating a prior authorization process that would more quickly return a prior authorization decision to the requester. For example, we received several suggestions to use forms rather than medical records to evidence the need for the requested item. There were suggestions to create a 24-hour, 7-days-a-week call-in service that could give a prior authorization decision after verbal conversation between the prior authorization requester and the call-in service personnel.

Response: We agree that additional flexibility beyond the proposed timeframes may be necessary under particular circumstances to ensure adequate beneficiary access to DMEPOS on the Required Prior Authorization List. In the interest of promoting beneficiary access to care and protecting the Medicare program without placing undue burden on practitioners and suppliers, we are not finalizing the proposed prior authorization timeframes. Therefore, prior authorization timeframe requirements will be made available to stakeholders and the public in subregulatory guidance, which allows for greater flexibility in the event timeline modifications are warranted. We note the prior authorization timeframe(s) detailed in subregulatory guidance will not exceed the timeframes described in the proposed rule.

We will take the comments regarding alternate processes that afford more expedient responses to the requestor (for example, the 24-hour 7-day a week model) into consideration when developing the prior authorization timeframes.

Comment: Many commenters were confused about actions that are afforded appeal rights. Commenters understood that denied claims can be appealed, but also wanted appeal rights for non-affirmation prior authorization decisions.

Response: We remind commenters that a request for prior authorization is not a claim for benefits, and a non-affirmation prior authorization decision is not an initial determination. See, section 1869(a) of the Act, and 42 CFR 405.904(a)(2), 405.920, and 405.924(b) of the regulations. Rather, a non-affirmation prior authorization decision is a finding by the review contractor that the prior authorization request and accompanying documentation had at least one error or omission of an applicable Medicare coverage, coding or payment rules. If the error remains uncorrected but the claim is still submitted for processing, the claim would be denied.

We believe that permitting resubmissions of non-affirmation prior authorization decisions allows the requester to be educated about what is missing in the initial prior authorization request before the claim is submitted. The review contractor will list the specific information that is missing for any prior authorization request receiving a non-affirmation prior authorization decision. For example, a requester who received a non-affirmation prior authorization decision because medical necessity documentation was missing can resubmit the request and include the required documentation previously missing. If all applicable Medicare coverage, coding, and payment rules are satisfied with the resubmitted prior authorization request, the formerly non-affirmation prior authorization decision would be changed to a provisional affirmation decision. If the requester disagreed with the review contractor's non-affirmation decision and believed that the prior authorization request met all requirements, the requester could submit the claim for payment. The supplier would receive a payment denial. After receiving the payment denial, the supplier may appeal the claim. The beneficiary may also appeal the denied claim.

We remind readers that an affirmation prior authorization decision is provisional because other information that is only available after the claim is submitted may result in a denial. For example, there may be technical issues, such as a duplicate claim, or an absent or improperly listed proof of delivery date that can be known only after the claim is submitted. However, we believe that reviewing the documentation and information in advance of submitting the claims does provide some assurance that the claim is likely to be paid. We believe that suppliers and beneficiaries prefer to have some assurance that their claim is likely to be paid because all the required information was provided in advance of submitting the claim and furnishing the item to the beneficiary.

Comment: Some suppliers stated that providing documentation before the claim is submitted is less burdensome than having to submit the documentation after the claim is submitted and after the item is furnished. Some believed that prior authorization would reduce their need to access the appeals process, which they state is costly and burdensome.

Response: We agree that prior authorization may reduce a supplier's need to access the appeals process because a requester may resubmit a prior authorization request an unlimited number of times. We believe that allowing requesters to resubmit an unlimited number of times allows the requester multiple opportunities to understand documentation or other requirements of payment, correct the omission before the claim is submitted, and thereby avoid having the subject claim denied. We agree that a prior authorization process is less burdensome than accessing and preparing an appeal request.

Comment: Many commenters expressed a general concern that the proposed prior authorization process would create an overall delay in care, possibly resulting in poor beneficiary health outcomes. For example, several commenters stated that the review timeframes for negative pressure wound therapy items would create a delay in care and result in poor outcomes. They stated that poor outcomes could include a delay in healing which would increase hospital readmissions and poor patient satisfaction. Commenters also stated that a delay in outpatient negative pressure wound therapy would delay beneficiary discharges, extend hospital stays, and increase inpatient costs. Similarly, commenters stated that requiring prior authorization for pressure reducing support surfaces could also delay beneficiary discharges and extend hospital stays.

Response: We understand commenters' concerns and agree that requiring a lengthy prior authorization process for negative pressure wound therapy devices, pressure reducing support surfaces, and perhaps other Master List items, could potentially delay care and lead to negative outcomes. We will take these comments as well as other similar comments into consideration as we develop the timeframes for the prior authorization process. We will issue the timeframes in subregulatory guidance because we believe that this will create the flexibility to quickly modify the timeframes as needed, if issues are identified.

Comment: Some commenters recommended that CMS compare and contrast the private insurance industry's prior authorization programs with the proposed prior authorization program and recommended that CMS mirror the private insurance industry as much as possible.

Response: We understand many commenters would like to see the Medicare Prior Authorization program mirror the private sector programs as much as possible. Due to the differences in how the private sector and Medicare do business with providers and suppliers, having the same process is

not entirely possible. However, in the development of the prior authorization process timeframes, we plan to reach out to the private industry, whenever possible, for examples and best practices that we can adopt.

Comment: Commenters expressed concern about varying aspects of the required prior authorization medical record documentation. For example, many commenters from the prosthetics and orthotics community stated that the prosthetists' notes and records should be considered part of the medical record. Several commenters stated that LCD and NCD medical record documentation requirements will increase the review time, delay the time the beneficiary receives the equipment, and decrease clinician productivity. Some commenters stated individual documentation requirements for certain items on the proposed Master List are more burdensome than others (that is, the monthly documentation requirement for negative pressure wound therapy and physician orders for respiratory assistive devices). Other commenters recommended eliminating some required documentation like date stamps and face-to-face encounters. A commenter recommended synchronizing the medical record documentation requirements of this rule with the medical record documentation requirements of the face-to-face encounter rule.

Response: As discussed previously, prior authorization does not create new or change any existing documentation requirements. This final rule does not change or create new Medicare medical necessity, coverage, coding or payment rules. As a long-standing expectation, all of the following requirements must be met to receive an affirmation prior authorization decision—

- Coverage and other requirements of NCDs/LCDs;
- Technical requirements (for example, date stamps);
- Statutory requirements (for example, face-to-face encounter documentation); and
- All other requirements.

We will provide education specific to each item subject to prior authorization so that suppliers are informed of specific documentation requirements.

In response to commenters that requested that the prosthetists' notes and records stand alone in fulfilling medical necessity documentation requirements for a beneficiary's prostheses, we note that the expertise of prosthetists is very important and contributes to beneficiaries' recovery. However, a prosthetist's records alone do not illustrate the comprehensive clinical picture of the beneficiary. For example, a physician order alone does not satisfy Medicare's medical necessity criteria. Rather, it is the documentation of multiple healthcare team members working on behalf of the beneficiary that conveys the complete picture of the beneficiary's medical need and appropriate delivery of care. As a principle, when reviewing any claim for medical necessity, we look for corroboration between all entries (including physician's orders) in a beneficiary's medical record.

Comment: Commenters requested that CMS provide clear guidance regarding required documentation. Other commenters suggested that CMS develop a form or questionnaire for the requester to complete in place of submitting beneficiaries' medical records.

Response: We strive to continually educate providers on required documentation. As always, we expect that any request for Medicare payment is supported in the beneficiary's medical record. Suppliers are permitted to create forms or questionnaires for ordering physicians. However, templates and forms are subject to corroboration with information in the medical record.

Comment: Some commenters questioned who is held responsible for providing the review contractor with the required medical documentation: The primary care provider, the ordering physician or the supplier. Other commenters recommended holding the ordering physicians accountable for lack of documentation and not the supplier. Other commenters recommended that CMS be responsible and accountable for obtaining missing documentation from the ordering physician, not the requester (supplier).

Response: The entity requesting payment for a Medicare-covered item or service is responsible for meeting all Medicare coverage, coding, and payment rules. That responsibility cannot be delegated. We understand obtaining medical records from the beneficiary's other healthcare providers can be challenging for suppliers. However, Medicare's long-standing expectation is that no DMEPOS item(s) should be furnished by a supplier unless the supplier has in its possession or can easily obtain the required medical documentation. This is not unique to DMEPOS suppliers. Other health care entities providing services to Medicare beneficiaries who were referred to them by other practitioners have an obligation to obtain all the pertinent medical documentation from the referring practitioner. This may require more collaboration among the beneficiary's health care providers, but this collaboration is needed. Research shows that the lack of collaboration between the beneficiary's treatment team can result in the beneficiary's readmission to the inpatient setting or in the beneficiary not receiving other needed care.[16]

Comment: A commenter recommended that we provide information on lower cost alternatives in cases when the review contractor returns a non-affirmation prior authorization decision to the requester.

Response: We expect providers to order and suppliers to provide the medically necessary item for a beneficiary, regardless of cost. If the review contractor determines that a prior authorization request does not meet all applicable Medicare coverage, coding, and payment rules based on the documentation received, it will be non-affirmed. The requester has the option of resubmitting the request with the required documentation an unlimited number of times. Receiving a non-affirmation prior authorization decision does not authorize the supplier to submit a claim for a similar but less costly item. All DMEPOS claims must have an associated physician's order submitted. That is, suppliers may not substitute DMEPOS items that are not ordered by the physician. A physician determines what DMEPOS item is medically necessary for the beneficiary.

Comment: Some commenters recommended using the tax ID and not the Provider Transactions Access Number (PTAN) in the prior authorization process. This way, commenters stated, the prior authorization is transferrable to new suppliers if the beneficiary relocates.

Response: We are developing the system capabilities to attach a prior authorization request to a claim. We will issue claims processing instructions in CMS guidance.

Comment: Several commenters recommended that suppliers be able to deliver the item to the beneficiary before a prior authorization decision is made.

Response: We recognize that some commenters' concerns about providing timely care to the beneficiary included a suggestion to allow suppliers to deliver the item to the beneficiary before a prior authorization decision is made, thus preventing any access issue. We proposed using a 10 business day timeline for initial prior authorization

[16] The Revolving Door: A Report on U.S. Hospital Readmissions. Robert Wood Johnson Foundation, February 2013. Retrieved on February 2, 2015 from *http://www.rwjf.org/content/dam/farm/reports/reports/2013/rwjf404178.*

requests, 20 business days for resubmitted prior authorization request and 2 business days for request for expedited reviews. Many commenters believed that these timeframes could create barriers to care for beneficiaries. In response to the concern, we will not finalize the proposed timelines. As mentioned previously, creating a prior authorization process in subregulatory guidance that is customized for the DMEPOS item subject to prior authorization provides flexibility to develop a process that involves fewer days, as may be appropriate. We believe this flexibility allows us to safeguard beneficiary access to care and avoid creating any barriers for beneficiaries and suppliers. Rather, under particular circumstances, we may develop a prior authorization timelines for certain items that permits fewer days than the proposed 10 or 20 business days. At any time we become aware that the prior authorization process is creating barriers to care, we can suspend the program.

Comment: Some commenters recommended that if the review contractor does not provide a prior authorization decision within the proposed timeframe, an automatic approval should be given. Several commenters believed that the review contractor should guarantee payment if they issue an affirmation prior authorization decision since the submitted documentation established medical necessity, even if technical errors are found after the claim is processed.

Response: We respectfully disagree with these suggestions. In order for a prior authorization request to receive an affirmation prior authorization decision, all Medicare coverage, coding, and payment rules must be met, including technical requirements. If medical necessity criteria are met with the initial prior authorization documentation, an affirmed prior authorization would be issued. If a prior authorization request receives an affirmation prior authorization decision, there is an assurance that the claim will not be denied on the basis of medical necessity. However, it is possible the claim could be denied because it did not meet a coding or billing requirement.

We expect that the review contractor will provide a prior authorization decision within the timeframes established in subregulatory guidance. We conduct day-to-day oversight, as well as formal annual performance evaluations of Medicare contractors, to make sure that they are meeting the requirements of their contract. We may require action plans for standards that are not met and also consider documented past performance for future contract awards.

Comment: Some commenters recommended that suppliers receiving a non-affirmation prior authorization decision for an advanced LLP should be allowed to submit another request after 30 days if the beneficiary's functional potential improves after 30 days.

Response: Prior authorization does not create or eliminate documentation requirements. Therefore, in the case of prostheses being subject to prior authorization, improved functional potential after 30 days does not take the place of documentation and medical necessity requirements evidencing this improvement. Provisionally affirmed prior authorizations are based on the submitted documentation. If the beneficiary's functional potential improves and the original prior authorization decision was a non-affirmation, the supplier would need to submit another prior authorization request with the change in beneficiary status in the clinical documentation and all of Medicare's coverage, coding, and payment rules must again be met. A prior authorization request can be submitted at any time and there are an unlimited number of resubmissions. However, if a new DMEPOS item is needed because the status of the beneficiary changes, then a new prior authorization request must be submitted.

Comment: A commenter suggested that the review contractor be fined 100 percent of the allowable amount for an item if one supplier receives a non-affirmation prior authorization for a particular item, for a particular beneficiary, but another supplier receives an affirmation decision for the same item, for the same beneficiary.

Response: A prior authorization request must meet all Medicare coverage, coding, and payment rules. Therefore, if one supplier did not provide all the required documentation or information, but another supplier did, the second supplier would receive a provisional affirmation prior authorization decision while the first one would not. In this situation, two suppliers submitted a prior authorization request at different times for the same item and same beneficiary, but only one supplier furnished the item. Our claims processing system will track prior authorization requests and we will conduct frequent monitoring. Thus, we can avoid situations when a beneficiary receives two of the same items from two different suppliers.

Beneficiaries and suppliers may file a complaint in cases where they believe access to a DMEPOS item or a supplier was improperly denied or if they believe a prior authorization request was not handled properly. More information on ways to file a complaint is available at *https://www.medicare.gov/claims-and-appeals/file-a-complaint/durable-medical-equipment/complaints-about-dme.html.* One of the described processes is through the Competitive Acquisition Ombudsman (CAO). The CAO position was established by the Congress and operates within CMS' Office of Hearings and Inquiries. The CAO plays a vital role in ensuring that Agency processes respond effectively to inquiries and complaints about the Program. The CAO notifies Agency leadership about potential systemic issues that may affect beneficiaries' access to quality DMEPOS items and services.

Federal procurement regulations effectively prohibit issuing fines or similar financial penalties to Medicare Administrative Contractors for not meeting performance standards. We provide incentives to contractors for exceeding the requirements in their contracts. This is done through a formal award fee process. Contractors are awarded extra fees for exemplary accuracy in their medical review determinations. We conduct quality checks of the prior authorization decisions through a sample of random claims. Findings from this quality check are communicated to CMS' Medicare Contractor Management Group (MCMG) and are used to determine if a contractor is eligible for an award fee. We also perform annual performance evaluations of MACs to ensure that they are meeting all requirements of their contract. We may require action plans for standards that are not met and also consider documented past performance for future MAC contract awards. In situations where two suppliers in the same contractor jurisdiction submit identical documentation to support medical necessity and receive two different determinations, we would refer the incident to MCMG for review.

In addition, we conduct day-to-day contractor oversight by, among other things, frequent communication with the contractor medical review components. In these communications, we receive status updates about the different types of medical review decisions. For example, we monitor contractors' pre- and post-pay medical review strategies. Upon implementation, we will also monitor contractors' prior authorization processes, including the decisions they render and the timeframes in which the decisions are rendered.

As noted earlier, prior authorization timeframe requirements will be made available to stakeholders and the public in subregulatory guidance, which allows for greater flexibility in the event timeline modifications are warranted. We remind commenters that both the final rule and the Act gives us the authority to implement the prior authorization requirement for a DMEPOS item locally or nationally, and suspend or cease the prior authorization process generally or for a particular item. We note the prior authorization timeframe(s) detailed in subregulatory guidance will not exceed the timeframes described in the May 28, 2014 proposed rule (79 FR 30521). We believe that this authority allows us to be quickly responsive to any general implementation issue(s) that may surface, including any unforeseen beneficiary access issues.

Comment: Some commenters questioned if receiving a non-affirmation prior authorization request is curable. For example, commenters sought clarification on whether a requestor could submit the prior authorization request multiple times until the requestor receives a provisional affirmative prior authorization decision.

Response: If a prior authorization request receives a non-affirmation decision, the prior authorization request can be resubmitted an unlimited number of times. If on subsequent submission(s) the requester provides information previously missing, and the resubmitted request complies with all applicable Medicare coverage, coding, and payment rules, the non-affirmation decision will be changed to a provisional affirmation decision.

We are finalizing prior authorization as a condition of payment. As such, if a claim subject to prior authorization is received without an associated affirmed prior authorization request, it will be denied. Once the claim is denied, standard appeal rights apply.

Comment: Several commenters expressed concern that there is no process to appeal a non-affirmation determination on an initial request. Some commenters recommended that after two non-affirmation decisions, the supplier should have an option for appeal. Several commenters stated that an appeals backlog would occur. Some commenters recommended that the contractors be subject to a fine for every denial that is overturned by appeal in the amount of 25 percent of the allowable amount for the claim.

Response: We are finalizing prior authorization as a condition of payment. As such, lack of an affirmed prior authorization request in cases where a prior authorization is required will result in a claim denial. Once the claim is denied, standard appeal rights apply. As previously clarified, a non-affirmed prior authorization is not an initial determination of payment and therefore not appealable. The prior authorization process does not change traditional appeal rights once a claim is submitted and denied. Claims appeals processes are outside the scope of this rule.

Additionally we believe that permitting unlimited resubmissions gives the requester multiple opportunities to make a prior authorization request with all of the required documentation and receive a provisional affirmation decision. As such, we expect fewer denials because a significant percentage of denials have been due to insufficient documentation. With fewer denials, we expect fewer appeals.

Comment: Several commenters recommended that the prior authorization process should be tailored to each individual item on the proposed Master List. For example, some commenters suggested we use diagnosis codes in electronic health records to demonstrate medical necessity because coding is based upon the assumption that all devices within a code are equivalent in ability to provide medically necessary performance.

Response: We believe these operational logistics of the prior authorization process are more appropriately addressed in subregulatory guidance. Issuing subregulatory guidance will give us the ability to continually improve upon the process going forward and tailor it to individual items, if necessary. Typically, a diagnosis code alone is not sufficient to demonstrate medical necessity. We expect diagnosis codes to be backed up with evidence in the medical record.

Comment: Some commenters requested that CMS clarify circumstances where a ''technical requirement'' not met for a claim that has an associated affirmed prior authorization could result in a payment denial.

Response: Examples of not meeting a ''technical requirement'' include situations where a claim is a duplicate claim or where the claim is coded improperly. A claim reporting a HCPCS code for a DMEPOS item that differs from the DMEPOS item associated with the issued provisional affirmation prior authorization decision is an example of a claim that is coded improperly. A claim with an associated affirmation prior authorization decision would be denied if these types of technical requirements were not met.

Comment: Several commenters recommended that CMS have a way of tracking and reporting the contractors' response times and inbound and outbound documentation submitted. Several commenters recommended that CMS make statistics of the prior authorization programs available to the public.

Response: We will take these comments into consideration as we implement the prior authorization process. We will meet regularly with our review contractors and will keep them informed on all aspects of the prior authorization program.

Comment: Some commenters recommended that after three non-affirmation prior authorization decisions, the suppliers should be allowed to talk directly to the review contractor's medical director. Some commenters recommended that there should be a verbal determination process, while others recommended that we create a central Web site where physicians can order DMEPOS and provide required information by answering a few questions, and that the Web site can provide an affirmed prior authorization approval in real time.

Response: We expect to create a process through subregulatory guidance that provides requesters with an efficient experience and takes into consideration public recommendations. For example, our review contractor will document specific requirements that were not met when issuing a non-affirmation decision. We believe that with knowledge of the applicable Medicare coverage, coding, and payment rules and communication from the review contractor, a supplier can receive a provisional affirmation decision for covered medically necessary items. In addition, we believe that timelines for the prior authorization process may need to be different for some DMEPOS items. For example, the prior authorization timeline for PMDs would likely differ from the prior authorization timelines for oxygen concentrator. We believe these operational logistics and the commenters' suggestions are more appropriately addressed in subregulatory guidance. This gives us the greatest flexibility for making improvements in the process in the future.

Comment: Some commenters recommended that CMS begin vigorous outreach and education on existing documentation requirements and prioritize providers for this education.

Response: We agree that outreach and education are extremely important. We will take these comments into consideration as we implement the prior authorization process.

We are finalizing the following proposed provisions summarized in section II.E. of this final rule:

- Create prior authorization as a condition of payment for items on the Required Prior Authorization List, as proposed in § 414.234(c)(1). Claims receiving a non-affirmation decision, as well as claims for items subject to prior authorization but for which no prior authorization was requested, will be denied if submitted for processing.
- Add a new paragraph (t) to § 405.926 stating that a contractor's prior determination of coverage is not an initial determination. Section 405.926 contains the list of actions that are not initial determinations and thus not appealable.
- Define a ''provisional affirmation'' prior authorization request decision, as proposed in § 414.234(a).
- Require all relevant documentation necessary to show that the item meets applicable Medicare coverage, coding, and payment rules be submitted before the item is furnished to the beneficiary and before the claims is submitted for processing, as proposed in § 414.234(d)(1).
- Permit unlimited resubmissions of the prior authorization request, as proposed in § 414.234(e)(3)(ii).
- Include an expedited review option and process, as proposed in § 414.234(e)(4).

F. Other

We received several comments that were outside the scope of the proposed rule. Other comments were related to the proposed prior authorization rule, but did not address any of the topics discussed in this final rule. In the following discussion, we summarize and respond to these comments.

Comment: Several commenters believe section 1834(a)(15) of the Act requires that the prior authorization process be fully electronic and use a valid ASC x12 278 transaction.

Response: We are aware of the need to be HIPAA compliant. We expect to have the ability to accept electronic 278 transmissions and will notify the public when electronic 278 transmissions can be accepted.

Comment: Several commenters recommended that the prior authorization decision should be communicated to both physician/practitioner and the supplier.

Response: We will take this comment under advisement as we develop operational guidance for this rule.

Comment: Commenters suggested that CMS continue to study the long-term impact of the PMD demonstration. Other commenters recommended that CMS should discontinue the PMD demonstration when finalizing this rule.

Response: The prior authorization of PMD demonstration will continue to its scheduled completion at which time we may choose to move any PMD codes on the Master List to the Required Prior Authorization List.

Comment: Several commenters recommended enforcing section 427 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000.

Response: Section 427 of BIPA regarding enforcement is outside the scope of this final rule.

Comment: Several commenters recommended that claims for serial items subject to prior authorization be exempt from future audits. For example, commenters recommended that claims for first month rental as well as future months be exempt from future audits.

Response: As noted previously, in response to public concern that a supplier may be subject to audits even after meeting the documentation requirements for a prior authorization request, paid claims for which there is an associated affirmed prior authorization decision will be afforded some protection from future audits. However, when the subject claim falls within the CERT annual sample or when a supplier's billing patterns signal potential fraud, inappropriate utilization or changes in billing patterns, the claim may be subject to an audit. Claims for subsequent and serial rental items will be covered under the initial prior authorization decision for time periods stated in NCDs, LCDs, statutes, regulations, and CMS issued manuals and publication. For example, if a policy for the subject DMEPOS item requires medical necessity documentation to be updated annually, the initial prior authorization decision will cover the claims for the subject DMEPOS item for 12 months.

Comment: Some commenters recommended we create an exception to the Stark Law.

Response: Exceptions to the Stark Law are outside the scope of this final rule.

Comment: A commenter recommended that Stage 1 meaningful use and 2013 Clinical Quality Measures (CQM's) should be allowed to qualify for meaningful use and incentive payments for 2014 because there is not enough time for the community to be able to successfully attest for 2014 meaningful use.

Response: Meaningful use incentive payments are outside of the scope of this final rule.

Comment: Several commenters gave alternate options to implement, instead of prior authorization. For example, rather than imposing prior authorization on suppliers, some commenters suggested that CMS recoup improper payments made by review contractors by having review contractors reimburse Medicare for the improper payments they made. Some commenters recommended that CMS continue to pay an incentive payment and to waiver temporary devices.

Response: We agree with commenters that CMS should avoid improper payments. In part, this is the reason we are implementing prior authorization for DMEPOS items subject to frequent unnecessary utilization that meet the inclusion criteria. We believe that a prior authorization request that meets the necessary requirements helps review contractors avoid making and suppliers avoid receiving improper payments. However, when an improper payment is identified, we must recoup the payment from the entity receiving it. Incentive payments and temporary device waivers are outside the scope of this final rule.

Comment: Some commenters stated that prior authorization will cost more than it will save and that the care of the beneficiaries, not cost, is most important.

Response: We agree that the care of beneficiaries is of utmost importance. We believe cost should not be the only consideration. There are likely to be other benefits that result from the DMEPOS prior authorization requirement. However, many of those benefits are difficult to quantify. For instance, we expect to see savings in the form of reduced unnecessary utilization, fraud, waste, and abuse, including a reduction in improper Medicare FFS payments (note that not all improper payments are fraudulent). We believe we must make sure that beneficiaries are receiving medically necessary care, items, and drugs when needed and can make informed financial decisions prior to receiving items and services that are not covered under the Medicare program. We believe providers and suppliers participating in the Medicare program have a responsibility to make sure their documentation evidences that the care/item/drug they provide is medically necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed

body member (section 1862(a)(1)(A) of the Act).

Comment: A commenter expressed concern about claims for dually-eligible beneficiaries. They questioned whether a supplier would be allowed to use a provisional non-affirmation prior authorization decision to submit a request for payment to a Medicaid program. Other commenters recommended creating an exception for suppliers to submit eligible claims without a prior authorization if there was a coordination of benefits error.

Response: Clarifying Medicaid requirements for coverage of DME is outside of the scope of this final rule, though we stated that we do not consider such a prior authorization decision on its own to be a Medicare payment decision. However, we are aware that there are opportunities to better align the two programs' coverage of DME, and note that we received comments on this opportunity in response to our May 16, 2011 Notice for Comment (76 FR 28196) in which we launched the Alignment Initiative. We will continue to work internally across components to find solutions to better serve dually-eligible beneficiaries.

Comment: Clarification was requested by some commenters whether the average cost of purchasing or renting an item would influence how long a contractor may have to reply to a request for prior authorization.

Response: Currently we do not believe purchase price or rental fee will impact the timeframe. We will issue the timeframes for making prior authorization decisions in subregulatory guidance. We believe that by doing so we create flexibility to quickly modify the timeframes if issues are identified.

Comment: Some commenters recommended that the requirement for physicians to co-sign and bill for the items should be removed. Some commenters requested clarification regarding the physician co-signature requirements.

Response: This final rule does not change any physician co-signature requirements. Physician co-signature requirements are outside the scope of this final rule.

Comment: A commenter recommended that CMS provide reimbursement for home care agencies to let medical social workers conduct visits with the sole intent of completing an updated advance directive and Physician Orders for Life-Sustaining Treatment (POLST).

Response: Home care reimbursements are outside the scope of this final rule.

Comment: Some commenters expressed concern regarding bundled items and that not all individual codes on the proposed Master List over $1,000 are standalone items and that they are used in combination with an entire multi-coded device.

Response: We recognize that some items on the Master List could be ordered together. Our prior authorization process will accommodate this circumstance. For example, a requester could list all related items on their prior authorization request and receive one prior authorization decision that covers all the items listed in the request. Specific instructions will be given in subregulatory guidance.

G. Liability

In the May 28, 2014 proposed rule (79 FR 30520), we discussed how CMS' liability policies apply to the prior authorization process. A request for prior authorization must be submitted prior to furnishing the item to the beneficiary and prior to submitting the claim for processing. When a claim for an item on the Required Prior Authorization List is submitted and denied, the contractor determines liability for the denied item based on sections 1834(j)(4) of the Act for non-assigned claims and 1879(h)(2)of the Act for assigned claims. Under these sections, any expenses incurred for the denied item or service are the responsibility of the supplier unless liability is transferred to the beneficiary in instances where beneficiaries are given an ABN, Form CMS–R–131, because the beneficiary knows or could be expected to know that payment would not be made. Sections 1834(j)(4) and 1879(h)(2) of the Act, both of which reference the refund procedures in section 1834(a)(18)(A) of the Act, address liability decisions made after assessing actual or expected knowledge, based on all the relevant facts pertaining to each particular denial.

The limitation on liability provision in section 1879 of the Act establishes a process for determining financial liability for certain denials of items or services. In the case of assigned DME that is subject to the prior authorization requirement established in this final rule, under section 1879(h) of the Act, a supplier is presumed to be financially liable for a claim denied if there is no prior authorization affirmation. The same holds true for non-assigned DME under section 1834(j)(4) of the Act. If the supplier collected any monies from the beneficiary for such denied items, the supplier is required to refund such monies. Under section 1879(a) of the Act, the determination of financial liability for certain categories of denied claims is based on actual or constructive knowledge that Medicare is not expected to cover or make payment for such denied items or services. In general, the supplier is held financially liable under section 1879 of the Act because it is expected to be familiar with Medicare coverage and payment requirements. However, as explained later in this section, under sections 1879(h) and 1834(a)(18) of the Act, liability may be shifted from the supplier to the beneficiary if the supplier delivers a valid ABN, Form CMS–R–131, to the beneficiary. Similarly, under section 1879(a) of the Act, if the supplier believes, for example, that an item may not be considered medically reasonable and necessary under section 1862(a)(1)(A) of the Act, the supplier may shift financial liability to the beneficiary by delivering a valid ABN to the beneficiary.

After promulgation of the prior authorization requirement through this final rule, CMS or its review contractors would presume that the supplier knew that Medicare would automatically deny the claim for which the supplier failed to request a prior authorization, per section 1834(a)(15) of the Act. However, CMS or its review contractors would generally presume that the Medicare beneficiary does not know, and cannot reasonably be expected to know, that Medicare will deny, or has denied, payment in advance under section 1834(a)(15) of the Act.

Under sections 1834(j)(4) and 1879(h)(2) of the Act, when a beneficiary receives an item or service and does not know that CMS or its review contractors may deny the claim based on an unmet prior authorization requirement, the supplier is financially liable for the denied claim and is obligated to refund any payments received from the beneficiary. In cases where the beneficiary insists on getting the item without the prior authorization decision or while the decision is pending, or in cases where the prior authorization decision is non-affirmed, the supplier must issue a valid ABN to the beneficiary, in order to shift liability to the beneficiary. If the beneficiary agrees to pay for the item when signing the ABN, liability rests with the beneficiary if Medicare does, in fact, deny the claim. The ABN notifies the beneficiary that an item usually covered by Medicare may not be paid for in this instance. When completing the ABN, the supplier must provide a clear reason why Medicare may deny payment. The ABN must not be used to bypass the prior authorization process, and existing policy prohibits routine ABN issuance. In order for the ABN to be considered valid, the ABN must be issued to the

beneficiary before the beneficiary receives the item or services.

Detailed requirements for valid ABN issuance can be found in Chapter 30 of the Medicare Claims Processing Manual (Internet Only Manual (IOM) Pub 100–04): *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c30.pdf*.

This section will be updated to provide standard language that suppliers must include on ABNs issued for items requiring prior authorization. If an ABN is not given to the beneficiary in the manner described in CMS' claims processing manual, financial liability for the denied claim will not be shifted to the beneficiary.

We did not receive any comments on this discussion of how CMS's liability policies apply to the prior authorization process and we are not making any changes.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act (PRA) of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In compliance with the PRA we solicited public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs). We note to readers that CMS is in compliance with the requirements of the PRA with respect to information collection requirements associated with the day-to-day medical review activities. The information collection requirements associated with day-to-day medical review activities are currently approved under OMB control number 0938–0969 and have an expiration date of July 31, 2018.

The base medical review information collection requirements assess the burden associated with the time and effort necessary for the provider and/or supplier of services to locate and obtain the supporting documentation for the Medicare claim and to forward the materials to the Medicare contractor for the medical review process. We note that the burden analysis for the prior authorization process proposed by this rule only addresses additional burdens created in excess of the standard medical review process utilized by CMS contractors and addressed in the base medical review information collection requirements. We will create a new information collection requirement package that is in addition to the current base medical review information collection requirement.

We are finalizing our proposal in § 414.234(c), that as a condition of payment for certain DMEPOS items frequently subject to unnecessary utilization, a prior authorization request must be submitted prior to the submission of a claim. As a condition of payment, program policies specify that certain documentation requirements be met prior to payment. Section 1833(e) of the Act states that no payment shall be made to any provider of services or other person unless there has been furnished such information as may be necessary in order to determine the amounts due such provider or other person for the period with respect to which the amounts are being paid or for any prior period. Section 1815(a) of the Act states that no such payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider for the period with respect to which the amounts are being paid or any prior period. We are not changing the documentation requirements. Prior authorization would require information to support a Medicare provisional payment decision earlier in the process, before the item is delivered. A prior authorization request would include evidence that the request for payment complies with applicable Medicare clinical documentation, coverage, coding, and payments rules. All documentation requirements specified in applicable policy would still apply. We note that it is a long standing expectation that supportive documentation be kept on file by affected providers/suppliers prior to furnishing a DMEPOS item.

This final rule does not add or change any current documentation requirements. However, we believe it will initially increase the time burden associated with collecting and submitting said documentation. The increase of time burden will vary depending on the volume of claims requiring prior authorization. Based on our previously described experience with the PMD demonstration, we similarly expect the time burden to ultimately decrease due to a decrease in utilization of the item(s) subject to prior authorization. Before or on the date in which this final rule is published, we will submit a new information collection request for OMB review and approval that will illustrate the new time burden associated with collecting and submitting prior authorization documentation.

We further note that the anticipated increase in cost associated with the collection and submission of the requested data is offset somewhat by the limited protection from future audits that is afforded to suppliers under this final rule. While the prior authorization program created by this final rule may share some select features with the PMD demonstration, they are disparate enough that we cannot quantify the cost reductions. We would need sufficient item-by-item historical prior authorization program data created by this final rule to perform the necessary calculations. Until the program is operational, we can only make this assertion based on our limited experience with the PMD demonstration.

We are finalizing the definition of unnecessary utilization as the furnishing of items or services that do not comply with one or more of Medicare's clinical documentation, coverage, coding, and payment rules. Specifically, and for the purpose of this final rule, an item frequently subject to unnecessary utilization is identified as having a high incidence of fraud, improper payments or unnecessary utilization in GAO or OIG reports or the CERT DME and/or DMEPOS Service Specific Report(s), has an average purchase fee of $1,000 or greater or an average rental fee schedule of $100 or greater, and is listed on the DMEPOS fee schedule.

This final rule implements prior authorization, a tool utilized by private sector health care payers to prevent unnecessary utilization of certain DMEPOS items. In 2014, the total utilization for all items listed in the Master List was over $1.6 billion. The Master List includes DMEPOS items frequently subject to unnecessary utilization meeting criteria described earlier in this final rule. Presence of an item(s) on the Master List would not automatically result in that item being subject to prior authorization. In order to balance provider and supplier burden

with our need to protect the Medicare program, we are finalizing our proposal to initially implement prior authorization for a subset of items on the Master List. This subset of items will be called the Required Prior Authorization List.

In 2014, there were over 2.3 million beneficiaries receiving an item from the Master List. Cost, utilization, and improper payment rates of items on the Master List vary greatly. It is important to note that not all items on the Master List have a known improper payment rate since their Master List inclusion may have been based on a 2007 or later OIG/GAO report and not the CERT DME and/or DMEPOS Service Specific Report(s). The CERT program develops improper payment rates for those items for which at least 30 claims are included in their sample. Consequently, DMEPOS items have an associated improper payment rate if at least 30 claims for that code were included in the CERT sample.

To best estimate the impact of this final rule within a range of programmatic activity, we isolated those items on the Master List that had an associated improper payment rate. Historically, the agency has focused its finite resources towards reducing the improper payment rate. We believe that we can best estimate the impact of this final rule using that approach.

We remind readers that items on the Master List are identified as those frequently subject to unnecessary utilization, have a high incidence of fraud, improper payments or unnecessary utilization in GAO or OIG reports and/or appear on the CERT DME and/or DMEPOS Service Specific Report(s), have an average purchase fee of $1,000 or greater or an average rental fee schedule of $100 or greater, and are listed on the DMEPOS fee schedule. The total number of items on the Master List is 135.

In order to determine what might be on the Required Prior Authorization List to estimate the burden of this final rule, we excluded PMDs from the Master List since they are currently subject to prior authorization under a CMS demonstration and thus not eligible to be selected from the Master List to the Required Prior Authorization List until the demonstration is completed. The remaining items were cross referenced against CERT DME and/or DMEPOS Service Specific Report(s) for an associated improper payment rate. We ranked the cross-referenced 20 items by average improper payment dollars per line. Using 2014 CERT data, we developed low, primary, and high estimates of potentially affected claims for each year for the first 10 years of the program.

To calculate our low estimate of affected claims, we focused on Master List items with the highest average improper payment dollars per line. For example, during the 2014 CERT reporting period, Medicare paid for the top three DMEPOS items on the Master List associated with the highest improper payment dollars per line nearly 7,500 times. We believe limiting prior authorization to the top three items results in a low programmatic activity compared to implementing prior authorization for all items in the Master List. Consequently we use 7,500 as our low estimate of potentially affected claims for our 10-year projection (see Table 6). We did not account for Medicare growth or ramp up activities of this program for our low estimate since we selected 7,500 to represent the minimum level of program activity regardless of other factors. Based on the 2014 CERT data, if we avoided 100 percent of payment errors for the top three items, we would realize the largest gain on investment. Again, it is important to note that the ranking could change every year since it is based on the acquired CERT sample and the highest average improper payment dollars.

To calculate the highest estimate of affected claims, we looked for the top 15 DMEPOS items on the Master List with the highest average improper payments dollars per line. These items were provided nearly 400,000 times. If we avoid 100 percent of improper payments for the top 15 Master List DMEPOS items with the highest average improper payment dollars per line, we realize a significantly lower gain on investment. Subjecting 15 items to prior authorization results in high programmatic activity, thus we used 500,000 as our highest estimate of affected claims for years 8 through 10 in our projections (Calendar Years (CY)s 2023 through 2025 Table 6). We believe 500,000 accounts for Medicare growth as well as the potential variability in ranking the highest average improper payment dollars per line of Master List DMEPOS items which may result in higher than 400,000 claim counts.

We derive our primary estimate (see Table 6) by averaging the low and high estimate of potential claims affected. Based on the 2014 CERT data, there were over 200,000 Medicare payments made for the top 14 Master List DMEPOS items with the highest average improper payment dollars per line. If we avoid 100 percent of improper payments for the top 14 Master List DMEPOS items with the highest improper payment dollars per line, we realize a moderate gain on investment. Subjecting 14 items to prior authorization results in moderate programmatic activity, thus we used 253,750 as our primary estimate of affected claims for years 8 through 10 in our projections (CYs 2023 through 2025 (see Table 6)). We believe the primary estimates accounts for Medicare growth as well as the potential variability in ranking the highest improper payment rates of Master List DMEPOS items which may result in higher than 200,000 claim counts.

We provide the preceding discussion to explain how we arrived at the estimated number of potential claims affected. However, we note that other factors may contribute to the number of claims ultimately affected. For example, future policies, regulations or response to stakeholder needs may be factored into the Master List item selection(s) and consequently impact the number of claims ultimately affected.

As noted earlier in this section, Table 6 lists our estimated range of potentially affected claims.

TABLE 6—RANGE OF ESTIMATES OF POTENTIALLY AFFECTED CLAIMS

Estimate	Number of potentially affected claims									
	CY 2016	CY 2017	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022	CY 2023	CY 2024	CY 2025
Low	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500
Primary	8,750	53,750	53,750	128,750	128,750	128,750	128,750	253,750	253,750	253,750
High	10,000	100,000	100,000	250,000	250,000	250,000	250,000	500,000	500,000	500,000

To account for the possibility of unlimited resubmissions, we multiplied the low, primary, and high estimates of potentially affected claims in Table 6 by 2.25. We selected 2.25 as the multiplier based on preliminary analysis of

resubmitted prior authorization requests in the CMS Prior Authorization of PMD Demonstration. We divided the total number of resubmissions by the total number of initial submissions and arrived at an average of 2.25. Once we multiplied the low, primary, and high estimates of potentially affected claims by 2.25, the value no longer reflects estimated individual affected claims. Rather, the value represents the estimated number of potential cases (potential claims plus resubmission(s) of associated prior authorization requests).

We note that it is a long standing expectation that supportive documentation be kept on file by affected providers/suppliers prior to furnishing a DMEPOS item. While it cannot be considered a usual and customary business practice as defined in the implementing regulations of the PRA at 5 CFR 1320.3(b)(2), we believe that the burden associated with maintaining the documentation represents a negligible increase above what is currently required for compliance with the base medical review information collection requirements approved under OMB control number 0938–0969. We also recognize that there will be an associated cost to the affected providers/suppliers when requiring full compliance with this expectation. This associated cost is incurred with the unlimited resubmission of prior authorization requests that this rule provides and the costs associated with documentation collection and submission during the prior authorization resubmission process. We believe this cost is justified in the case of unlimited resubmissions as the process affords the supplier more than one opportunity to receive a provisional affirmative prior authorization determination that ultimately could result in claim payment. In addition, the resubmission process allows for supplier education about the documentation requirements. We anticipate that as the supplier becomes more familiar with those requirements, the amount of resubmissions would decrease over time for that particular item or service as would the associated costs of documentation collection and submission. We further note, that by allowing an unlimited number of resubmissions, we ultimately reduce supplier burden as we expect that a fewer number of appeals will be pursued. We believe that the resubmission process would provide the supplier with an increased opportunity for claims to be paid; however, no data exists to validate this assertion so it is not assumed in the associated burden calculations.

Table 7 provides low, primary, and high estimates of potentially affected cases (claims and resubmissions of associated prior authorization requests). The average of the high estimate of potentially affected cases in years 1 through 3 is 157,500 ((22,500 + 225,000 + 225,000)/3) cases per year for the first 3 years.

TABLE 7—RANGE OF POTENTIALLY AFFECTED CASES

[Potential claims and resubmissions of associated prior authorization requests]

Estimate	Number of potentially affected claims									
	CY 2016	CY 2017	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022	CY 2023	CY 2024	CY 2025
Low	16,875	16,875	16,875	16,875	16,875	16,875	16,875	16,875	16,875	16,875
Primary	19,688	120,938	120,938	289,688	289,688	289,688	289,688	570,938	570,938	570,938
High	22,500	225,000	225,000	562,500	562,500	562,500	562,500	1,125,000	1,125,000	1,125,000

We estimate that the private sector's per-case time burden attributed to submitting documentation and associated clerical activities in support of a prior authorization request is equivalent to that of submitting documentation and clerical activities associated for prepayment review, which is 0.5 hours per submission. We apply this time burden estimate to initial submissions, resubmissions, and expedited requests (that is, affected cases). The total high estimated burden for the first year is 11,250 hours (22,500 × 0.5 hours) and the total high estimated burden per year for years 2 and 3 is 112,500 hours (225,000 × 0.5 hours). Table 8 lists the low, primary, and high estimated time burden associated with potentially affected cases.

TABLE 8—RANGE ESTIMATE OF INFORMATION COLLECTION TIME BURDEN IN HOURS

Estimate	Number of hours									
	CY 2016	CY 2017	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022	CY 2023	CY 2024	CY 2025
Low	8,437.50	8,437.50	8,437.50	8,437.50	8,437.50	8,437.50	8,437.50	8,437.50	8,437.50	8,437.50
Primary	9,843.75	60,468.75	60,468.75	144,843.75	144,843.75	144,843.75	144,843.75	285,468.75	285,468.75	285,468.75
High	11,250.00	112,500.00	112,500.00	281,250.00	281,250.00	281,250.00	281,250.00	562,500.00	562,500.00	562,500.00

Then, we multiply the time burden estimate to an average loaded hourly rate of $35.36 (mean hourly rate of $18.13 + fringe benefits) for the Medical Record and Health Information Technician classification [17] to equate the burden in dollars. The high time burden for the first year is 11,250 hours and multiplied by the hourly rate of $35.36, we arrive at a high cost estimate of $397,800. Using the same approach, the total estimated high cost per year for years 2 and 3 is $3,978,000. The average of the high estimate annual cost for years 1 through 3 is $2.8 million. Table 9, lists the range estimate of PRA burden in dollars. This impact is allocated across providers and suppliers nationwide.

[17] Bureau of Labor Statistics. Accessed February 20, 2015 at *http://www.bls.gov/oes/current/oes292071.htm.*

TABLE 9—RANGE ESTIMATE OF INFORMATION COLLECTION BURDEN IN DOLLARS

Estimate	PRA burden (in dollars)									
	CY 2016	CY 2017	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022	CY 2023	CY 2024	CY 2025
Low	298,350	298,350	298,350	298,350	298,350	298,350	298,350	298,350	298,350	298,350
Primary	348,075	2,138,175	2,138,175	5,121,675	5,121,675	5,121,675	5,121,675	10,094,175	10,094,175	10,094,175
High	397,800	3,978,000	3,978,000	3,978,000	9,945,000	9,945,000	9,945,000	19,890,000	19,890,000	19,890,000

We also estimate the cost of mailing medical records to be $5 per request for prior authorization. Some commenters questioned how we arrived at the $5 estimate cost for mailing medical records. Our estimation is based on the mailing costs of medical records for prepay review. However, many of the records are received via fax machines which have lower associated costs than traditional mail. Additionally, we offer methods of electronic submission of medical documentation to providers and suppliers who wish to use a less expensive alternative for sending in medical documents. Additional information is available on Medicare review contractor Web sites.

In instances when the supplier must first obtain the medical records from a health care provider, we estimate that the mailing costs are doubled ($10), as records are transferred from provider to supplier, and then to CMS or its contractors. We estimate that there are 22,500 cases (high estimate cases, see Table 7) for which the mailing costs could be doubled in the first year. Based on CMS' experience within the agency and Medicare medical review contractor feedback, it is reasonable to believe that less than half (11,250) of the medical records are mailed in. Therefore, we estimate the costs are $112,500 (11,250 x $10) for the first year. The total high estimated mailing cost for years 2 and 3 is $4,500,000, or $2,250,000 per year. Mailing costs for the CYs 2016 through 2018 average $3,037,500.

To summarize, based on the average of the high estimate of potentially affected claims for CYs 2016 through 2018 (Table 6), the information collection requirements discussed earlier in this section will affect an average of 70,000 claims in CYs 2016 through 2018. Please note that while we have provided data for 10 calendar years, our estimates are based off of the 3-year average of CYs 2016 through 2018. Three years is the maximum term of an OMB approval period for an information collection request. We estimate that the average 70,000 claims will have an associated prior authorization request submission 2.25 times resulting in an average of 157,500 cases. The total estimated average annual time burden for CYs 2016 through 18 is 78,750 hours per year at a cost of $2.8 million per year. After adding CYs 2016–2018 average mailing costs, the burden rises to $5.8 million per year.

We solicited public comment on our proposed review and cost time estimates. A summary of the comments and our responses follows.

Comment: Several commenters disagreed with the proposed review cost and time estimate believing that the estimates were too low. Some believed that the proposed review cost and time estimate may not be appropriate for certain items on the proposed Master List (that is, review of negative pressure wound therapy). Several commenters disagreed with the cost analysis for mailing the records. Some commenters stated that if the review time estimate included administrative support time, it was underestimated. Some commenters recommended including the cost of appeals.

Response: The Medicare Administrative Contractors (MACs) have experience conducting reviews and we based our time and cost estimates on their previous experience. We understand some reviews take longer than others; consequently, our estimates are averages. Suppliers have several options for submitting records. They may mail the document through postal service, they may submit them online through the MACs secure web portal or other secure electronic means, or they may fax records. We based our cost methodology on previous experience collecting medical records as well as the standard cost for a flat rate envelope for an average size medical record. As noted earlier, this final rule does not create new documentation requirements. We expect that any entity requesting CMS payment have on hand any required medical records to support their request for Medicare payment. Appeal rights are not affected by this final rule. Therefore, the cost of the appeal process is outside the scope of this final rule.

Comment: Several commenters sought clarification on who was going to be reviewing the prior authorization requests and recommended we use an independent contractor for reviews. A commenter expressed concerns that there is no mention of resources which will be employed to make a prior authorization decision.

Response: The MACs as well as other Medicare medical review contractors currently engage in review of beneficiary's medical records to support claims. The difference is that these activities are completed after the service/item/drug is delivered and after the claim is submitted for payment. Consequently, we can estimate required resources. With prior authorization, as in traditional medical review, clinicians will review the records. Reviewing clinicians include physicians, nurses, and therapists.

In response to public comments, we have re-evaluated the provided information, collection data, and explanation. We believe that the requirements expressed in this final rule meet the utility and clarity standards. We are finalizing the provisions in the Collection of Information Requirement section, as proposed.

IV. Regulatory Impact Analysis

A. Statement of Need

This final rule codifies section 1834(a)(15)(A) and (C) of the Act to monitor payments for certain DMEPOS items by creating a requirement for advance decision as a condition of payment. This new requirement aims to reduce the unnecessary utilization and the resulting overpayment for certain DMEPOS items.

B. Overall Impact

We have examined the impact of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (February 2, 2012), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 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). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). Since the effect of this final rule may redistribute more than $100 million in years 8 through 10 if the high estimates are realized, it is considered economically significant.

Per Executive Order 12866, we have prepared a regulatory impact analysis that, to the best of our ability, presents the costs and benefits of this final rule. The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.5 million to $38.5 million in any 1 year. For details see the Small Business Administration's (SBA) Web site at: *www.sba.gov/content/table-small-business-size-standards* (refer to the 62 sector). Individuals and states are not included in the definition of a small entity.

The RFA requires that we analyze regulatory options for small businesses and other entities. We prepare a regulatory flexibility analysis unless we certify that a rule would not have a significant economic impact on a substantial number of small entities. The analysis must include a justification concerning the reason action is being taken, the kinds and number of small entities that the rule affects, and an explanation of any meaningful options that achieve the objectives with less significant adverse economic impact on the small entities.

For purposes of the RFA, physicians, non-physician practitioners (NPPs), and suppliers, including independent diagnostic treatment facilities (IDTFs), are considered small businesses if they generate revenues of $11 million or less based on the SBA size standards. Approximately 95 percent of physicians are considered to be small entities. There are over 1 million physicians, other practitioners, and medical suppliers that receive Medicare payment under the physician fee schedule (PFS). Because we acknowledge that many of the affected entities are small entities, the analysis discussed throughout the preamble of this final rule constitutes our regulatory flexibility analysis for the remaining provisions and addresses comments received on these issues.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this final rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits on state, local, or tribal governments or on the private sector before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2015, that threshold is approximately $144 million. This final rule would not impose a mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of more than $144 million in any one year.

Executive Order 13132 establishes certain requirements that an agency must meet when it announces a final rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. Since this final rule does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

We have prepared the following analysis, which together with the information provided in the rest of this preamble, meets all assessment requirements. The analysis explains the rationale for and purposes of this final rule, details the costs and benefits of the rule, and presents the measures we would use to minimize the burden on small entities. We are unaware of any relevant federal rules that duplicate, overlap, or conflict with this final rule. The relevant sections of this final rule contain a description of significant alternatives if applicable.

Methodology: A number of factors affect this analysis. For instance, the number of Master List items selected to be subject to the prior authorization requirement is dependent on multiple factors. Consequently, we are proposing a range of estimates to illustrate various implementation scenarios, as described in section III. of this final rule.

In addition, as the DMEPOS community acclimates to using prior authorization as part of their billing practice, there may be greater systemic or other processing efficiencies to allow more extensive implementation.

Lastly, the overall economic impact of this provision on the health care sector is dependent on the number of claims affected. For the purpose of this narrative analysis, we use the ''primary'' estimate to project costs. However, Table 7 lists both the low and high estimated cost projections, as well as the primary cost estimate.

The values populating Table 10 were obtained from Table 9, Range Estimate of PRA Burden in Dollars (see section III. of this final rule) and Table 11, Medicare Cost, which can be found in following pages. Together, Tables 9 and 11 combine to convey the overall economic impact to the health sector, which is illustrated in Table 10 titled, Overall Economic Impact to the Health Sector.

Based on the estimate, the overall economic cost of this final rule is approximately $1.3 million in the first year. The 5 year cost is approximately $57 million and the 10 year cost is approximately $212 million, mostly driven by the assumed increased number of items subjected to prior authorization after the first year. Paperwork costs to private sector providers and an increase in Medicare spending to conduct reviews combine to create the financial impact. However, this impact is offset by some savings as described in Table 12. We believe there are likely to be other benefits and cost savings that result from the DMEPOS prior authorization requirement. However, many of those benefits are difficult to quantify. For instance, we expect to see savings in the form of reduced unnecessary utilization, fraud, waste, and abuse, including a reduction in improper Medicare FFS payments (note that not all improper payments are fraudulent).

We have provided the following budgetary cash impact possibilities based on the President's 2016 Budget baseline with an assumed January 1, 2016 effective date.

TABLE 10—OVERALL COST TO HEALTH SECTOR

[In dollars]

		Year 1	5 Years	10 Years
Private Sector Cost	Low Claim Estimation	298,350	1,491,750	2,938,500
	Primary Claim Estimation	348,075	14,867,775	55,393,650
	High Estimation	397,800	28,243,800	107,803,800
Medicare Cost	Low Claim Estimation	843,750	4,218,750	8,437,500
	Primary Claim Estimation	984,375	42,046,875	156,656,250
	High Claim Estimation	1,125,000	79,875,000	304,875,000
Total Cost to Health Sector	Low Claim Estimation	1,142,100	5,710,500	11,376,000
	Primary Claim Estimation	1,332,450	56,914,650	212,049,900
	High Claim Estimation	1,522,800	108,118,800	412,678,800

The definition of small entity in the RFA includes non-profit organizations. Per the RFA's use of the term, most suppliers and providers are small entities. Likewise, the vast majority of physician and nurse practitioner (NP) practices are considered small businesses according to the SBA's size standards, which define a small business as having total revenues of $11 million or less in any 1 year. While the economic costs and benefits of this final rule are substantial in the aggregate, the economic impact on individual entities would be relatively small. We estimate that 90 to 95 percent of DMEPOS suppliers and practitioners who order DMEPOS are small entities under the RFA definition. The rationale behind requiring prior authorization of covered DMEPOS items is to make sure the beneficiary's medical condition warrants the item of DMEPOS before the item is delivered.

The impact on DMEPOS suppliers could be significant, as the final rule changes their billing practices. We believe that the purpose of the statute and this final rule is to avoid unnecessary utilization of DMEPOS items, thus we do not view decreased revenues from items frequently subject to unnecessary utilization by DMEPOS suppliers to be a condition that we must mitigate. We believe that the effect on legitimate suppliers and practitioners would be minimal. Additionally, this final rule offers an additional protection to a supplier's cash flow as the supplier would know in advance if the Medicare requirements are met.

C. Anticipated Effects

1. Costs

a. Private Sector Costs

We do not believe that this final rule would significantly affect the number of legitimate claims submitted for items on the required prior authorization list. However, we do expect a decrease in the overall amount paid for DMEPOS items resulting from a reduction in unnecessary utilization of DMEPOS items requiring prior authorization.

In accordance with our explanation, we would select certain items from the Master List to require prior authorization by placing them on the Required List. As discussed previously, we have chosen a flexible approach that makes it difficult to specify the number of items on the Required List in advance. Similarly, it is not possible to specify the resulting numbers of affected claims and medical reviews in advance. Consequently, we are proposing a range of estimates to capture various possible scenarios.

If funded for the high estimation of potentially affected claims, we could grow the program and affect as many as 500,000 claims by years 8 through 10. This estimate accounts for initial prior authorization requests only.

Resubmissions after a non-affirmation decision is rendered on an initial request are not included in the high estimation of potential claims affected. If the program grew to impact as many as 500,000 claims, the potentially impacted cases (claims and resubmissions) total would be 1,125,000. This potential growth accounts for the large fiscal increase shown in the program impact analysis.

We estimate that the private sector's costs are associated with the per-case time burden attributed to submitting documentation and associated clerical activities in support of a prior authorization request. These costs are discussed in detail in section III. of this final rule (see Table 9). As noted in Table 9, we estimate that the private sector's average costs for years 1 through 3 would total $2.8 million.

b. Medicare Costs

Medicare would incur additional costs associated with processing the prior authorization requests. Applying the same logic previously described, we develop a range of potential costs that are dependent on the extent of implementation. We use the range of potentially affected cases (claims and resubmissions) in Table 7 and multiply it by $50, the estimated cost to review each request. The Medicare Administrative Contractors (MACs) have experience conducting reviews and we based our time and cost estimates on their previous experience. We understand some reviews take longer than others; consequently, our estimates are averages. Table 11 lists the cost range estimates.

TABLE 11—MEDICARE COST

Estimate	Cost (in dollars)									
	CY 2016	CY 2017	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022	CY 2023	CY 2024	CY 2025
Low	843,750	843,750	843,750	843,750	843,750	843,750	843,750	843,750	843,750	843,750
Primary	984,375	6,046,875	6,046,875	14,484,375	14,484,375	14,484,375	14,484,375	28,546,875	28,546,875	28,546,875
High	1,125,000	11,250,000	11,250,000	28,125,000	28,125,000	28,125,000	28,125,000	56,250,000	56,250,000	56,250,000

c. Beneficiary Costs

As discussed in the next section, we expect a reduction in the utilization of Medicare DMEPOS items when such utilization does not comply with one or more of Medicare's coverage, coding, and payment rules. Although these rules are designed to permit utilization that is medically necessary, DMEPOS items

that are not medically necessary may still provide convenience or usefulness for beneficiaries; any rule-induced loss of such convenience or usefulness constitutes a cost of the rule that we lack data to quantify.

2. Benefits and Transfers

We can anticipate benefits because we expect a reduction in the unnecessary utilization of those Medicare DMEPOS items subject to prior authorization. We will be closely monitoring utilization and billing practices. The benefits include a changed billing practice that also enhances the coordination of care for the beneficiary. For example, requiring prior authorization for certain items requires that the primary care provider and the supplier collaborate more frequently to order and deliver the most appropriate DMEPOS item meeting the needs of the beneficiary. Improper payments made because the practitioner did not order the DMEPOS, or because the practitioner did not evaluate the patient, would likely be reduced by the requirement that a supplier submit clinical documentation created by the practitioner as part of its prior authorization request.

We believe it is more reasonable to require practitioners and suppliers to adopt new practices for fewer items at a time, rather than institute large scale change all at once. In addition, during the ramp up of the program in year 1, we will be doing education and outreach. Consequently, we estimate a smaller volume of items in year 1.

Our Office of the Actuary has provided the following budgetary cash impact possibilities based on the President's 2016 Budget baseline with an assumed January 1, 2016 effective date. The impacts are specific to the three scenarios in our potentially affected claim range: The low, primary, and high estimation of potentially affected claims (see Table 6).

TABLE 12—CY BUDGETARY IMPACT (WITH MANAGED CARE) ESTIMATE IN MILLIONS

Type of scenario	Calendar year											
	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2016–2020 (5-year impact)	2016–2025 (10-year impact)
Scenario 1: Assume Low Number of Claims												
Number of Part B Claims	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	.....	.....
Part B Impacts:												
Direct Medicare Budgetary Savings (in millions) ..	−10	−10	−10	−10	−10	−10	−10	−10	−10	−10	−50	−100
Premium (Offset* (in millions)	0	0	0	0	0	0	0	0	0	0	0	0
Total Part B (in millions)	−10	−10	−10	−10	−10	−10	−10	−10	−10	−10	−50	−100
Scenario 2: Assume Primary Number of Claims												
Number of Part B Claims	8,750	53,750	53,750	128,750	128,750	128,750	128,750	253,750	253,750	253,750	.....	.....
Part B Impacts:												
Direct Medicare Budgetary Savings ($ in millions)	−10	−40	−60	−70	−80	−80	−80	−110	−120	−120	−260	−770
Premium Offset ($ in millions)	0	10	10	20	20	20	20	30	30	30	60	190
Total Part B ($ in millions)	−10	−30	−50	−50	−60	−60	−60	−80	−90	−90	−200	−580
Scenario 3: Assume High Number of Claims												
Number of Part B Claims	10,000	100,000	100,000	250,000	250,000	250,000	250,000	500,000	500,000	500,000	.....	.....
Part B Impacts:												
Direct Medicare Budgetary Savings ($ in millions)	−10	−50	−80	−100	−120	−120	−120	−150	−160	−160	−360	−1070
Premium Offset ($ in millions)	0	10	20	20	30	30	30	40	40	40	80	260
Total Part B ($ in millions)	−10	−40	−60	−80	−90	−90	−90	−110	−120	−120	−280	−810

Note: Premium offset is an expected change in premium resulting from the proposed rule.

D. Alternatives Considered

1. No Regulatory Action

As previously discussed, each item on the Master List is high cost and frequently subject to unnecessary utilization. In addition, each item has been either the subject of a previous OIG or GAO report or has appeared on a CERT DME and/or DMEPOS Service Specific Report(s) (2011 or later) of DMEPOS items with high improper payment rates. Together, utilization of items on the Master List accounted for $1.6 billion. The status quo is not a desirable alternative to this final rule because current payment practices have not affected unnecessary utilization appreciably. Accordingly, the economic impact of no regulatory action would result in the lack of recoupment of some or all associated projected improper payments. Evidence of this is found in the CERT improper payment rates and the associated projected improper payment amount for all DMEPOS, which despite trending downward, have remained high for the last several years (53.1 percent in 2014). By exercising our statutory authority to establish a prior authorization process that creates a Master List of DMEPOS high cost items known to be the subject of GAO/OIG reports and/or high improper payment rates, we hope to positively affect unnecessary utilization and improper payments for DMEPOS in general.

2. Defer to Medicare Administrative Contractors (MACs)

Another alternative we considered was to allow MACs processing Medicare claims to design safeguards that positively affect improper payment rates and unnecessary utilization. However, in recent years we have required MACs to create strategies aimed at reducing improper payment and over utilization. While MACs have complied with this requirement, we have not seen sufficient effect on the improper payment rate and over utilization. The reason is that MACs are limited in their resources and authority. Often unforeseen issues or statutory requirements cause the MACs to reprioritize their work and respond to CMS direction to focus on an issue not previously on their strategy. In addition, their current practices of pre-payment or post-payment manual medical reviews are costly, and thus are used on a very small percentage of claims. Both create burdens for the claim submitter. For example, in a pre-payment medical review, the claim submitter has already furnished the item or service. Payment is held until the claim submitter supplies the MAC with requested documentation supporting their request for payment. Submitters may be confused about the type of documents being requested and, as a result, submit incomplete documentation. The submitter has only one opportunity to submit the appropriate documentation, which if insufficient, will result in the submitter not receiving his or her payment. In post-payment reviews, the submitter has furnished the item or service and has received payment. Similar to pre-payment reviews, the submitter may be confused about the documents needed to support the payment. If the payment is denied, the MAC is obligated to recover the payment. Claim submitters have told us that returning payment, or requesting an appeal to defend the payment, is burdensome and costly.

By requiring documentation before the claim is submitted and before the item or service is furnished, the submitter and contractor are afforded unlimited opportunities to clarify requirements to receive a provisional affirmation decision. By addressing this process in advance of furnishing the item or service or submitting the claim, we believe there will be less items and/or services paid improperly and unnecessarily utilized, as well as less burden on providers.

3. Alternate Prior Authorization Program Strategies

Another alternative we considered in response to public comments was to subject 100 percent of the 135 items on the Master List to prior authorization at the same time rather than establishing a prior authorization program for a certain Master List item for a particular state or MAC jurisdiction.

Using 2013 data, as cited in footnote 4, this approach would impact 11 million beneficiaries and potentially 91,000 DME suppliers. If we looked at 2014 data per footnote 5, the impact of implementing prior authorization for 135 items on the Master List would affect 10 million beneficiaries and potentially 90,000 suppliers. We recognize that an impact of this magnitude would allow the DMEPOS community little time to alter current business practices and adjust to the collection and submission requirements of the prior authorization process. Furthermore, we believe that subjecting all of the 135 items on the Master List to prior authorization would maximize both administrative and provider burden alike due to the sheer volume of items and suppliers affected.

In addition to maximizing supplier and administrative burden, we believe this approach could potentially create beneficiary access to care issues. By utilizing prior authorization for all 135 items on the Master List at the same time, we believe that our ability to suspend, cease or make adjustments to the prior authorization process would be hampered by the volume of items and affected suppliers. This could lead to a delay in processing prior authorization requests and result in beneficiaries waiting for reasonable and medically necessary DMEPOS items they would otherwise receive. In addition, we believe that establishing prior authorization for select items on the Master List rather than all 135 items on the Master List allows us to monitor and balance programmatic activity with return on investment while safeguarding program integrity and beneficiary access to care.

We recognize that DMEPOS suppliers may have some difficulty tracking what items are on the Required Prior authorization List versus what items are on the Master List, given that changes could happen frequently. However, we believe two separate lists will maximize flexibility and allow us to be as responsive as possible to suppliers' and beneficiaries' concerns.

E. Accounting Statement and Table

As required by OMB Circular A4 (available at *http://www.whitehouse.gov/omb/circulars_default/*), in Table 13 (Accounting Statement), we have prepared an accounting statement showing the estimated expenditures associated with this final rule.

TABLE 13—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS, BENEFITS, AND COSTS

Category	Primary estimate	Low estimate	High estimate	Units		
				Year dollars	Discount rate	Period covered
Transfers						
Annualized Monetized ($million/year)	53.5 56.0	10.0 10.0	74.7 78.3	2015 2015	7% 3%	2016–2025 2015–2025
	Savings to the Medicare program due to the reduced unnecessary utilization, fraud, waste, and abuse.					
Costs						
Annualized Monetized * ($million/year)	4.9 5.3	0.3 0.3	8.9 9.6	2015 2015	7% 3%	2016–2025 2016–2025
Annualized Monetized ** ($million/year) ..	13.9 14.9	0.8 0.8	27.0 29.0	2015 2015	7% 3%	2016–2025 2016–2025

Notes

* These costs are associated with the private sector paperwork.

** These costs are associated with the processing the prior authorization requests for Medicare.

F. Conclusion

The analysis in the previous sections, together with the remainder of this preamble, provides our Regulatory Flexibility Analysis. In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 414

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

■ 1. The authority citation for part 405 continues to read as follows:

Authority: Secs. 205(a), 1102, 1861, 1862(a), 1869, 1871, 1874, 1881, and 1886(k) of the Social Security Act (42 U.S.C. 405(a), 1302, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr and 1395ww(k)), and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

■ 2. Section 405.926 is amended by adding paragraph (t) to read as follows:

§ 405.926 Actions that are not initial determinations.

* * * * *

(t) A contractor's prior authorization determination related to coverage of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS).

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

■ 1. The authority citation for part 414 continues to read as follows:

Authority: Secs. 1102, 1871, and 1881(b)(1) of the Social Security Act (42 U.S.C.1302, 1395hh, and 1395rr(b)(1)).

■ 2. Section 414.234 is added to subpart D to read as follows:

§ 414.234 Prior authorization for items frequently subject to unnecessary utilization.

(a) *Definitions.* For the purpose of this section, the following definitions apply:

Prior authorization is a process through which a request for provisional affirmation of coverage is submitted to CMS or its contractors for review before the item is furnished to the beneficiary and before the claim is submitted for processing.

Provisional affirmation is a preliminary finding that a future claim meets Medicare's coverage, coding, and payment rules.

Unnecessary utilization means the furnishing of items that do not comply with one or more of Medicare's coverage, coding, and payment rules.

(b) *Master list of items frequently subject to unnecessary utilization.* (1) The Master List of Items Frequently Subject to Unnecessary Utilization includes items listed on the Durable Medical Equipment, Prosthetics, Orthotics, and Supplies fee schedule with an average purchase fee of $1,000 (adjusted annually for inflation using consumer price index for all urban consumers (CPI–U)) or greater or an average rental fee schedule of $100 (adjusted annually for inflation using CPI–U) or greater that also meet one of the following two criteria:

(i) The item has been identified as having a high rate of fraud or unnecessary utilization in a report that is national in scope from 2007 or later published by any of the following:

(A) The Office of Inspector General (OIG).

(B) The General Accountability Office (GAO).

(ii) The item is listed in the 2011 or later Comprehensive Error Rate Testing (CERT) program's Annual Medicare Fee-For-Service (FFS) Improper Payment Rate Report DME and/or DMEPOS Service Specific Report(s).

(2) The Master List of DMEPOS Items Frequently Subject to Unnecessary Utilization is self-updating annually and is published in the **Federal Register**.

(3) DMEPOS items identified as having a high rate of fraud or unnecessary utilization in any of the following reports that are national in scope and meeting the payment threshold criteria set forth in paragraph (b)(1) of this section are added to the Master List:

(i) OIG reports published after 2015.

(ii) GAO reports published after 2015.

(iii) CERT program's Annual Medicare FFS Improper Payment Rate Report DME and/or DMEPOS Service Specific Report(s) published after 2015, also referred to as the Comprehensive Error Rate Testing (CERT) program's Annual Medicare FFS Improper Payment Rate Report DME Service Specific Report(s).

(4) Items remain on the Master List for 10 years from the date the item was added to the Master List.

(5) Items that are discontinued or are no longer covered by Medicare are removed from the Master List.

(6) An item is removed from the list if the purchase amount drops below the payment threshold (an average purchase fee of $1,000 or greater or an average monthly rental fee schedule of $100 or greater).

(7) An item is removed from the Master List and replaced by its equivalent when the Healthcare Common Procedure Coding System (HCPCS) code representing the item has been discontinued and cross-walked to an equivalent item.

(c) *Condition of payment*—(1) *Items requiring prior authorization.* CMS publishes in the **Federal Register** and posts on the CMS Prior Authorization Web site a list of items, the Required Prior Authorization List, that require prior authorization as a condition of payment.

(i) The Required Prior Authorization List specified in paragraph (c)(1) of this section is selected from the Master List of Items Frequently Subject to Unnecessary Utilization (as described in paragraph (b) of this section). CMS may consider factors such as geographic location, item utilization or cost, system capabilities, administrative burden, emerging trends, vulnerabilities identified in official agency reports, or other data analysis.

(ii) CMS may elect to limit the prior authorization requirement to a particular region of the country if claims data analysis shows that unnecessary utilization of the selected item(s) is concentrated in a particular region.

(iii) The Required Prior Authorization List is effective no less than 60 days after publication and posting.

(2) *Denial of claims.* (i) CMS or its contractors denies a claim for an item that requires prior authorization if the claim has not received a provisional affirmation.

(ii) Claims receiving a provisional affirmation may be denied based on either of the following:

(A) Technical requirements that can only be evaluated after the claim has been submitted for formal processing.

(B) Information not available at the time of a prior authorization request.

(d) *Submission of prior authorization requests.* A prior authorization request must do the following:

(1) Include all relevant documentation necessary to show that the item meets

applicable Medicare coverage, coding, and payment rules, including all of the following:

(i) Order.

(ii) Relevant information from the beneficiary's medical record.

(iii) Relevant supplier produced documentation.

(2) Be submitted before the item is furnished to the beneficiary and before the claim is submitted for processing.

(e) *Review of prior authorization requests.* (1) After receipt of a prior authorization request, CMS or its contractor reviews the prior authorization request for compliance with applicable Medicare coverage, coding, and payment rules.

(2) If applicable Medicare coverage, coding, and payment rules are met, CMS or its contractor issues a provisional affirmation to the requester.

(3)(i) If applicable Medicare coverage, coding, and payment rules are not met, CMS or its contractor issues a non-affirmation decision to the requester.

(ii) If the requester receives a non-affirmation decision, the requester may resubmit a prior authorization request before the item is furnished to the beneficiary and before the claim is submitted for processing.

(4) *Expedited reviews.* (i) A prior authorization request for an expedited review must include documentation that shows that processing a prior authorization request using a standard timeline for review could seriously jeopardize the life or health of the beneficiary or the beneficiary's ability to regain maximum function.

(ii) If CMS or its contractor agrees that processing a prior authorization request using a standard timeline for review could seriously jeopardize the life or health of the beneficiary or the beneficiary's ability to regain maximum function, then CMS or its contractor expedites the review of the prior authorization request and communicates the decision following the receipt of all applicable Medicare required documentation.

(f) *Suspension of prior authorization requests.* (1) CMS may suspend prior authorization requirements generally or for a particular item or items at any time and without undertaking rulemaking.

(2) CMS provides notification of the suspension of the prior authorization requirements via—

(i) **Federal Register** notice; and

(ii) Posting on the CMS prior authorization Web site.

Dated: November 2, 2015.

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: November 20, 2015.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2015–32506 Filed 12–29–15; 8:45 am]

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Part III

Securities and Exchange Commission

Notice of Filing of a Proposed Rule Change Consisting of Proposed Amendments to Rule G–37, on Political Contributions and Prohibitions on Municipal Securities Business, Rule G–8, on Books and Records, Rule G–9, on Preservation of Records, and Forms G–37 and G–37x; Notices

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76763; File No. SR–MSRB–2015–14]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Proposed Amendments to Rule G–37, on Political Contributions and Prohibitions on Municipal Securities Business, Rule G–8, on Books and Records, Rule G–9, on Preservation of Records, and Forms G–37 and G–37x

December 23, 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, the Municipal Securities Rulemaking Board (the ''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. 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 MSRB filed with the Commission a proposed rule change consisting of proposed amendments to Rule G–37, on political contributions and prohibitions on municipal securities business, Rule G–8, on books and records to be made by brokers, dealers, municipal securities dealers, and municipal advisors, Rule G–9, on preservation of records, and Forms G–37 and G–37x (the ''proposed rule change''). The MSRB requested that the proposed rule change be approved with an effective date to be announced by the MSRB in a regulatory notice published no later than two months following the Commission approval date, which effective date shall be no sooner than six months following publication of the regulatory notice and no later than one year following the Commission approval date; provided, however, that any prohibition under Rule G–37 already in effect before the effective date of the proposed rule change shall be of the scope, and continue for the length of time, provided under Rule G–37 as in effect at the time of the contribution that resulted in such prohibition.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2015-Filings.aspx,* at the MSRB'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 MSRB 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 MSRB 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 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'') amended Section 15B of the Exchange Act [3] to provide for the regulation by the Commission and the MSRB of municipal advisors and to grant the MSRB certain authority to protect municipal entities and obligated persons.[4] The Dodd-Frank Act establishes a federal regulatory regime that requires municipal advisors to register with the Commission [5] and prohibits municipal advisors from engaging in any fraudulent, deceptive, or manipulative act or practice.[6] The Dodd-Frank Act also grants the MSRB broad rulemaking authority over municipal advisors and municipal advisory activities.[7]

As charged by Congress, the MSRB is in the process of developing a comprehensive regulatory framework for municipal advisors and their associated persons, including the proposed amendments to Rule G–37.[8] The proposed rule change would extend to municipal advisors through targeted amendments to Rule G–37 the regulatory policies in Rule G–37 that address ''pay to play'' practices and the appearance thereof. ''Pay to play'' practices typically involve a person or an entity making cash or in-kind political contributions (or soliciting or coordinating others to make such contributions) to help finance the election campaigns of state or local officials or bond ballot initiatives as a *quid pro quo* for the receipt of government contracts. The proposed rule change would further the purposes of the Exchange Act, as amended by the Dodd-Frank Act, by addressing an area of potential corruption, or appearance of corruption, in connection with the awarding of municipal advisory business, which impedes a free and open market in municipal securities and may harm investors, issuers, municipal entities and obligated persons.

Such practices among municipal advisors create conflicts of interest and give rise to circumstances suggesting *quid pro quo* corruption involving public officials of municipal entities resulting from such conflicted interests and the receipt of political contributions. In the worst cases, such practices involve the actual corruption of public officials of municipal entities. Even if actual *quid pro quo* corruption does not occur, the appearance of *quid pro quo* corruption in the awarding of municipal advisory business (or municipal securities business or engagements to provide investment advisory services when a municipal advisor solicits on behalf of brokers, dealers or municipal securities dealers (''dealers'') or investment advisers) may be as damaging to the integrity of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78*o*–4.

[4] Pub. L. 111–203, 124 Stat. 1376 (2010).

[5] *See* Section 15B(a)(1)(B) of the Exchange Act (15 U.S.C. 78*o*–4(a)(1)(B)).

[6] *See* Section 15B(a)(5) of the Exchange Act (15 U.S.C. 78*o*–4(a)(5)).

[7] *See* Section 15B(b)(2) of the Exchange Act (15 U.S.C. 78*o*–4(b)(2)).

[8] In furtherance of this framework, the MSRB adopted Rule G–44 regarding the supervisory and compliance obligations of municipal advisors. *See* Release No. 34–73415 (October 23, 2014), 79 FR 64423 (October 29, 2014) (File No. SR–MSRB–2014–06) (SEC order approving Rule G–44). The MSRB also adopted amendments to Rule G–20, on gifts, gratuities and non-cash compensation, to extend provisions of the rule to municipal advisors and Rule G–3 to establish registration and professional qualification requirements for municipal advisors. *See* Release No. 34–76381 (November 6, 2015), 80 FR 70271 (November 13, 2015) (File No. SR–MSRB–2015–09) (SEC order approving amendments to Rule G–20 on gifts, gratuities and non-cash compensation); and Release No. 34–74384 (February 26, 2015), 80 FR 11706 (March 4, 2015) (File No. SR–MSRB–2014–08) (SEC order approving registration and professional qualification requirements for municipal advisor representatives and municipal advisor principals) (''Order Approving MA Qualification Requirements''). The MSRB also proposed Rule G–42, regarding duties of non-solicitor municipal advisors. *See* Release No. 34–74860 (May 4, 2015), 80 FR 26752 (May 8, 2015) (File No. SR–MSRB–2015–03) (notice of filing and request for comment) (''Proposed Rule G–42 Filing''); Release No. 34–75737 (August 19, 2015), 80 FR 51645 (August 25, 2015) (notice of filing of Amendment No. 1 and request for comment); and Release No. 34–76420 (November 10, 2015) 80 FR 71858 (November 17, 2015) (File No. SR–MSRB–2015–03) (notice of filing of Amendment No. 2 and request for comment).

municipal securities market as actual *quid pro quo* corruption. Further, the appearance may breed actual *quid pro quo* corruption as municipal advisors may feel a need to make *quid pro quo* political contributions in order to be considered a candidate for the award of business that they believe will only be awarded to contributors.[9] Similarly, public officials may feel the need to engage in *quid pro quo* corruption in order to avoid a financial disadvantage to their campaigns as compared to other officials they believe engage in such practices. Even in the absence of actual *quid pro quo* corruption, the mere appearance of such corruption stifles and creates artificial barriers to competition for municipal advisors that believe that ''pay to play'' practices are a prerequisite to being awarded municipal advisory business (or municipal securities business or engagements to provide investment advisory services for broker, dealer, municipal securities dealer or investment adviser clients of a municipal advisor soliciting such business on behalf of clients) but are unwilling or unable to engage in such practices.

''Pay to play'' practices are rarely explicit: Participants typically do not let it be known that contributions or payments are made or accepted for the purpose of influencing the selection of a municipal advisor (or dealer, municipal advisor or investment adviser on behalf of which a municipal advisor acts as a solicitor).[10] Nonetheless, as discussed *infra,*[11] numerous developments in recent years have led the MSRB to conclude that, at least in some instances, the awarding of municipal advisory business (or municipal securities business or engagements to provide investment advisory services when a municipal advisor solicits on behalf of dealers or investment advisers) has been influenced, or has appeared to have been influenced, by ''pay to play'' practices.

In the Board's view, continued ''pay to play'' practices by professionals seeking or engaging in municipal advisory business (including municipal advisors soliciting municipal entities on behalf of dealers, municipal advisors and investment advisers) and the awarding of business by conflicted officials erodes public trust and confidence in the fairness of the municipal securities market, impedes a free and open market in municipal securities, may damage the integrity of the market, and may increase costs borne by municipal entities, issuers, obligated persons and investors. The MSRB believes that extending the policies embodied in Rule G–37 to municipal advisors through targeted amendments to Rule G–37 will help ensure common standards for dealers and municipal advisors, who operate in the same market, and frequently with the same clients.

Rule G–37

In the years preceding the MSRB's adoption of Rule G–37, widespread reports regarding the existence of ''pay to play'' practices had fueled industry, regulatory and public concerns, calling into question the integrity, fairness, and sound operation of the municipal securities market.[12] When proposing Rule G–37 in 1994, the Board believed, based on the Board's review of comment letters and other information, that there were ''numerous instances in which dealers have been awarded municipal securities business based on their political contributions.''[13] Moreover, in the Board's view, even when impropriety had not occurred:

> political contributions create a potential conflict of interest for issuers, or at the very least the appearance of a conflict, when dealers make contributions to officials responsible for, or capable of influencing the outcome of, the awarding of municipal securities business and then are awarded business by issuers associated with these officials.[14]

The problems associated with ''pay to play'' practices undermined investor confidence in the municipal securities market, which was essential to the liquidity and capital-raising ability of the market.[15] Further, such practices stifled and created artificial barriers to competition, thereby harming investors and the public interest and increasing market costs associated with the municipal securities business.[16] In light of these concerns, the Board determined that regulatory action was necessary to protect investors and maintain the integrity of the municipal securities market.[17] In approving Rule G–37 in 1994, the Commission affirmed that the rule was adopted ''to address the real as well as perceived abuses resulting from 'pay to play' practices in the municipal securities market.''[18] The Commission also noted that ''[Rule G–37] represents a balanced response to allegations of corruption in the municipal securities market.''[19]

Current Rule G–37 is a comprehensive regulatory regime composed of several separate and mutually reinforcing requirements for dealers. Chief among them are: Limitations on business activities that are triggered by the making of certain political contributions; limitations on solicitation and coordination of political contributions; and disclosure and recordkeeping regarding political contributions and municipal securities business.

This regime is widely recognized as having significantly curbed ''pay to play'' practices and the appearance of such practices in the municipal securities market.[20] Rule G–37 also has been used as a model by various federal regulators to create ''pay to play'' regulations in other segments of the financial services industry. Pursuant to the Advisers Act,[21] the SEC adopted Rule 206(4)–5 (the ''IA Pay to Play Rule''), which applies to investment advisers and political contributions.[22] The Commodity Futures Trading Commission subsequently adopted Rule 23.451, a rule regarding swap dealers

[9] Rule G–37 was first adopted in the wake of similar dealer concerns in the municipal securities market. *See Blount* v. *SEC,* 61 F.3d 938, 945–946 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1119 (1996) (''*Blount*'') citing Thomas T. Vogel Jr., *Politicians Are Mobilizing to Derail Ban on Muni Underwriters,* Wall St. J., December 27, 1993, (reporting about some officials rallying support for a boycott of firms that vowed to halt municipal campaign giving); John M. Doyle, *Muni Bond Market Faces Scrutiny Allegations Include Influence Peddling,* Cincinnati Post, March 1, 1994 (''Of primary concern to most reformers is the practice of 'pay to play,' the belief that political contributions by firms are necessary to compete for muni bond underwriting business''); John D. Cummins, *Blount* v. *SEC: An End for Pay-to-Play,* Bond Buyer, August 21, 1995 (noting that support for ''pay to play'' reform ''grew out of a desire to end the perceived abuses'' as well as ''individual bankers who were simply tired of writing checks to politicians'').

[10] *See Blount,* 61 F.3d at 945 (''While the risk of corruption is obvious and substantial, actors in this field are presumably shrewd enough to structure their relations rather indirectly. . . .''); *id.* (''[N]o smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.'').

[11] *See infra,* nn. 99–102.

[12] *See* Release No. 34–33868 (April 7, 1994), 59 FR 17621, 17623 (April 13, 1994) (File No. SR–MSRB–94–02) (''Rule G–37 Approval Order'').

[13] *See* Release No. 34–33482 (January 14, 1994), 59 FR 3389, 3390 (January 21, 1994) (File No. SR–MSRB–94–02) (''Notice of Proposed Rule G–37'').

[14] *See id.* at 3390.

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See* Rule G–37 Approval Order, at 17624.

[19] *Id.* at 17628.

[20] *See* Release No. IA–3043 (July 1, 2010), 75 FR 41018, at 41020, 41026–41027 (July 14, 2010) (File No. S7–18–09) (SEC order adopting a rule regarding political contributions made by investment advisers pursuant to the Investment Advisers Act of 1940 (''Advisers Act''), (''Order Adopting IA Pay to Play Rule'')); *id.,* at n. 101 and accompanying text; comment letter from Sanchez, *infra,* n. 113; comment letter from SIFMA, *infra,* n. 113.

[21] *See* 15 U.S.C. 80b–1 *et seq.*

[22] 17 CFR 275.206(4)–5.

and political contributions, (the ''Swap Dealer Rule''),[23] pursuant to the Commodity Exchange Act.[24]

Rule G–37 currently applies to dealers in the following respects. Rule G–37(b) prohibits dealers from engaging in municipal securities business with an issuer within two years after a triggering contribution to an official of such issuer is made by: (i) The dealer; (ii) any person who is a municipal finance professional (''MFP'') of the dealer; or (iii) any political action committee (''PAC'') controlled by either the dealer or any MFP of the dealer (the ''ban on municipal securities business'').[25] Under the principal exclusion to the ban on municipal securities business, provided in Rule G–37(b), a contribution will not trigger a ban on municipal securities business if made by an MFP to an official for whom the MFP is entitled to vote, if such contribution, together with any other contributions made by the MFP to the official, do not exceed $250 per election (a ''*de minimis* contribution''). There is no *de minimis* exclusion for a contribution to an official for whom an MFP is not entitled to vote.

Current Rule G–37(c)(i) prohibits dealers and their MFPs from soliciting or coordinating contributions to an official of an issuer with which the dealer is engaging or seeking to engage in municipal securities business. Rule G–37(c)(ii) prohibits dealers and certain of their MFPs [26] from soliciting or coordinating payments to a political party of a state or locality where the dealer is engaging or seeking to engage in municipal securities business. Rule G–37(d) is an anti-circumvention provision prohibiting dealers and their MFPs from, directly or indirectly, through any person or means, doing any act that would result in a violation of section (b) or (c) of the rule. Rule G–37(e) requires dealers to disclose to the MSRB, for public dissemination, certain information related to their contributions and their municipal securities business.[27]

Currently, Rule G–37 also applies to certain activities of dealers that are now defined as municipal advisory activities under the Exchange Act and Exchange Act Rule 15Ba1–1(e).[28] Specifically, Rule G–37 defines as a type of MFP a person ''primarily engaged in municipal securities representative activities'' other than sales with natural persons.[29] Such municipal securities representative activities may include the provision of ''financial advisory or consultant services for issuers in connection with the issuance of municipal securities.'' [30] Most, and perhaps all, of these financial advisory and consultant services are also municipal advisory activities under Section 15B(e)(4) of the Exchange Act [31] and the SEC Final Rule. Moreover, currently, under Rule G–37, if a ban on municipal securities business is triggered, the ban encompasses the dealer's provision of those same financial advisory and consultant services. Current Rule G–37 applies equally to dealers that are also municipal advisors (''dealer-municipal advisors''). However, Rule G–37 does not currently apply in any respect to any municipal advisor that is not also a dealer (a ''non-dealer municipal advisor.'')

Proposed Amendments to Rule G–37

In summary, the proposed amendments to Rule G–37 would extend the core standards under Rule G–37 to municipal advisors by:

- Subject to exceptions, prohibiting a municipal advisor from engaging in ''municipal advisory business'' [32] with a municipal entity for two years following the making of a contribution to certain officials of the municipal entity by the municipal advisor, a ''municipal advisor professional'' [33] (or ''MAP'') of the municipal advisor, or a PAC controlled by the municipal advisor or an MAP (a ''ban on municipal advisory business'');
- prohibiting municipal advisors and MAPs from soliciting contributions, or coordinating contributions, to certain officials of a municipal entity with which the municipal advisor is engaging or seeking to engage in municipal advisory business;
- requiring a ''nexus'' between a contribution and the ability of the official to influence the awarding of business to the municipal advisor (or the dealer, municipal advisor or investment adviser clients of a defined ''municipal advisor third-party solicitor'');[34]
- prohibiting municipal advisors and certain MAPs from soliciting payments, or coordinating payments, to political parties of states and localities with which the municipal advisor is engaging in, or seeking to engage in, municipal advisory business;
- prohibiting municipal advisors and MAPs from committing indirect violations of proposed amended Rule G–37;
- requiring quarterly disclosures to the MSRB of certain contributions and related information;
- providing for certain exemptions from a ban on municipal advisory business; and
- extending applicable interpretive guidance under Rule G–37 to municipal advisors.

In addition, subject to exceptions, the proposed amendments would prohibit a dealer or municipal advisor from engaging in municipal securities business or municipal advisory business, as applicable, with a municipal entity for two years following the making of a contribution to certain officials of the municipal entity by a municipal advisor third-party solicitor engaged by the dealer or municipal advisor, an MAP of such municipal advisor third-party solicitor, or a PAC controlled by the municipal advisor third-party solicitor or an MAP of the municipal advisor third-party solicitor. The proposed amendments would also subject a dealer-municipal advisor to a ''cross-ban'' on municipal securities business, municipal advisory business,

[23] 17 CFR 23.451.

[24] *See* Commodity Exchange Act (''CEA''), 7 U.S.C. 1 *et seq.*

[25] Hereinafter, a contribution that triggers a ban on municipal securities business, or, as discussed *infra,* municipal advisory business, or both, is a ''triggering contribution.''

[26] MFPs as described in current paragraphs (A) through (C) of current Rule G–37(g)(iv) are subject to the prohibition in Rule G–37(c)(ii). (Paragraph (A) refers to an associated person primarily engaged in municipal securities representative activities, paragraph (B), to an associated person who solicits municipal securities business, and paragraph (C), to an associated person who is both a municipal securities principal or sales principal and a supervisor of the personnel described in paragraph (A) or (B)).

[27] The MSRB makes the information that dealers are required to disclose under Rule G–37(e) available to the public for inspection on the MSRB's Electronic Municipal Market Access (EMMA®) Web site.

[28] 17 CFR 240.15Ba1–1(e). *See generally,* 17 CFR 240.15Ba1–1 to 17 CFR 240.15Ba1–8 and related rules (collectively, ''SEC Final Rule'') (providing for the registration of municipal advisors); Release No. 34–70462 (September 20, 2013), 78 FR 67467, at 67469 (November 12, 2013) (File No. S7–45–10) (''Order Adopting SEC Final Rule'').

[29] *See* Rule G–37(g)(iv)(A).

[30] Rule G–3(a)(i)(A)(2); *see* Rule G–37(g)(iv) (providing that MFP means, under paragraph (A), ''any associated person primarily engaged in municipal securities representative activities, as defined in rule G–3(a)(i), provided, however, that sales activities with natural persons shall not be considered to be municipal securities representative activities for purposes of . . . subparagraph (A)'').

[31] *See* 15 U.S.C. 78*o*–4(e)(4).

[32] The term ''municipal advisory business'' is defined in proposed Rule G–37(g)(ix) and discussed *infra.*

[33] The proposed definition of ''municipal advisor professional'' closely parallels the definition of municipal finance professional in current Rule G–37(g)(iv) and proposed Rule G–37(g)(ii), and is discussed *infra.*

[34] *See* discussion in ''Municipal Advisor Third-Party Solicitors,'' *infra.* The new term ''municipal advisor third-party solicitor'' is defined in proposed Rule G–37(g)(x).

or both municipal securities business and municipal advisory business, consistent with the type of business the award of which can be influenced by the official to whom the contribution was made.

The discussion of the proposed rule change begins with the proposed amendments to expand the purpose and scope of Rule G–37 as set forth in proposed section (a). This is followed by a discussion of the defined terms ''municipal advisor third-party solicitor,'' ''municipal financial professional'' and ''municipal advisor professional'' [35] as an understanding of these defined terms and the treatment under the proposed rule change of persons that fall within these definitions is fundamental to understanding the scope and operation of the subsequent sections of proposed amended Rule G–37. Thereafter, the proposed amendments are discussed in order of the sections of the rule, beginning with a discussion of the proposed amendments to section (b), regarding bans on business.

Purpose Section

Currently, Rule G–37(a) describes the purpose and intent of Rule G–37, which includes the protection of investors and the public interest. It further describes the key mechanisms through which the rule aims to achieve its purposes: (i) A ban on municipal securities business following the making of a triggering contribution to an official of an issuer; and (ii) the public disclosure of information regarding dealers' political contributions and municipal securities business.

The proposed amendments would modify section (a) to include reference to municipal advisory business and reflect that a ban on business and the public disclosure requirements would apply to both dealers and municipal advisors. The proposed amendments also would expand the scope of the purpose to ensure that the high standards and integrity of the ''municipal securities market'' (instead of the ''municipal securities industry'') are maintained. In addition, in section (a) and throughout the rule, the proposed defined term ''municipal entity'' [36] would be used in lieu of the term ''issuer,'' and, the term ''dealer'' would be defined to include collectively, for purposes of the rule, brokers, dealers and municipal securities dealers. With these proposed amendments to section (a), the proposed rule change makes clear that proposed amended Rule G–37 is intended to apply to all dealers and all municipal advisors (collectively ''regulated entities'').

The proposed amendments to section (a) also would add ''municipal entities'' and ''obligated persons'' [37] as parties that the rule would be intended to protect, which reflects the scope of the MSRB's broadened statutory charge under the Dodd-Frank Act.[38] Although, by definition, obligated persons are not in that capacity issuers of municipal securities, at times officials who are the recipients of contributions may have influence in the selection of a dealer, municipal advisor or investment adviser in a matter in which an obligated person has financial obligations.

Municipal Advisor Third-Party Solicitors

Municipal advisors that undertake a solicitation of a municipal entity on behalf of a third-party dealer, municipal advisor or investment adviser engage in a distinct type of municipal advisory business. To extend the policies contained in Rule G–37 to these municipal advisors, the proposed amendments to Rule G–37 would add a new defined term, ''municipal advisor third-party solicitor'' in proposed Rule G–37(g)(x). A municipal advisor third-party solicitor would be defined in proposed Rule G–37(g)(x) as a municipal advisor that:

> Is currently soliciting a municipal entity, is engaged to solicit a municipal entity, or is seeking to be engaged to solicit a municipal entity for direct or indirect compensation, on behalf of a dealer, municipal advisor or investment adviser (as defined in Section 202(a)(11) of the Investment Advisers Act of 1940) that does not control, is not controlled by, or is not under common control with the municipal advisor undertaking such solicitation.

The terms ''solicit'' and ''soliciting'' [39] would be defined in proposed Rule G–37(g)(xix) to mean, except for purposes of Rule G–37(c):

> to make, or making, respectively, a direct or indirect communication with a municipal entity for the purposes of obtaining or retaining an engagement by the municipal entity of a dealer, municipal advisor or investment adviser (as defined in Section 202(a)(11) of the Investment Advisers Act of 1940) for municipal securities business, municipal advisory business or investment advisory services; provided, however, that it does not include advertising by a dealer, municipal advisor or investment adviser.

The terms ''municipal advisor third-party solicitor,'' ''solicit'' and ''soliciting'' would be consistent with the terms ''municipal advisor'' [40] and ''solicitation of a municipal entity or obligated person'' [41] as defined in the Exchange Act and the rules and regulations thereunder.[42] Under the Exchange Act and the SEC Final Rule, the terms ''municipal advisor'' and ''solicitation of a municipal entity or obligated person'' are to be broadly construed, and are reflective of a legislative determination that municipal advisors that act as solicitors on behalf of third-party dealers, municipals advisors or investment advisers should be regulated as such without regard to the extent to which they undertake such

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[35] *See* discussion in ''Municipal Finance Professionals and Municipal Advisor Professionals,'' *infra*. The new term ''municipal advisor professional'' is defined in proposed Rule G–37(g)(iii).

[36] In proposed Rule G–37(g)(xi), ''municipal entity'' would have the meaning specified in Section 15B(e)(8) of the Act (15 U.S.C. 78*o*–4(e)(8)), and the rules and regulations thereunder. The proposed rule change would use this term in lieu of the more narrowly defined term ''issuer'' in light of the Dodd-Frank Act's grant of authority to the MSRB to adopt rules with respect to municipal advisors and municipal advisory activities for the protection of municipal entities. *See supra* nn. 3–7 and accompanying text. Exchange Act Rule 15Ba1–1(g) (17 CFR 240.15Ba1–1(g)) defines ''municipal entity'' to mean ''any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including: (1) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (2) Any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (3) Any other issuer of municipal securities.''

''Municipal entity'' includes college savings plans (''529 plans'') that comply with Section 529 of the Internal Revenue Code (26 U.S.C. 529), and certain entities that do not issue municipal securities, including various types of state or local government-sponsored or established plans or pools of assets, such as local government investment pools (''LGIPs''), public employee retirement systems, public employee benefit plans and public pension plans (including participant directed plans and 403(b) and 457 plans). *See* SEC Order Adopting Final Rule, at n. 191 (defining ''public employee retirement system,'' ''public employee benefit plan,'' ''403(b) plan'' and ''457 plan''); *id.,* at 78 FR at 67480–83 (discussing these terms).

[37] ''Obligated person'' is defined in Section 15B(e)(10) of the Exchange Act (15 U.S.C. 78*o*–4(e)(10)) and rules promulgated thereunder. *See* Exchange Act Rule 15Ba1–1(k) (17 CFR 240.15Ba1–1(k)).

[38] *See, e.g.,* 15 U.S.C. 78*o*–4(b)(2)(C).

[39] The proposed definitions of ''solicit'' and ''soliciting'' would be consistent with the term ''solicitation of a municipal entity or obligated person'' as defined in Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78*o*–4(e)(9)) and the rules and regulations thereunder. *See, e.g.,* 17 CFR 240.15Ba1–1(n). In addition, the MSRB proposes to move the definition of ''solicit'' from current Rule G–37(g)(ix) to proposed Rule G–37(g)(xix).

[40] *See* Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78*o*–4(e)(4)).

[41] *See* Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78*o*–4(e)(9)).

[42] *See* Exchange Act Rules 15Ba1–1(d), (e) and (n) (17 CFR 240.15Ba1–1(d), (e) and (n)) (defining the terms ''municipal advisor,'' ''municipal advisory activities'' and ''solicitation of a municipal entity or obligated person,'' respectively).

solicitations.[43] This includes regulation with regards to ''pay to play'' practices.[44] Indeed, Congress determined to grant rulemaking authority over municipal advisors to the MSRB, in part, because it already ''has an existing, comprehensive set of rules on key issues such as pay-to-play. . . .'' [45]

Thus, a municipal advisor that provides advice to or on behalf of a municipal entity or obligated person within the meaning of Section 15B(e)(4) of the Exchange Act [46] and the rules and regulations thereunder may, depending on its other conduct, also be a municipal advisor third-party solicitor within the meaning of proposed Rule G–37(g)(x). Additionally, a municipal advisor may at one point in time also be a municipal advisor third-party solicitor and at another point in time may no longer fall within the proposed definition. For example, in one engagement, a municipal advisor's role may be limited to that of a municipal advisor third-party solicitor and the municipal advisor would solicit a municipal entity on behalf of a third-party dealer, municipal advisor or investment adviser. Contemporaneously, in a second engagement, the municipal advisor may be engaged to provide advice to a municipal entity regarding the issuance of municipal securities. Because, under the above example, the municipal advisor falls within the scope of the municipal advisor third-party solicitor definition in connection with at least one solicitation, engagement to solicit or attempt to seek an engagement to solicit, for purposes of the proposed rule change, the municipal advisor would fall within the definition of a municipal advisor third-party solicitor. Under the proposed rule change, the engagement of a municipal advisor third-party solicitor would have special implications for a dealer or municipal advisor (either a dealer or municipal advisor, a ''regulated entity'') that engages a municipal advisor third-party solicitor (''dealer client'' or ''municipal advisor client,'' respectively) to solicit a municipal entity on its behalf.[47]

Municipal Finance Professionals and Municipal Advisor Professionals

Under current Rule G–37, a contribution by a person who is a municipal finance professional, or MFP, of a dealer may trigger a ban on municipal securities business as to the dealer in certain cases. The proposed amendments would incorporate minor non-substantive amendments to the term MFP, and define as a ''municipal advisor professional,'' or MAP, certain persons who are employed or otherwise affiliated with a municipal advisor. Similarly to an MFP, if an MAP makes a contribution, under the proposed amendments the action may trigger a ban on municipal advisory business as to the municipal advisor in certain cases.

Municipal Finance Professional. An associated person of a dealer is a ''municipal finance professional'' if he or she engages in the functions described in paragraphs (A) through (E) of current Rule G–37(g)(iv). In addition, if designated by a dealer as an MFP in the dealer's records, an associated person is deemed an MFP and retains the designation for one year after the last activity or position that gave rise to the designation.[48]

The MSRB proposes to more specifically identify the persons engaged in the functions described in current paragraphs (A) through (E) of Rule G–37(g)(iv), and to relocate the defined term, municipal finance professional, from subsection (g)(iv) to proposed subsection (g)(ii) of the rule. A person described in current Rule G–37(g)(iv)(A) would be a ''municipal finance representative'' in proposed Rule G–37(g)(ii)(A); a person described in current Rule G–37(g)(iv)(B) would be a ''dealer solicitor'' in proposed Rule G–37(g)(ii)(B); a person described in current Rule G–37(g)(iv)(C) would be a ''municipal finance principal'' in proposed Rule G–37(g)(ii)(C); a person described in current Rule G–37(g)(iv)(D) would be a ''dealer supervisory chain person'' in proposed Rule G–37(g)(ii)(D); and a person described in current Rule G–37(g)(iv)(E) would be a ''dealer executive officer'' in proposed Rule G–37(g)(ii)(E). Additionally, proposed Rule G–37(g)(ii)(B), describing ''dealer solicitors'' (*i.e.,* associated persons of dealers who solicit municipal securities business), would describe this category of MFP by cross-referencing an additional proposed defined term, ''municipal solicitor,'' [49] and would delete as superfluous the parenthetical reference to Rule G–38, on solicitation of municipal securities business. The proposed rule change would use the proposed descriptive defined terms, in both the definition of ''municipal finance professional'' and throughout the rule text.

The MSRB also proposes additional minor technical amendments to the definition of MFP to improve its readability. In paragraph (A), defining the term, ''municipal finance representative,'' the MSRB proposes to substitute the words ''other than'' in place of the more lengthy proviso in the current definition. In paragraph (E), defining the term ''dealer executive officer,'' the MSRB proposes to: (i) Relocate the parenthetical pertaining to bank dealers within the definition; and (ii) reorganize the clause that provides that a dealer shall be deemed to have no MFPs if the only associated persons meeting the MFP definition are those described in paragraph (E) (of current Rule G–37(g)(iv) or proposed Rule G–37(g)(ii)). Also, the MSRB proposes minor, non-substantive amendments to shorten the final paragraph of the definition of municipal finance professional, which provides that a person designated by the dealer as an MFP in the dealer's records under Rule G–8(a)(xvi) would be deemed to be an MFP and would retain the designation for one year after the last activity or position which gave rise to the designation. The amendments to the defined term are not intended to, and would not be interpreted to, substantively modify the scope of the current definition of municipal finance professional, except to the extent the defined term ''municipal solicitor'' used within the ''dealer solicitor'' definition applies to the solicitation of a

[43] *See* Order Adopting SEC Final Rule, 78 at 67477 (noting that ''the statutory definition of municipal advisor is broad and includes persons that traditionally have not been considered to be municipal financial advisors'' and that the definition includes ''solicitors'' that engage in municipal advisory activities). *See also id.* at n. 411 and accompanying text (''As discussed in the Proposal, a solicitation of a single investment of any amount from a municipal entity would require the person soliciting the municipal entity to register as a municipal advisor.'').

[44] As the Commission has recognized, the regulation of municipal advisors and their advisory activities is generally intended to address problems observed with the unregulated conduct of some municipal advisors, including ''pay to play'' practices. *See* Order Adopting SEC Final Rule, 78 FR at 67469.

[45] S. Report 111–176, at 149 (2010) (''Senate Report'').

[46] 15 U.S.C. 78*o*–4(e)(4).

[47] Hereinafter, a ''dealer client'' or a ''municipal advisor client'' may also be referred to as a ''regulated entity client.''

[48] *See* Rule G–8(a)(xvi) (Records Concerning Political Contributions and Prohibitions on Municipal Securities Business Pursuant to Rule G–37).

[49] In proposed Rule G–37(g)(xiii), ''municipal solicitor,'' would mean: (A) An associated person of a dealer who solicits a municipal entity for municipal securities business on behalf of the dealer; (B) an associated person of a municipal advisor who solicits a municipal entity for municipal advisory business on behalf of the municipal advisor; or (C) an associated person of a municipal advisor third-party solicitor who solicits a municipal entity on behalf of a dealer, municipal advisor or investment adviser (as defined in Section 202(a)(11) of the Investment Advisers Act of 1940) that does not control, is not controlled by, or is not under common control with such municipal advisor third-party solicitor.

''municipal entity,'' rather than an ''issuer.''

Municipal Advisor Professionals. The associated persons of a municipal advisor that would be subject to the rule would be defined as ''municipal advisor professionals'' in proposed Rule G–37(g)(iii). ''Municipal advisor professional'' would be analogous to the amended defined term, ''municipal finance professional.'' As in the definition of ''municipal finance professional,'' proposed Rule G–37(g)(iii) identifies five types of MAPs, in proposed paragraphs (A) through (E), respectively, as: ''municipal advisor representative,'' ''municipal advisor solicitor,'' ''municipal advisor principal,'' ''municipal advisor supervisory chain person,'' and ''municipal advisor executive officer.''

Under proposed Rule G–37(g)(iii), an MAP would be any associated person of a municipal advisor engaged in the following activities:

(A) Any ''municipal advisor representative''—any associated person engaged in municipal advisor representative activities, as defined in Rule G–3(d)(i)(A); [50]

(B) any ''municipal advisor solicitor''—any associated person who is a municipal solicitor (as defined in paragraph (g)(xiii)(B) of this rule) (or in the case of an associated person of a municipal advisor third-party solicitor, paragraph (g)(xiii)(C) of this rule);

(C) any ''municipal advisor principal''—any associated person who is both: (1) A municipal advisor principal (as defined in Rule G–3(e)(i)); [51] and (2) a supervisor of any municipal advisor representative (as defined in paragraph (g)(iii)(A) of this rule) or municipal advisor solicitor (as defined in paragraph (g)(iii)(B) of this rule);

(D) any ''municipal advisor supervisory chain person''—any associated person who is a supervisor of any municipal advisor principal up through and including, in the case of a municipal advisor other than a bank municipal advisor, the Chief Executive Officer or similarly situated official, and, in the case of a bank municipal advisor, the officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's municipal advisory activities, as required by 17 CFR 240.15Ba1–1(d)(4)(i); or

(E) any ''municipal advisor executive officer''—any associated person who is a member of the executive or management committee (or similarly situated official) of a municipal advisor (or, in the case of a bank municipal advisor, the separately identifiable department or division of the bank as defined in Section 15B(e)(4) of the Act and 17 CFR 240.15Ba1–1(d)(4)(i) thereunder); provided, however, that if the persons described in this paragraph are the only associated persons of the municipal advisor meeting the definition of municipal advisor professional, the municipal advisor shall be deemed to have no municipal advisor professionals.

As in the definition of MFP, proposed Rule G–37(g)(iii) defining MAP would provide that a person designated by a municipal advisor as an MAP in the municipal advisor's records would be deemed an MAP and would retain the designation for one year after the last activity or position which gave rise to the designation.

The chart below illustrates the similarities between the defined term, ''municipal finance professional,'' as revised by the proposed amendments, and the new proposed defined term, ''municipal advisor professional.''

Types of municipal finance professional	Types of municipal advisor professional
''municipal finance representative''	''municipal advisor representative.''
''dealer solicitor''	''municipal advisor solicitor.''
''municipal finance principal''	''municipal advisor principal.''
''dealer supervisory chain person''	''municipal advisor supervisory chain person.''
''dealer executive officer''	''municipal advisor executive officer.''

Ban on Business

Currently, Rule G–37(b) sets forth a ban on municipal securities business that might have otherwise been awarded as a *quid pro quo* for a contribution, or at least as to which the appearance of a *quid pro quo* might have arisen. It prohibits a dealer from engaging in municipal securities business with an issuer within two years after a triggering contribution is made to an issuer official by the dealer, an MFP of the dealer or a PAC controlled by either the dealer or an MFP of the dealer. Proposed Rule G–37(b)(i)(A) would retain this ban on municipal securities business for dealers. Proposed Rule G–37(b)(i)(B) would create an analogous two-year ban on municipal advisory business applicable to municipal advisors that are not, at the time of the triggering contribution, municipal advisor third-party solicitors. Proposed Rule G–37(b)(i)(C)(1) would create, for municipal advisor third-party solicitors, a two-year ban on municipal advisory business analogous to the ban in proposed Rule G–37(b)(i)(B).

Under the proposed amendments, as discussed *infra,* [52] whether a contribution would trigger a ban on municipal securities business, a ban on municipal advisory business, or a ban on both types of business (any such ban, a ''ban on applicable business'') for a dealer, municipal advisor or dealer-municipal advisor generally would depend on the identity of the person who made the contribution, the type of influence that can be exercised by the official to whom the contribution was made and whether an exclusion from the ban would apply.

Persons From Whom Contributions Could Trigger a Ban on Business

Dealers. Under current Rule G–37(b)(i), contributions by three types of contributors—a dealer, [53] an MFP of the dealer [54] or a PAC controlled by either the dealer or an MFP of the dealer [55]—

[50] Rule G–3(d)(i)(A), defines a ''municipal advisor representative'' as ''a natural person associated with a municipal advisor who engages in municipal advisory activities on the municipal advisor's behalf, other than a person performing only clerical, administrative, support or similar functions.''

[51] Rule G–3(e)(i) defines the term ''municipal advisor principal'' to mean ''a natural person associated with a municipal advisor who is qualified as a municipal advisor representative and is directly engaged in the management, direction or supervision of the municipal advisory activities of the municipal advisor and its associated persons.'' *See* Order Approving MA Qualification Requirements. The term ''municipal advisory activities'' (which is used within the ''municipal advisor principal'' definition) is defined in Rule D–13 to mean, except as otherwise specifically provided by rule of the Board, ''the activities described in Section 15B(e)(4)(A)(i) and (ii) of the Act and the rules and regulations promulgated thereunder.''

[52] *See* discussion in ''Persons from Whom Contributions Could Trigger a Ban on Business,'' ''Official of a Municipal Entity,'' ''Ban on Business for Dealers; Ban on Business for Municipal Advisors,'' ''Ban on Business for Dealer-Municipal Advisors'' and ''Excluded Contributions,'' *infra.*

[53] *See* Rule G–37(b)(i)(A).

[54] *See* Rule G–37(b)(i)(B).

[55] *See* Rule G–37(b)(i)(C).

may trigger a ban on municipal securities business for the dealer. The proposed amendments to Rule G–37 would provide that this same set of persons may trigger a ban on business for the dealer, and would renumber this provision as proposed subsection (b)(i)(A).

Municipal Advisors that are not Municipal Advisor Third-Party Solicitors. Proposed Rule G–37(b)(i)(B) would set forth, for municipal advisors that are not municipal advisor third-party solicitors at the time of a contribution, a provision that parallels proposed Rule G–37(b)(i)(A) for dealers. Under proposed Rule G–37(b)(i)(B), contributions by three types of contributors—a municipal advisor, an MAP of the municipal advisor or a PAC controlled by either the municipal advisor or an MAP of the municipal advisor—may trigger a ban on municipal advisory business for the municipal advisor.

Municipal Advisor Third-Party Solicitors. Proposed Rule G–37(b)(i)(C)(1) would set forth, for municipal advisor third-party solicitors, a provision that parallels proposed Rule G–37(b)(i)(A) for dealers and proposed Rule G–37(b)(i)(B) for municipal advisors that are not municipal advisor third-party solicitors. Under proposed Rule G–37(b)(i)(C)(1), contributions by three types of contributors—the municipal advisor third-party solicitor, an MAP of the municipal advisor third-party solicitor or a PAC controlled by either the municipal advisor third-party solicitor or an MAP of the municipal advisor third-party solicitor—may trigger a ban on municipal advisory business for the municipal advisor third-party solicitor.

Clients of a Municipal Advisor Third-Party Solicitor that are Dealers or Municipal Advisors. Under proposed Rule G–37(b)(i)(C)(2), the engagement of a municipal advisor third-party solicitor would have special implications for a dealer client or municipal advisor client. If a dealer or municipal advisor engages a municipal advisor third-party solicitor to solicit a municipal entity on its behalf, three additional types of contributors may trigger a ban on municipal securities business as to a dealer client, or a ban on municipal advisory business as to a municipal advisor client. Clause (b)(i)(C)(2)(a) would apply to dealer clients of a municipal advisor third-party solicitor [56] and clause (b)(i)(C)(2)(b) would apply to municipal advisor clients (including municipal advisor third-party solicitor clients) of a municipal advisor third-party solicitor.[57] Under each of the proposed provisions, the additional types of contributors that may trigger a ban for the regulated entity are the same. They are: The engaged municipal advisor third-party solicitor; an MAP of the engaged municipal advisor third-party solicitor; and a PAC controlled by either the engaged municipal advisor third-party solicitor or an MAP of the engaged municipal advisor third-party solicitor. The MSRB believes the risk of actual or apparent *quid pro quo* corruption is obvious and substantial when a municipal advisor third-party solicitor who is engaged to solicit a municipal entity for business on behalf of a regulated entity client makes a triggering contribution to an official of that municipal entity with the ability to influence the awarding of business to the municipal advisor third-party solicitor's client. For such instances, clauses (b)(i)(C)(2)(a) and (b) are designed to curb actual and apparent *quid pro quo* corruption involving the regulated entity client and the official to whom the contribution is made and to prevent such a regulated entity client from obtaining the benefit of any actual *quid pro quo* corruption.

The determination of whether a municipal advisor was engaged as a municipal advisor third-party solicitor by a regulated entity client would be determined based on the facts and circumstances.[58] The MSRB would not consider the absence of a writing evidencing the relationship, or the absence of particular terms in a writing evidencing the relationship, to preclude a finding that a municipal advisor third-party solicitor was engaged by a regulated entity to solicit a municipal entity on its behalf within the meaning of proposed Rule G–37(b)(i).[59]

Investment Adviser Clients of a Municipal Advisor Third-Party Solicitor. Because Rule G–37 does not apply to investment advisers in their capacity as such, if an investment adviser engages a municipal advisor third-party solicitor to solicit on its behalf for an engagement to provide investment advisory services, the actions of the municipal advisor third-party solicitor would not trigger a ban on business for the investment adviser.[60]

Official of a Municipal Entity

Under current Rule G–37, for any contribution to trigger a ban on applicable business, an additional element—selection influence—must be present. A contribution by a dealer, MFP or PAC controlled by either the dealer or an MFP of the dealer can only trigger a ban on municipal securities business for the dealer if the official to whom the contribution was made is an ''official of an issuer.'' As discussed

[56] Currently, a dealer is generally prohibited under Rule G–38 from making payments to a third-party solicitor to solicit municipal securities business on behalf of the dealer. However, proposed Rule G–37(b)(i)(C)(2)(a) would apply in the limited cases where payments to a third-party solicitor are permitted under Rule G–38 as well as in cases where a dealer engaged a municipal advisor third-party solicitor in violation of Rule G–38.

[57] Although municipal advisors that are not dealers are not subject to Rule G–38, municipal advisors that are not municipal advisor third-party solicitors would be subject to proposed Rule G–42, if approved by the Commission. In relevant part, proposed Rule G–42 provides that non-solicitor municipal advisors are prohibited from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities subject to limited exceptions, which include reasonable fees paid to another municipal advisor registered as such with the Commission and the Board for making such a direct or indirect communication with a municipal entity or obligated person on behalf of the municipal advisor where such communication is made for the purpose of obtaining or retaining an engagement to perform municipal advisory activities. *See* Proposed Rule G–42 Filing.

[58] For example, if the facts and circumstances suggest that On-Site MA, a municipal advisor third-party solicitor, and Best Dealer, a dealer, orally agreed that On-Site MA would solicit Municipal Entity to retain Best Dealer to underwrite municipal securities for Municipal Entity, On-Site MA would be deemed to have been engaged as a municipal advisor third-party solicitor on behalf of Best Dealer with respect to Municipal Entity, even in the absence of a written engagement letter. Similarly, if there was a written engagement letter between On-Site MA and Best Dealer that was limited to soliciting municipal securities business in a major metropolitan city located in a tri-state area, but the facts and circumstances show that Best Dealer actually agreed to engage On-Site MA to solicit municipal securities business from any and all municipal entities in the metropolitan tri-state area, On-Site MA would be deemed to have been engaged as a municipal advisor third-party solicitor on behalf of Best Dealer with respect to the entire metropolitan tri-state area.

[59] *But see* discussion in ''Persons from Whom Contributions Could Trigger a Ban on Business—Municipal Advisor Third-Party Solicitors,'' *supra,* and ''Municipal Securities Business and Municipal Advisory Business,'' *infra.* Under proposed Rule G–37(b)(i)(C)(1), to impose a ban on municipal advisory business for a municipal advisor third-party solicitor, the municipal advisor third-party solicitor does not need to be specifically engaged, at the time of the contribution, to solicit the type of work over which the official to whom the contribution is made has selection influence. Because a municipal advisor third-party solicitor, by definition, may solicit for several different types of business (*i.e.,* municipal securities business, municipal advisory business and investment advisory services), a contribution to any official with the ability to influence the awarding of business to the solicitor's *current or prospective* dealer, municipal advisor or investment adviser clients could trigger a ban for the municipal advisor third-party solicitor since there is at least an appearance of *quid pro quo* corruption when it makes a contribution to such an official. *See infra,* n. 62.

[60] However, investment advisers are subject to the requirements and prohibitions provided in the IA Pay to Play Rule. 17 CFR 275.206(4)–5; *see generally,* Order Adopting IA Pay to Play Rule.

infra, an ''official of an issuer'' must, in relevant part, have the ability to influence ''the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.'' [61] Proposed amended Rule G–37 would, as explained below, extend this selection influence element to municipal advisors (and the dealer, municipal advisor and investment adviser clients of municipal advisor third-party solicitors), requiring a nexus between the influence that can be exercised by the ''official of a municipal entity'' (''ME official'') who receives a potentially ban-triggering contribution and the type of business in which the regulated entity is engaged or is seeking to engage.[62]

The term ''official of a municipal entity'' would be substituted for the current term ''official of an issuer'' in Rule G–37. The definition of ''official of an issuer'' (or ''official of such issuer'') in current Rule G–37(g)(vi) includes any person who, at the time of the contribution, was an incumbent, candidate or successful candidate: (A) For elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a dealer for municipal securities business by an issuer.

The proposed amendments would delete the term ''official of an issuer'' from Rule G–37(g)(vi) and substitute the term ''official of a municipal entity'' as set forth in proposed Rule G–37(g)(xvi). To take into account the possibility that an ME official may have the ability to influence the hiring of a dealer, municipal advisor or investment adviser, or the hiring of two or more of such professionals, three categories of ME officials would be identified in proposed Rule G–37(g)(xvi): An official of a municipal entity with dealer selection influence, as described in proposed paragraph (A), an official of a municipal entity with municipal advisor selection influence, as described in proposed paragraph (B), and an official of a municipal entity with investment adviser selection influence, as described in proposed paragraph (C).

The term ''official of a municipal entity with dealer selection influence'' would be substantively similar to the ''official of an issuer'' definition in current Rule G–37(g)(vi), with the exception of the substitution of the term ''municipal entity'' in place of the term ''issuer.'' [63] However, because the term ''municipal entity'' used in the ''official of a municipal entity with dealer selection influence'' definition includes entities beyond those defined as ''issuers,'' the official of a municipal entity with dealer selection influence definition is more expansive than the ''official of an issuer'' definition it replaces.[64] The term ''official of a municipal entity with municipal advisor selection influence'' would be analogous to the ''official of a municipal entity with dealer selection influence'' definition. In connection with municipal advisor third-party solicitors that solicit on behalf of an investment adviser, the term ''official of a municipal entity with investment adviser selection influence'' would be analogous to the ''official of a municipal entity with dealer selection influence'' definition for dealers (and municipal advisor third-party solicitors on behalf of a dealer) and the ''official of a municipal entity with municipal advisor selection influence'' definition for all municipal advisors. The proposed definition's structure, which includes the three categories of ME officials, provides the flexibility to establish, in the case of a contribution to an ME official, whether there is the required nexus between the ME official who received the contribution (based upon his or her scope of influence) and the awarding of business that gives rise to a sufficient risk of *quid pro quo* corruption or the appearance of such corruption to warrant a two-year ban.

Municipal Securities Business and Municipal Advisory Business

Currently, under Rule G–37, a dealer subject to a ban is generally prohibited from engaging in ''municipal securities business'' with the relevant issuer. ''Municipal securities business'' is currently defined in Rule G–37(g)(vii) as the purchase of a primary offering on other than a competitive bid basis, the offer or sale of a primary offering of municipal securities, providing financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering on other than a competitive bid basis, and providing remarketing agent services with respect to a primary offering on other than a competitive bid basis. Under interpretive guidance issued in 1997 (the ''1997 Guidance''), the municipal securities business from which a dealer subject to a ban is prohibited from engaging in is ''new'' municipal securities business. The MSRB has interpreted ''new'' municipal securities business as contractual obligations with an issuer entered into after the date of the triggering contribution to an official of the issuer and contractual obligations that were entered into prior to the date of the triggering contribution but which

[61] *See* Rule G–37(g)(vi).

[62] Dealers and municipal advisors that are not municipal advisor third-party solicitors are typically compensated by the municipal entity or obligated person to whom they are providing advice or municipal securities business. Thus, when a *quid pro quo* contribution is made by a dealer or such a municipal advisor, the *quid* is the contribution and the *quo* is the awarding of business to the dealer or municipal advisor in exchange for the contribution. However, municipal advisor third-party solicitors (in their capacity as such) are typically compensated not by the municipal entity or obligated person they solicit, but by a third-party dealer, municipal advisor or investment adviser for whom they are attempting to secure municipal securities business, municipal advisory business or engagements to provide investment advisory services. When a *quid pro quo* contribution is made by a municipal advisor third-party solicitor, the *quid* is the contribution and the *quo* is typically the awarding of business to the current or prospective clients of the municipal advisor third-party solicitor. Of course, the *quo* for a municipal advisor third-party solicitor (a type of municipal advisor) could also be the awarding of municipal advisory business to the municipal advisor itself, as a municipal advisor third-party solicitor may simultaneously undertake a solicitation of a municipal entity or obligated person and provide, or seek to provide, to another municipal entity or obligated person certain advice. Thus, for municipal advisor third-party solicitors, the appearance of *quid pro quo* corruption may arise with respect to a wider range of contributions, as compared to dealers and municipal advisors that are not municipal advisor third-party solicitors. Because municipal advisor third-party solicitors are in the business of attempting to secure business for third-party dealers, municipal advisors and investment advisers, the fact that a municipal advisor third-party solicitor is not, at the time of a contribution, actually engaged to solicit a municipal entity for a particular type of business does not avoid the appearance of *quid pro quo* corruption. As discussed *supra,* a municipal advisor third-party solicitor is a municipal advisor that, in relevant part, is currently soliciting, is engaged to solicit, or is seeking to be engaged to solicit a municipal entity for business on behalf of a third-party dealer, municipal advisor or investment adviser. Thus, a municipal advisor third-party solicitor will always stand to gain from a *quid pro quo* contribution as such a contribution may assist the municipal advisor third-party solicitor in obtaining new business from a prospective dealer, municipal advisor or investment adviser client seeking to curry favor with the ME official to whom the municipal advisor third-party solicitor made the contribution.

[63] In addition, the proposed definition of ''official of a municipal entity with dealer selection influence'' would include minor technical amendments to the current definition of ''official of an issuer'' to improve its readability.

[64] For example, the term ''municipal entity'' includes certain entities that do not issue municipal securities, including various types of state or local government-sponsored or established plans or pools of assets, such as LGIPs, public employee retirement systems, public employee benefit plans and public pension plans (including participant directed plans and 403(b) and 457 plans). *See supra,* n. 36.

are not specific to a particular issue of a security.[65] The latter category that is subject to the ban is referred to as ''pre-existing but non-issue specific contractual undertakings.''[66] In contrast, pre-existing issue-specific contractual undertakings are generally not deemed ''new'' municipal securities business, and are not subject to the ban.[67] Interpretive guidance issued in 2002 (the ''2002 Guidance'') modified the 1997 Guidance in a limited respect to expand the scope of municipal securities business that is not ''new'' for dealers that serve as primary distributors of municipal fund securities, in light of the unique aspects of municipal fund securities programs and the role that primary distributors play with respect to such programs.

Under the proposed rule change, the definition of municipal securities business would not be amended, except to renumber the definition as proposed subsection (g)(xii) and incorporate conforming changes. Additionally, the 1997 Guidance and the 2002 Guidance would remain unchanged for dealers.

Under proposed Rule G–37(b)(i)(B) and proposed Rule G–37(b)(i)(C)(1), a municipal advisor (including a municipal advisor third-party solicitor) subject to a ban would generally be prohibited from engaging in ''municipal advisory business'' with the relevant municipal entity. Proposed Rule G–37(g)(ix) would define ''municipal advisory business'' to mean those activities that would cause a person to be a municipal advisor as defined in Section 15B(e)(4) of the Act, 17 CFR 240.15Ba1–1(d)(1)–(4) and other rules and regulations thereunder.[68]

Notably, if a municipal advisor third-party solicitor is subject to a ban under proposed Rule G–37(b)(i)(C), it would be prohibited from engaging in all types of municipal advisory business with the relevant municipal entity, including providing certain advice to the municipal entity and soliciting the municipal entity on behalf of *any* third-party dealer, municipal advisor or investment adviser.

For municipal advisors, the MSRB intends that all existing interpretive guidance regarding the municipal securities business of dealers under Rule G–37 would apply to the analogous interpretive issues regarding the municipal advisory business of municipal advisors. However, because the ''new'' versus non-''new'' business distinction in the 1997 Guidance only applies to pre-existing issue-specific contractual obligations *with an issuer,* such guidance would not apply to municipal advisor third-party solicitors as their contractual obligations are not owed to an issuer but to third parties that are regulated entity clients or investment adviser clients. Further, the 2002 Guidance would not be extended to any municipal advisors to municipal fund securities programs because the 2002 Guidance addressed a non-analogous interpretive issue for dealers.[69] Multiple factors supported the 2002 Guidance regarding primary distributors of municipal fund securities, but the essential factor was the magnitude of the possible repercussions to an issuer of municipal fund securities or investors in municipal fund securities resulting from a sudden change in the primary distributor. For example, issuers would typically not be faced with redesigning existing programs in light of the exit of a municipal advisor to such a plan. Further, the MSRB believes that the exit of a municipal advisor would typically have little or no direct impact on investors, and would not force investors to restructure or establish new relationships with different dealers in order to maintain their investments. The Board does not believe that the disruption of services provided by a municipal advisor to a municipal fund securities plan would result in repercussions of comparable scope or severity to issuers and investors.

Ban on Business for Dealers; Ban on Business for Municipal Advisors

Under the proposed rule change, a dealer or municipal advisor that is not a municipal advisor third-party solicitor could be subject to a ban on applicable business only when a triggering contribution is made to an ME official who can influence the awarding of the type of business in which that regulated entity engages.

A dealer that engages in municipal securities business, but not municipal advisory business, would be subject to a ban on municipal securities business only when a triggering contribution is made by any of the persons described in proposed Rule G–37(b)(i)(A) or proposed Rule G–37(b)(i)(C)(2) to an official of a municipal entity with dealer selection influence, as described in proposed Rule G–37(g)(xvi)(A). (Although the ME official may also have influence as described in proposed Rule G–37(g)(xvi)(B) and (C), regarding the selection of municipal advisors and investment advisers, the broader scope of influence would be irrelevant in determining whether a dealer would be subject to a ban on municipal securities business.)[70] Conversely, a contribution made by any of the persons described in proposed Rule G–37(b)(i)(A) or proposed Rule G–37(b)(i)(C)(2) to an ME official that does not have dealer selection influence (such as an official with only municipal advisor selection influence, or only municipal advisor and investment adviser selection influence) would not trigger a ban for the dealer.

Similarly, a non-dealer municipal advisor that is not a municipal advisor

[65] *See* 1997 Guidance.

[66] *See id.* Pre-existing but non-issue-specific contractual undertakings are subject to the ban on municipal securities business, subject to an orderly transition to another entity that is not subject to a ban to perform such business. *Id.*

[67] *See id.* For example, if a bond purchase agreement was signed prior to the date of a contribution triggering a ban on municipal securities business, a dealer may continue to perform its services as an underwriter on the issue. Significantly, however, new or different services provided under provisions in existing issue-specific contracts that allow for changes in the services provided by the dealer or the compensation paid by the issuer are deemed new municipal securities business. *Id.* Thus, Rule G–37 precludes a dealer subject to a ban from performing such additional functions or receiving additional compensation.

[68] *See* proposed Rule G–37(g)(ix).

[69] Because the 1997 Guidance would not apply to municipal advisor third-party solicitors, the 2002 Guidance (which modifies the 1997 Guidance) would also have no application to municipal advisor third-party solicitors. Thus, municipal advisor third-party solicitors on behalf of third-party dealers, municipal advisors and investment advisers would be prohibited, based on a triggering contribution, from continuing to perform under any pre-existing contract to solicit the relevant municipal entity (whether an issuer of municipal fund securities or any other type of municipal entity).

[70] The following example illustrates the impact of a triggering contribution made by an MAP of a municipal advisor third-party solicitor when the municipal advisor third-party solicitor was engaged by a dealer client as set forth in proposed Rule G–37(b)(i)(C)(2).

Best Dealer is a dealer located in a Midwestern state. On-Site MA is a municipal advisor third-party solicitor located in a western coastal state, State A. Best Dealer engages On-Site MA to solicit three major municipal entities in State A to hire Best Dealer to underwrite municipal bonds, including North City and South City of State A. Dan is an employee and an MAP of On-Site MA. Dan resides in North City. Dan makes a contribution of $240 to an ME official of South City, for whom Dan is not entitled to vote. The ME official exercises influence in the selection of dealers, municipal advisors and investment advisers for South City matters. As a result of Dan's $240 contribution to the ME official, Best Dealer, the dealer client of On-Site MA, becomes subject to a ban on engaging in municipal securities business with South City, because Dan's contribution is a triggering contribution and Best Dealer engaged On-Site MA to solicit South City on behalf of Best Dealer. In addition, as discussed *infra,* On-Site MA would also become subject to a ban on engaging in municipal advisory business with South City.

Although the ME official exercises influence in the selection of municipal advisors and investment advisers, because Best Dealer does not engage in municipal advisory business, a ban on applicable business would subject Best Dealer only to a ban on municipal securities business.

third-party solicitor would be subject to a ban on municipal advisory business only when a triggering contribution is made by any of the persons described in proposed Rule G–37(b)(i)(B) or proposed Rule G–37(b)(i)(C)(2) to an ME official that is at least an official of a municipal entity with municipal advisor selection influence.[71]

A non-dealer municipal advisor third-party solicitor would be subject to a ban on municipal advisory business, including advising and soliciting, when a triggering contribution is made by any of the persons described in proposed Rule G–37(b)(i)(C)(1) to any ME official,[72] if investment adviser selection influence.[73]

If a municipal advisor does not also engage in municipal securities business, a ban on applicable business under the proposed rule change would subject the municipal advisor only to a ban on municipal advisory business.

Ban on Business for Dealer-Municipal Advisors

The proposed rule change would treat dealer-municipal advisors as a single economic unit and would subject such firms to an appropriately scoped ban on business. The scope of the ban on business would not be dependent on the particular line of business within the dealer-municipal advisor with which the person or PAC that is the contributor may be associated. Instead, the scope of the ban on business would depend on the type of influence that can be exercised by the ME official to whom the triggering contribution is made. As a result, a dealer-municipal advisor could be subject, based on a single contribution, to a ban on municipal securities business, a ban on municipal advisory business, or both. Further, any of the following entities or persons might trigger a ban on business for a dealer-municipal advisor if the entity or person makes a contribution that is a triggering contribution in the particular facts and circumstances: The dealer-municipal advisor; an MFP or MAP of the dealer-municipal advisor; a PAC controlled by the dealer-municipal advisor or an MFP or an MAP of the dealer-municipal advisor; a municipal advisor third-party solicitor engaged on behalf of the dealer-municipal advisor; an MAP of such municipal advisor third-party solicitor; or a PAC controlled by either such municipal advisor third-party solicitor or an MAP of such municipal advisor third-party solicitor.

Ban on Applicable Business for Dealer-Municipal Advisors. A dealer-municipal advisor could be subject to a ban on municipal securities business, in its capacity as a dealer, under proposed Rule G–37(b)(i)(A) or proposed Rule G–37(b)(i)(C)(2)(a), under the same terms that apply to other dealers. Similarly, a dealer-municipal advisor that is not a municipal advisor third-party solicitor could, under proposed Rule G–37(b)(i)(B) or proposed Rule G–37(b)(i)(C)(2)(b), be subject to a ban on municipal advisory business under the same terms that apply to non-dealer municipal advisors that are not municipal advisor third-party solicitors. In addition, if a dealer-municipal advisor is a municipal advisor third-party solicitor, under proposed Rule G–37(b)(i)(C), the dealer-municipal advisor could be subject to a ban on municipal advisory business under the same terms that apply to other municipal advisor third-party solicitors.

Cross-Ban. In addition to paragraphs (b)(i)(A), (b)(i)(B) and (b)(i)(C) potentially having application to dealer-municipal advisors, proposed Rule G–37(b)(i)(D) would provide for the imposition of a ''cross-ban'' for dealer-municipal advisors to address *quid pro quo* corruption, or the appearance thereof, in two scenarios that arise only for dealer-municipal advisors. The proposed cross-ban would be a ban on business applicable to a line of business within a dealer-municipal advisor as a result of a triggering contribution that emanated from a person or entity associated with the other line of business within the same dealer-municipal advisor. With the provision for a cross-ban, the scope of a ban on business for a dealer-municipal advisor would not be dependent on the particular line of business within the dealer-municipal advisor with which the person or PAC that is the contributor may be associated. Instead, the scope of

[71] The following example illustrates the impact of a triggering contribution made by an MAP of a municipal advisor third-party solicitor when engaged by a municipal advisor client that is not a municipal advisor third-party solicitor as set forth in proposed Rule G–37(b)(i)(C)(2).

Best MA is a municipal advisor located in a Midwestern state, and is not a municipal advisor third-party solicitor. On-Site MA is a municipal advisor third-party solicitor located in a western coastal state, State A. Best MA engages On-Site MA to solicit the city school districts of three major municipalities in State A to hire Best MA to provide municipal advisory services for such school districts, including North City School District and South City School District. Dan is an employee and an MAP of On-Site MA. Dan resides in North City. Dan makes a contribution of $240 to an official running for re-election to the school board of South City School District. Dan is not entitled to vote for the candidate. The ME official exercises influence in the selection of dealers, municipal advisors and investment advisers for South City School District matters. As a result of Dan's $240 contribution to the ME official, Best MA, the client of On-Site MA, becomes subject to a ban on engaging in municipal advisory business with South City School District, because Dan's contribution is a triggering contribution and Best MA engaged On-Site MA to solicit South City School District on behalf of Best MA. Because Best MA does not engage in municipal securities business, a ban on applicable business would subject Best MA only to a ban on municipal advisory business.

In addition, as discussed *infra,* On-Site MA would also become subject to a ban on engaging in municipal advisory business with South City.

[72] The impact of a triggering contribution made by a municipal advisor third-party solicitor (or one of its MAPs, or a PAC controlled by the municipal advisor third-party solicitor or an MAP thereof) to an ME official is illustrated as follows:

Best Dealer is a dealer located in a Midwestern state. Best MA is a municipal advisor located in a Midwestern state, and is not a municipal advisor third-party solicitor. Best IA third-party solicitor located in a western coastal state, State A. Best Dealer engages On-Site MA to solicit three major municipal entities in State A, including North City and South City, to hire Best Dealer to underwrite municipal bonds. Best MA engages On-Site MA to solicit the five largest municipal entities in State A, including North City and South City, to hire Best MA to provide municipal advisory services for such entities. Best IA engages On-Site MA to solicit, in State A, all municipalities with populations over 150,000 people, to retain Best IA for investment advice. Dan is an employee and an MAP of On-Site MA, and resides in North City. Dan makes a contribution of $240 to an ME official of South City, for whom Dan is not entitled to vote. The ME official exercises influence in the selection of dealers, municipal advisors and investment advisers, for South City matters.

The consequences for On-Site MA would be as follows: On-Site MA would be banned from the following business with South City: engaging in any form of municipal advisory business with South City (because municipal advisory business is defined to include solicitation on behalf of dealers, municipal advisors and investment advisers AND other municipal advisory functions), including soliciting South City on behalf of any dealer, including Best Dealer, any third-party municipal advisor, including Best MA, and any investment adviser.

The additional consequences of such contribution would be as follows: The dealer client, Best Dealer, would become subject to a ban on engaging in municipal securities business with South City, because Best Dealer engaged On-Site MA to solicit South City on behalf of Best Dealer (and the ME official receiving the contribution had dealer selection influence); and the municipal advisor client, Best MA, would become subject to a ban on engaging in municipal advisory business (of any type) with South City, because Best MA engaged On-Site MA to solicit South City on behalf of Best MA (and the ME official receiving the contribution had municipal advisor selection influence). However, Best IA, who also engaged On-Site MA to solicit South City (a municipality with a population of over 150,000 people), would not be subject to a ban under proposed amended Rule G–37, because although the ME official receiving the contribution had investment adviser selection influence, the proposed rule change does not extend to investment advisers that are not also dealers or municipal advisors. However, as noted *supra,* Best IA would be subject to the requirements and prohibitions provided in the IA Pay to Play Rule. *See* discussion in ''Investment Adviser Clients of a Municipal Advisor Third-Party Solicitor'' and n. 60, *supra.*

[73] Additionally, a contribution made by any of the persons described in proposed Rule G–37(b)(i)(C)(2) to an official of a municipal entity with municipal advisor selection influence could also trigger a ban for the engaging municipal advisor third-party solicitor if the engaging municipal advisor third-party solicitor engaged another municipal advisor third-party solicitor under proposed Rule G–37(b)(i)(C)(2)(b).

the ban on business will depend on the type of influence that can be exercised by the ME official to whom the triggering contribution is made.

In the first scenario, a contribution is made to an ME official with *both* dealer and municipal advisor selection influence by a person or entity associated with *only one* line of business within the dealer-municipal advisor. For example, assume an MFP of the dealer-municipal advisor who is not also an MAP makes a triggering contribution to an ME official with both dealer and municipal advisor selection influence. Proposed paragraph (b)(i)(D) would subject the dealer-municipal advisor to a ban not only on municipal securities business but also to a cross-ban on municipal advisory business because the contribution is to an ME official who can exercise influence as to the selection of the dealer-municipal advisor in both a dealer and municipal advisor capacity.

In the second scenario, a contribution is made to an ME official with *only one* type of influence (either dealer selection influence or municipal advisor selection influence, but not both) from a person or entity associated only with the line of business as to which the ME official *does not* have influence. For example, assume a triggering contribution is made to an official of a municipal entity with only dealer selection influence by an MAP of the dealer-municipal advisor who is not also an MFP. Proposed paragraph (b)(i)(D) would subject the dealer-municipal advisor to a cross-ban on municipal securities business, but not to a ban on municipal advisory business because the ME official is not an official with municipal advisor selection influence.[74] Similarly, if a triggering contribution were made to an official of a municipal entity with only municipal advisor selection influence by an MFP of the dealer-municipal advisor who is not an MAP, the dealer-municipal advisor would be subject to only a ban on municipal advisory business.

The table below shows the most common persons from whom a contribution could trigger a ban on municipal securities business, a ban on municipal advisory business, or both under proposed amended Rule G–37.

PERSONS FROM WHOM A CONTRIBUTION COULD TRIGGER A BAN ON MUNICIPAL SECURITIES BUSINESS, MUNICIPAL ADVISORY BUSINESS, OR BOTH[75]

Regulated Entity Subject to a Ban	I. Dealer	II. Municipal Advisor That Is Not a Municipal Advisor Third-Party Solicitor	III. Municipal Advisor Third-Party Solicitor (for purposes of this table, "MATP solicitor")	IV. Dealer-Municipal Advisor (for purposes of this table, "the firm")	
Contributor	the dealer	the municipal advisor	the MATP solicitor	the firm.	
	an MFP of the dealer	an MAP of the municipal advisor.	an MAP of the MATP solicitor.	an MFP of the firm	an MAP of the firm.
	a PAC controlled by the dealer.	a PAC controlled by the municipal advisor.	a PAC controlled by the MATP solicitor.	a PAC controlled by the firm.	
	a PAC controlled by an MFP of the dealer.	a PAC controlled by an MAP of the municipal advisor.	a PAC controlled by an MAP of the MATP solicitor.	a PAC controlled by an MFP of the firm.	a PAC controlled by an MAP of the firm.
	If an MATP solicitor is engaged to solicit a municipal entity on behalf of the dealer, the entities and persons in column III.	If an MATP solicitor is engaged to solicit a municipal entity on behalf of the municipal advisor, the entities and persons in column III.	If an MATP solicitor is engaged to solicit a municipal entity on behalf of the MATP solicitor, the entities and persons in this column above.	If an MATP solicitor is engaged to solicit a municipal entity on behalf of the firm, the entities and persons in column III.	

Orderly Transition Period

As discussed above, under the 1997 Guidance, a dealer that is subject to a ban on municipal securities business with an issuer is prohibited from engaging in new municipal securities business with that issuer, which includes pre-existing but non-issue-specific contractual undertakings. In such cases, to give the issuer the opportunity to receive the benefit of the work already provided and to find a replacement to complete the work performed by the dealer, as needed, the dealer may—notwithstanding the ban on business—continue to perform its pre-existing but non-issue-specific contractual undertakings subject to an orderly transition to another entity to perform such business.[76] The interpretive guidance provides that this transition period should be as short a period of time as possible.[77]

Proposed Rule G–37(b)(i)(E) would essentially codify this guidance for dealers and extend it to municipal advisors that are not soliciting the municipal entity with which they become subject to a ban on applicable business. Under this provision, a dealer or municipal advisor that is engaging in municipal securities business or municipal advisory business with a municipal entity and, during the period of the engagement, becomes subject to a ban on applicable business, may continue to engage in the otherwise prohibited municipal securities business and/or municipal advisory business solely to allow for an orderly transition to another entity and, where

[74] Consistently, if a contribution is made by an MAP of a dealer-municipal advisor that is also a municipal advisor third-party solicitor to an ME official with only investment adviser selection influence, the dealer-municipal advisor would be subject to a ban on municipal advisory business, but it would not be subject to a cross-ban on municipal securities business.

[75] This table is for illustrative purposes only. Reference should be made to the proposed amended rule text for complete details.

[76] *See* 1997 Guidance.

[77] *Id.*

applicable, to allow a municipal advisor to act consistently with its fiduciary duty to its client. This provision, however, would not permit a municipal advisor third-party solicitor to continue soliciting a municipal entity with which it becomes prohibited from engaging in municipal advisory business.[78] Consistent with the 1997 Guidance, the proposed rule change would specifically provide that the transition period must be as short a period of time as possible. In addition, in the event that a dealer or municipal advisor avails itself of the orderly transition period, proposed Rule G–37(b)(i)(E) would extend the ban on business with the municipal entity for which the dealer or municipal advisor utilized the orderly transition period by the duration of the orderly transition period.

For municipal advisors, consistent with the existing interpretive guidance applicable to dealers, the orderly transition period would apply only with respect to pre-existing but non-issue-specific contractual undertakings owed to municipal entities, which, as discussed above, are included in ''new'' municipal advisory business and are subject to a ban. For example, if a municipal advisor enters into a long-term contract with a municipal entity for municipal advisory business (*e.g.,* a five-year agreement in which the municipal advisor agrees to provide to the municipal entity advice on a range of matters, including with respect to its reserve policy and the issuance of municipal securities) and a contribution that results in a ban on municipal advisory business is given after such a non-issue-specific contract is entered into, the municipal advisor would be permitted to continue to perform under the contract for as short a period of time as possible to allow for an orderly transition to another municipal advisor. Also, in this example, the ban on municipal advisory business with the municipal entity would be extended by the length of the orderly transition period.

After carefully considering whether to extend the orderly transition period under the interpretive guidance to municipal advisors, the MSRB determined that it is a necessary and appropriate aspect of the regulatory framework governing the municipal market. Significantly, the MSRB believes that certain aspects of proposed amended Rule G–37 would serve as important bulwarks against potential abuse of the orderly transition period. Public disclosure is a critical aspect of Rule G–37 and under the proposed rule change, municipal advisors would be required to disclose (comparable to the current requirements for dealers) to the MSRB information about their political contributions and the municipal advisory business in which they have engaged.[79] The MSRB then would make such disclosures available to the public as well as fellow regulators charged with examining for compliance with and enforcing Rule G–37. In addition, under proposed Rule G–37(d), municipal advisors and their MAPs would (comparable to the current requirements for dealers) be prohibited from doing, directly or indirectly, through or by any other person or means, any act which would result in a violation of a ban on business. This anti-circumvention provision, together with the required disclosures, would act to deter and promote detection of potential abuses of the orderly transition period. The MSRB believes that this overall approach strikes the appropriate balance between accommodating the need for municipal advisors to act consistently with their fiduciary duties and the need to address the appearance of, or actual, *quid pro quo* corruption involving municipal advisors.

Excluded Contributions

Proposed amendments to Rule G–37(b)(ii) would consolidate in one provision the types of contributions that do not currently subject a dealer to a ban on applicable business, and would extend the same exclusions to municipal advisors. The first exclusion is for *de minimis* contributions, and the second and third exclusions are modifications of the two-year look-back provision that would otherwise apply, as explained below.

De Minimis Contributions. Under current Rule G–37(b)(i), contributions made by an MFP to an issuer official for whom the MFP is entitled to vote will not trigger a ban on municipal securities business if such contributions do not, in total, exceed $250 per election.[80] The proposed amendments to Rule G–37 would retain this exclusion for MFPs of dealers in proposed Rule G–37(b)(ii)(A). Proposed Rule G–37(b)(ii)(A) also would extend this exclusion to the MAPs of all municipal advisors, including the MAPs of municipal advisor third-party solicitors. If a contribution by an MAP of a municipal advisor third-party solicitor would meet the *de minimis* exclusion, neither the municipal advisor third-party solicitor nor the dealer client or municipal advisor client for which it was engaged to solicit business would be subject to a ban. In addition, proposed Rule G–37(b)(ii)(A) would incorporate non-substantive changes to the *de minimis* exclusion in current Rule G–37 to improve the readability of the provision.

Other Excluded Contributions. Currently, under Rule G–37, according to what is known as the ''two-year look-back,'' a dealer is generally subject to a ban on municipal securities business for a period of two years from the making of a triggering contribution, even if such contributions were made by a person, who, although now an MFP of a dealer, was not an MFP of the dealer at the time he or she made the contribution. The proposed rule change would retain the two-year look-back for MFPs[81] and would extend it to the MAPs of municipal advisors that are not municipal advisor third-party solicitors[82] as well as municipal advisors that are municipal advisor third-party solicitors.[83]

Currently, the two-year look-back is modified under Rule G–37 in two situations. Under Rule G–37(b)(ii), contributions to an issuer official by an individual that is an MFP solely based on his or her solicitation activities for the dealer are excluded and do not trigger a ban on municipal securities business for the dealer, *unless* such MFP (who is so characterized solely based on his or her solicitation activities for the dealer) subsequently solicits municipal securities business from the same issuer. The proposed amendments to Rule G–37 would relocate to proposed paragraph (b)(ii)(B) this exclusion applicable to such MFPs (''dealer solicitors'' as defined in proposed Rule G–37(g)(ii)(B)) and would extend it to MAPs that perform a similar solicitation function within a municipal advisory firm (''municipal advisor solicitors'' as

[78] Because any relevant contractual obligations of a municipal advisor third-party solicitor in its capacity as such are owed not to a municipal entity but to third-party regulated entities or investment advisers, the rationale for the orderly transition period would not apply.

[79] *See* discussion in ''Public Disclosure of Contributions and Other Information,'' *infra.*

[80] For purposes of the *de minimis* exclusion, primary elections and general elections are separate elections. Therefore if an official is involved in a primary election prior to the general election, an MFP who is entitled to vote for such official may, within the scope of the *de minimis* exclusion, contribute up to $250 to the official in a primary election and again contribute a separate $250 to the same official in a general election. *See* MSRB Rule G–37 Interpretive Notice—Application of Rule G–37 to Presidential Campaigns of Issuer Officials (March 23, 1999).

[81] *See* proposed Rule G–37(b)(i)(A).

[82] *See* proposed Rule G–37(b)(i)(B).

[83] *See* proposed Rule G–37(b)(i)(C). The ban on business for the dealer or municipal advisor, like the current treatment under Rule G–37, would only begin when such individual becomes an MFP or MAP of the dealer or municipal advisor, as applicable.

defined in proposed Rule G–37(g)(iii)(B)). To improve the readability of this provision, Rule G–37(b)(ii), as proposed to be amended, would refer to the relevant MFPs and MAPs by the proposed descriptive terms (discussed above) rather than by cross-reference to the relevant definitions. Lastly, a technical amendment would be incorporated in proposed Rule G–37(b)(ii)(B) to clarify that the non-solicitation condition would not be required to be met for the contribution to be excluded after two years have elapsed since the making of the contribution.

Currently, under Rule G–37(b)(iii), contributions by MFPs who have that status solely by virtue of their supervisory or management-level activities, including persons serving on an executive or management committee (*i.e.,* those persons described in paragraphs (C), (D) and (E) of current Rule G–37(g)(iv), the definition of municipal finance professional) are excluded and do not trigger a ban on municipal securities business if such contributions were made more than six months before the contributor obtained (including by designation) his or her MFP status. The proposed amendments to Rule G–37 would relocate to paragraph (b)(ii)(C) this exclusion applicable to such MFPs (*i.e.,* ''municipal finance principals,'' ''dealer supervisory chain persons,'' and ''dealer executive officers'' as defined in proposed Rule G–37(g)(ii)(C), (D) and (E)) and, similarly, would treat contributions made, under the same circumstances, by the analogous categories of MAPs as excluded contributions. The analogous categories of MAPs would be those MAPs that have MAP status solely by virtue of their supervisory or management-level activities, including persons serving on an executive or management committee (*i.e.,* ''municipal advisor principals,'' ''municipal advisor supervisory chain persons,'' and ''municipal advisor executive officers'' as defined in proposed Rule G–37(g)(iii)(C), (D) and (E)). To improve the readability of this provision, proposed Rule G–37(b)(ii), as proposed to be amended, would refer to the relevant MFPs and MAPs by the proposed descriptive terms rather than by cross-references to the relevant definitions.

Prohibition on Soliciting and Coordinating Contributions

Currently, Rule G–37(c)(i) prohibits a dealer and an MFP of the dealer from soliciting any person or PAC to make any contribution or coordinating any contributions to an issuer official with which the dealer is engaging or is seeking to engage in municipal securities business. The proposed amendments to this subsection would retain this prohibition with respect to dealers and their MFPs and would extend the prohibition to municipal advisors and their MAPs. Further, to ensure a relevant nexus exists between the type of business in which a regulated entity engages or seeks to engage and its solicitation or coordination of any contributions to an ME official with the influence to award such business, proposed subsection (c)(i) would be amended to distinguish contributions based on the type of influence held by the ME official.

Thus, under proposed subsection (c)(i), a dealer and an MFP of the dealer would be prohibited from soliciting any person or PAC to make any contribution, or from coordinating any contributions, to an official of a municipal entity with dealer selection influence with which municipal entity the dealer is engaging, or is seeking to engage, in municipal securities business. Similarly, a municipal advisor and an MAP of the municipal advisor would be prohibited from soliciting any person or PAC to make any contribution, or from coordinating any contributions, to an official of a municipal entity with municipal advisor selection influence with which municipal entity the municipal advisor is engaging, or is seeking to engage, in municipal advisory business. In addition, in light of the nexus that exists between a municipal advisor third-party solicitor's business (to solicit business on behalf of dealers, municipal advisors and investment advisers) and ME officials of every type, the prohibition on soliciting and coordinating contributions would apply, for municipal advisor third-party solicitors, to the solicitation or coordination of contributions to any ME official, if the ME official has municipal advisor selection influence, dealer selection influence or investment adviser selection influence.

Because dealer-municipal advisors engage in both municipal securities business and municipal advisory business, and consistent with the principle that dealer-municipal advisors should be treated as a single economic unit, proposed subsection (c)(i) would not, for dealer-municipal advisors, distinguish a contribution given to an official of a municipal entity with dealer selection influence from one given to an official of a municipal entity with municipal advisor selection influence. Thus, a dealer-municipal advisor, its MFPs, and its MAPs would be prohibited from soliciting any person or PAC to make any contribution or coordinating any contributions to an official of a municipal entity with dealer selection influence or municipal advisor selection influence with which municipal entity the dealer-municipal advisor is engaging or is seeking to engage in municipal securities business or municipal advisory business. If the dealer-municipal advisor is a municipal advisor third-party solicitor, the dealer-municipal advisor and its MAPs would also be prohibited from soliciting or coordinating contributions to an official with investment adviser selection influence.

Currently, Rule G–37(c)(ii) prohibits a dealer and three of the five categories of MFPs as defined, respectively, in current Rule G–37(g)(iv)(A), (B) and (C), from soliciting any person or PAC to make any payment or coordinate any payments to a political party of a state or locality where the dealer is engaging or seeking to engage in municipal securities business. Proposed amendments to this subsection would retain this prohibition with respect to dealers and these categories of MFPs and would extend the prohibitions to municipal advisors and the three analogous categories of MAPs (''municipal advisor representatives,'' ''municipal advisor solicitors,'' and ''municipal advisor principals,'' as defined, respectively, in proposed Rule G–37(g)(iii)(A), (B) and (C)). To improve the readability of this provision, Rule G–37(c)(ii), as proposed to be amended, would refer to the relevant MFPs and MAPs by their proposed descriptive terms, rather than by cross-references to the relevant definitions.

Prohibition on Circumvention of Rule

Rule G–37(d) currently prohibits a dealer and any MFP of the dealer from doing, directly or indirectly, through or by any other person or means, any act which would result in a violation of the ban on municipal securities business or the prohibition on soliciting or coordinating contributions. Proposed amendments to this section would retain this prohibition with respect to dealers and their MFPs and would extend it to municipal advisors and their MAPs.

Public Disclosure of Contributions and Other Information

Currently, Rule G–37(e) contains broad public disclosure requirements to facilitate enforcement of Rule G–37 and to promote public scrutiny of dealers' political contributions and municipal securities business. Under the provision, dealers are required to

disclose publicly on Form G–37 information about certain: (i) Contributions to issuer officials; (ii) payments to political parties of states or political subdivisions; (iii) contributions to bond ballot campaigns; and (iv) information regarding municipal securities business with issuers. Currently, Form G–37 may be provided to the Board in paper or electronic form.

The proposed amendments to Rule G–37(e) would retain these disclosure requirements for dealers, except such requirements would apply to contributions to ''officials of municipal entities,'' which is a potentially broader group of recipients than ''officials of an issuer.'' [84] The disclosure requirements would also apply to municipal securities business with ''municipal entities'' rather than ''issuers.'' Proposed amendments to Rule G–37(e)(iv), however, would remove the option of making paper, rather than electronic, submissions to the Board.

For municipal advisors, the disclosure requirements of proposed amended Rule G–37(e), would be substantially similar to those for dealers, with one exception for municipal advisor third-party solicitors. The proposed amendments to Rule G–37(e)(i)(C) would require municipal advisor third-party solicitors to list on Form G–37 the names of the third parties on behalf of which they solicited business as well as the nature of the business solicited. The proposed amendments to Rule G–37(e)(iv) would require municipal advisors, like dealers, to submit the required disclosures to the Board in electronic form. The MSRB also proposes to incorporate minor, non-substantive changes to section (e) to improve the readability of the section.

Currently, Rule G–37(f) permits dealers to submit additional voluntary disclosures to the Board. The proposed amendments to Rule G–37(f) would make no change in this respect for dealers and would permit municipal advisors also to make voluntary disclosures.

Definitions

Current Rule G–37(g) sets forth definitions for several terms used in Rule G–37. Proposed amendments to this section (which are not addressed in detail elsewhere in this filing) would add to Rule G–37 new defined terms and would modify existing defined terms in large part to make the appropriate provisions of Rule G–37 applicable to municipal advisors and their associated persons. The first new defined term, ''regulated entity,'' in proposed Rule G–37(g)(i), would mean ''a dealer or municipal advisor,'' and the terms ''regulated entity,'' ''dealer'' and ''municipal advisor'' would exclude the entity's associated persons. With the addition of the defined term ''regulated entity'' current Rule G–37(g)(iii), which distinguishes dealers from their associated persons, would be deleted as unnecessary. The definition of ''reportable date of selection'' would be amended to apply it to municipal advisors, to slightly reorganize the definition and to relocate it from Rule G–37(g)(xi) to proposed Rule G–37(g)(xviii).

Several of the proposed new defined terms for municipal advisors would be analogous to the defined terms applicable to dealers in current Rule G–37. Proposed Rule G–37(g)(xiv) would define the new term ''non-MAP executive officer'' regarding the executive officers of a municipal advisor in a manner analogous to the term ''non-MFP executive officer'' applicable to executive officers of dealers under proposed Rule G–37(g)(xv).[85] Also, proposed Rule G–37(g)(iv) would define the new term ''bank municipal advisor'' in a manner analogous to the current definition of the term ''bank dealer'' under Rule D–8.[86] The term ''municipal advisor'' would be defined based on the definition of the term in the Exchange Act and Commission rules.[87]

The proposed amendments would renumber and relocate a number of definitions in Rule G–37(g) as follows: ''bond ballot campaign'' would be relocated from subsection (g)(x) to proposed subsection (g)(v); ''issuer'' would be relocated from subsection (g)(ii) to proposed subsection (g)(vii); ''payment'' would be relocated from subsection (g)(viii) to proposed subsection (g)(xvii); ''municipal securities business'' would be relocated from subsection (g)(vii) to proposed subsection (g)(xii); and ''contribution'' would be relocated from subsection (g)(i) to proposed subsection (g)(vi). With the exception of substituting the term ''municipal entity'' in place of ''issuer'' in the definition of the terms ''contribution'' and ''municipal securities business,'' the proposed amendments to Rule G–37(g) would not substantively amend the definitions of these terms.

Operative Date

Current Rule G–37(h) provides that a ban on business under the rule arises only from contributions made on or after April 25, 1994 (the original effective date of Rule G–37). Proposed amendments to section (h) would provide that a ban on applicable business under the rule would arise only from contributions made on or after an effective date to be announced by the MSRB in a regulatory notice published no later than two months following SEC approval, which effective date shall be no sooner than six months following publication of the regulatory notice and no later than one year following SEC approval. However, with respect to dealers and dealer-municipal advisors that are currently subject to the requirements of Rule G–37, any ban on municipal securities business that was already triggered before the effective date of the proposed rule change would remain in effect and end according to the provisions of Rule G–37 as in effect at the time of the contribution that triggered the ban.

Exemptions

Rule G–37 currently provides two mechanisms through which a dealer may be exempted from a ban on municipal securities business. First, under current Rule G–37(i), a registered securities association of which a dealer is a member, or another appropriate regulatory agency [88] (collectively, ''agency'') may, upon application, exempt a dealer from a ban on municipal securities business. In determining whether to grant the exemption, the agency must consider, among other factors:

- Whether the exemption is consistent with the public interest, the protection of investors and the purposes of the rule;

[84] The MSRB does not propose to amend the existing disclosure requirements to limit the disclosure of contributions based on the relevant ME official's type of influence. Rather, to further the purposes of the proposed rule change, including permitting the public to scrutinize the political contributions of regulated entities and to address the appearance of *quid pro quo* corruption, the applicable disclosures would be required for contributions to any type of ME official.

[85] The current definition of ''Non-MFP executive officer'' would be relocated from Rule G–37(g)(v) to proposed Rule G–37(g)(xv) and incorporate minor, technical changes to the term (*e.g.,* to update a cross-reference and to replace the phrase ''broker, dealer or municipal securities dealer,'' with ''dealer'').

[86] ''Bank municipal advisor'' is defined in proposed Rule G–37(g)(iv) to mean: ''a municipal advisor that is a bank or a separately identifiable department or division of the bank as defined in Section 15B(e)(4) of the Act and 17 CFR 240.15Ba1–1(d)(4)(i) thereunder.''

Rule D–8 defines the term ''bank dealer'' to mean ''a municipal securities dealer which is a bank or a separately identifiable department or division of a bank as defined in rule G–1 of the Board.''

[87] ''Municipal advisor'' is defined in proposed Rule G–37(g)(viii) to mean: ''a municipal advisor that is registered or required to be registered under Section 15B of the Act and the rules and regulations thereunder.''

[88] Under MSRB Rule D–14, ''[w]ith respect to a broker, dealer, or municipal securities dealer, 'appropriate regulatory agency' has the meaning set forth in Section 3(a)(34) of the Act.''

• whether, prior to the time a triggering contribution was made, the dealer had developed and instituted procedures reasonably designed to ensure compliance with the rule, and had no actual knowledge of the triggering contribution;

• whether the dealer has taken all available steps to cause the contributor to obtain a return of the triggering contribution(s), and has taken other remedial or preventive measures as appropriate under the circumstances, and the nature of such other remedial or preventive measures directed specifically toward the contributor who made the triggering contribution and all employees of the dealer;

• whether, at the time of the triggering contribution, the contributor was an MFP or otherwise an employee of the dealer, or was seeking such employment;

• the timing and amount of the triggering contribution;

• the nature of the election (*e.g.,* federal, state or local); and

• the contributor's apparent intent or motive in making the triggering contribution, as evidenced by the facts and circumstances surrounding the triggering contribution.[89]

The proposed amendments to section (i) would extend its provisions to municipal advisors, including municipal advisor third-party solicitors, and bans on municipal advisory business, on generally analogous terms. The proposed amendments would provide a process for municipal advisors subject to a ban on municipal advisory business to request exemptive relief from such ban on business from a registered securities association of which is it a member or the Commission, or its designee, for all other municipal advisors. Dealer-municipal advisors seeking exemptive relief from a ban on municipal securities business and a ban on municipal advisory business must, for each type of ban, seek relief from the applicable agency or agencies. With respect to dealers, the proposed amendments to section (i) would also make minor, non-substantive changes to improve its readability.

Under the proposed amendments, in determining whether to grant the requested exemptive relief from a ban on municipal advisory business, the relevant agency would be required to consider the factors, with limited modifications, that currently apply when a request for exemptive relief is made by a dealer. The proposed modifications to the factors are limited to those necessary to reflect their application to both dealers and municipal advisors[90] and to make them otherwise consistent with previously discussed proposed amendments to Rule G–37. Specifically, subsection (i)(i), which currently requires an agency to consider whether the requested exemptive relief would be ''consistent with the public interest, the protection of investors and the purposes of'' Rule G–37, would be amended to require consideration also of whether such exemptive relief would be consistent with the protection of municipal entities and obligated persons. In addition, as incorporated throughout the proposed amended rule, the term ''regulated entity'' would be substituted for the deleted phrase, ''broker, dealer or municipal securities dealer.''

As previously discussed, under the proposed amendments to Rule G–37(b), a contribution made by an MAP of a municipal advisor third-party solicitor soliciting business for a dealer client or a municipal advisor client would subject both the municipal advisor third-party solicitor and the regulated entity client to a ban on applicable business. Under the proposed amendments to section (i), if either the municipal advisor third-party solicitor or the regulated entity client desired exemptive relief from the applicable ban on business, the entity that desired relief would be required to separately apply for the exemptive relief and independently satisfy the relevant agency that the application should be granted.

Second, under Rule G–37(j)(i), a dealer currently may avail itself of an automatic exemption (*i.e.,* without the need to apply to an agency) from a ban triggered by its MFP if the dealer: Discovered the contribution within four months of the date of contribution; the contribution did not exceed $250; and the MFP obtained a return of the contribution within sixty days of the dealer's discovery of the contribution. Rule G–37(j)(ii) currently limits the number of automatic exemptions available to a dealer to no more than two automatic exemptions per twelve-month period. Rule G–37(j)(iii) currently further limits the use of the automatic exemption, providing that a dealer may not execute more than one automatic exemption relating to contributions made by the same person (*i.e.,* an individual MFP) regardless of the time period.

The proposed amendments to section (j) would extend its provisions to all municipal advisors and bans on municipal advisory business. A municipal advisor could avail itself of an automatic exemption from a ban triggered by an MAP of the municipal advisor upon satisfaction of conditions that are the same or analogous[91] to those currently applicable to dealers. Similarly, a dealer-municipal advisor subject to a cross-ban could avail itself of an automatic exemption from a ban on applicable business upon satisfaction of the applicable conditions.[92] In addition, when a contribution made by an MAP of the municipal advisor third-party solicitor soliciting business for a regulated entity client would subject both the municipal advisor third-party solicitor and the regulated entity client to a ban on applicable business, each would be allowed to avail itself of an automatic exemption if it separately met the specified conditions. The use of an automatic exemption would count against a regulated entity's allotment (of no more than two automatic exemptions) per twelve-month period, regardless of whether the contribution that triggered the ban was made by an MFP or an MAP of that regulated entity or by an MAP of an engaged municipal advisor third-party solicitor.

Proposed Amendments to Rules G–8 and G–9 and Forms G–37 and G–37x

The proposed amendments to Rule G–8 (books and records) and Rule G–9 (preservation of records) would make related changes to those rules based on the proposed amendments to Rule G–37. The proposed amendments to Rule G–8 would add a new paragraph (h)(iii) to impose the same recordkeeping requirements related to political contributions by municipal advisors and their associated persons as currently exist for dealers and their associated persons. With respect to dealers, minor conforming proposed amendments to Rule G–8(a)(xvi) would be incorporated to conform the recordkeeping requirements of the rule to the proposed

[89] *See* Rule G–37(i).

[90] For example, in the case of a municipal advisor, the proposed amendments to Rule G–37(i)(iii) would require an agency to consider whether, at the time of the triggering contribution, the contributor was an MAP, otherwise an employee of the municipal advisor, or was seeking such employment, or was an MAP or otherwise an employee of a municipal advisor third-party solicitor engaged by the municipal advisor, or was seeking such employment.

[91] For example, in the case of a municipal advisor pursuing an automatic exemption, the proposed amendments to Rule G–37(j)(i)(C) would require the MAP-contributor to obtain the return of the triggering contribution.

[92] A cross-ban would be considered one ban on business. Thus, under section (j)(ii), as proposed to be amended, the execution by a dealer-municipal advisor of the automatic exemptive relief provision to address a cross-ban would be the execution of one exemption.

amendments to Rule G–37 regarding dealers. For example, the proposed rule change would incorporate in Rule G–8(a)(xvi) certain terms added to the definition of municipal finance professional, and the obligation to submit Forms G–37 and G–37x to the Board in electronic form.

The proposed amendments to Rule G–9(h) would generally require municipal advisors to preserve for six years the records required to be made in proposed amended Rule G–8(h)(iii), consistent with the analogous retention requirement in Rule G–9(a) for dealers.

The proposed amendments to Forms G–37 and G–37x would permit the forms to be used by both dealers and municipal advisors to make the disclosures that would be required by proposed amended Rule G–37(e). Dealer-municipal advisors could make all required disclosures on a single Form G–37.

2. Statutory Basis

Section 15B(b)(2) of the Exchange Act [93] provides that

[t]he Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act [94] provides that the MSRB's rules shall

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes that the proposed rule change is consistent with the Act. It would address potential ''pay to play'' practices by municipal advisors involving corruption or the appearance of corruption. Doing so is consistent with the intent of Congress in granting rulemaking jurisdiction over municipal advisors to the MSRB. As the Commission has recognized, the regulation of municipal advisors and their advisory activities is generally intended to address problems observed with the unregulated conduct of some municipal advisors, including ''pay to play'' practices.[95] Indeed, the relevant legislative history indicates that Congress determined to grant rulemaking authority over municipal advisors to the MSRB, in part, because it already ''has an existing, comprehensive set of rules on key issues such as pay-to-play and . . . that consistency would be important to ensure common standards.'' [96]

The proposed amendments to Rule G–37 would subject all municipal advisors, including municipal advisor third-party solicitors, to ''pay to play'' regulation that is consistent with the MSRB's regulation of dealers.[97] Like dealers, municipal advisors that seek to influence the award of business by government officials by making, soliciting or coordinating political contributions to officials can distort and undermine the fairness of the process by which government business is awarded, creating artificial impediments to a free and open market in municipal securities and municipal financial products. These practices can harm obligated persons, municipal entities and their citizens by resulting in inferior services and higher fees, as well as contributing to the violation of the public trust of elected officials who might allow political contributions to influence their decisions regarding public contracting. ''Pay to play'' practices are rarely explicit: Participants do not typically let it be known that contributions or payments are made or accepted for the purpose of influencing the selection of a municipal advisor (or dealer, municipal advisor or investment adviser on behalf of which a municipal advisor acts as a solicitor).[98] Nonetheless, numerous developments in recent years have led the MSRB to conclude that the selection of market participants that may now be defined as municipal advisors has been influenced by ''pay to play'' practices and that political contributions as the *quid pro quo* for the award of valuable financial services contracts have been funneled through third parties that may now be municipal advisor third-party solicitors as defined in the proposed rule change. These include public reports of ''pay to play'' practices involving the use of persons that may now be defined as municipal advisors,[99] legislative and regulatory statements regarding the activity engaged in by some persons that may now be defined as municipal advisors,[100] market participant

[93] 15 U.S.C. 78*o*–4(b)(2).

[94] 15 U.S.C. 78*o*–4(b)(2)(C).

[95] *See* Order Adopting SEC Final Rule, 78 FR at 67469, 67475 nn.104–6 and accompanying text (discussing relevant enforcement actions); Senate Report, at 38.

[96] Senate Report, at 149.

[97] Some financial advisory firms that may now be defined as municipal advisory firms are registered as dealers and therefore subject to current Rule G–37. With respect to municipal advisors that are not dealers, as of 2009, approximately fifteen states had some form of ''pay to play'' prohibition, some of which were broad enough to apply to financial advisory services. Some municipalities also have such rules. In many cases, the limited and patchwork nature of these state and local laws has not been effective in addressing in a comprehensive way the possibility and appearance of ''pay to play'' practices in the municipal securities market. *See* Statement of Ronald A. Stack, Chair, MSRB, Before the Senate Committee on Banking, Housing and Urban Affairs (Mar. 26, 2009).

[98] *See Blount,* 61 F.3d at 945 (''While the risk of corruption is obvious and substantial, actors in this field are presumably shrewd enough to structure their relations rather indirectly. . . .''); *id.* (''[N]o smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.'').

[99] *See, e.g.,* Randall Jensen, *Some California FAs Use Pay-to-Play Tactics, Critics Say,* Bond Buyer, May 24, 2012 (suggesting that some financial advisors may engage in ''pay to play'' practices in the municipal market and noting that they are not currently subject to ''pay to play'' regulation); Randall Jensen, *Brokers' Gifts That Keep Giving,* Bond Buyer, January 13, 2012 (suggesting that the selection of dealers, financial advisors and other professionals in connection with bond ballot initiatives is motivated by ''pay to play'' practices and noting that financial advisors generally donate more than dealers but are not required to disclose contributions to the MSRB); Mary Williams Walsh, *Nationwide Inquiry on Bids for Municipal Bonds,* N.Y. Times, January 8, 2009, at A1 (reporting that ''pay to play'' in the municipal bond market was widespread, and specifically referencing ''independent specialists who are supposed to help local governments''); Sarah McBride and Leslie Eaton, *Legal Run-Ins Dog the Firm in New Mexico Probe,* Wall St. J., January 7, 2009 and Mary Williams Walsh, *Bond Advice Leaves Pain in Its Wake,* N.Y. Times, February 16, 2009 (both describing potential ''pay to play'' activity in the municipal securities market engaged in by an ''unregulated'' adviser); Brad Bumsted, *Firm in ''Pay to Play'' Probe Got $770,000 From State,* Pittsburgh Trib. Rev., January 6, 2009 (reporting on the political contributions made by the head of a financial advisory firm and the awarding of a financial advisory contract to that firm in the context of a nationwide inquiry into ''pay to play'' practices in the municipal bond market); and Lynn Hume, *SEC Doing Pay-to-Play Examinations,* Bond Buyer, July 1, 2004 (reporting SEC plans to examine a number of financial advisors and broker-dealers to determine if they have engaged in ''pay to play'' activities in the municipal market).

[100] *See* nn. 95 and 97 and accompanying text. *See also Bond Regulators Eye Campaign Contribution Abuses,* Reuters, April 10, 2003, available at Westlaw, 4/10/03 Reuters News 20:14:27 (citing Commission, MSRB, and NASD (now FINRA) concerns of continued ''pay to play'' activity in the market, based on reports involving suspicious conduct engaged in by some market participants, including financial advisors); and SEC Report, at 102 (''[O]ther forms of potentially problematic pay-to-play activities involving commodity trading

Continued

comments submitted to the MSRB regarding ''pay to play'' regulation,[101] and a number of enforcement actions involving potential ''pay to play'' practices and financial advisors or third-party intermediaries that may now be defined as municipal advisors.[102]

The proposed rule change is expected to aid municipal entities that choose to engage municipal advisors in connection with their issuance of municipal securities as well as transactions in municipal financial products by promoting higher ethical and professional standards of such advisors and helping to ensure that the selection of such municipal advisors is based on merit and not tainted by *quid pro quo* corruption or the appearance thereof. The MSRB also believes that, by applying the proposed rule change to municipal advisor third-party solicitors, the proposed rule change will level the playing field upon which dealers and municipal advisors (and the third-party dealer, municipal advisor and investment adviser clients of such solicitors) compete because all such persons would be subject to the same or similar requirements.

These parties play a valuable role in the municipal securities market, in the course of providing financial and related advice or in underwriting the securities. The mere perception of *quid pro quo* corruption among such professionals may breed actual *quid pro quo* corruption as municipal advisors, dealers, investment advisers and ME officials alike may feel compelled to take part in ''pay to play'' practices in order to avoid a competitive disadvantage as compared to similarly situated parties they believe do engage in such practices. The appearance of *quid pro quo* corruption in the selection of municipal securities professionals also diminishes investor confidence in the ability or willingness of a dealer, municipal advisor or investment adviser to faithfully fulfill its obligations to municipal entities and the investing public. Such apparent *quid pro quo* corruption also creates artificial impediments to a free and open market as professionals that believe that ''pay to play'' practices are a prerequisite to the receipt of government business but are unwilling or unable to engage in such practices may be reluctant to enter the market and provide to issuers and investors their honest, and potentially more qualified, services. The proposed rule change is expected to curb such *quid pro quo* corruption and the appearance thereof.

Further, the disclosure requirements contained in the proposed rule change will serve to give regulators and the market, including investors, transparency regarding the political contributions of municipal advisors and thereby promote market integrity. The combined effect of the ban on business provisions and the disclosure provisions will serve to reduce the appearance of *quid pro quo* corruption in the municipal market and enhance the ability of the MSRB and other regulators to detect and deter fraudulent or manipulative acts and practices in connection with the awarding of municipal securities business and municipal advisory business (and engagements to provide investment advisory services to the extent a municipal advisor third-party solicitor is used to obtain or retain such business).

Additionally, upon a finding by the Commission that the proposed rule change imposes at least substantially equivalent restrictions on municipal advisors as the IA Pay to Play Rule imposes on investment advisers and that the proposed rule change is consistent with the objectives of the IA Pay to Play Rule, the proposed rule change would serve as a means to permit investment advisers to continue to pay municipal advisors for the solicitation of investment advisory

advisors, municipal advisors, or other municipal securities market participants are not yet directly regulated but raise disclosure issues for investors and the market.'').

[101] Notice of Filing of Proposed Rule Change Relating to Solicitation of Municipal Securities Business Under MSRB Rule G–38, Release No. 34–51561 (April 15, 2005), 70 FR 20782, at 20785–20786 (April 21, 2005) (File No. SR–MSRB–2005–04) (citing comment letters from Jerry L. Chapman, First Southwest Company, Kirkpatrick, Pettis, Smith, Polian Inc., Merrill Lynch and Morgan Keegan & Company, Inc. and stating ''[m]any commentators are concerned that, although the problems associated with pay-to-play in the municipal securities industry are not limited to dealers, only dealers are subject to regulation in this area . . . They urge the MSRB to coordinate efforts with the Commission, NASD and others to apply pay-to-play limits to financial advisors, derivatives advisors, bond lawyers and other market participants'') (internal citations omitted); Notice of Filing of a Proposed Rule Change Relating to Amendments to MSRB Rules G–37 and G–8 and Form G–37, Release No. 34–68872 (February 8, 2013), 78 FR 10656, 10663 (February 14, 2013) (File No. SR–MSRB–2013–01) (summarizing comments from market participants that recommend extending the proposed amendments to Rule G–37 regarding increased disclosure of bond ballot contribution information to municipal advisors); Notice of Filing of Proposed New Rule G–42, on Political Contributions and Prohibitions on Municipal Advisory Activities; Proposed Amendments to Rules G–8, on Books and Records, G–9, on Preservation of Records, and G–37, on Political Contributions and Prohibitions on Municipal Securities Business; Proposed Form G–37/G–42 and Form G–37x/G–42x; and a Proposed Restatement of a Rule G–37 Interpretive Notice, Release No. 34–65255 (September 2, 2011), 76 FR 55976 at 55983 (September 9, 2011) (File No. SR–MSRB–2011–12) (withdrawn) (quoting commenter NAIPFA) (''All too often, we see funds and/or campaign services being contributed to bond campaigns by underwriters [and] financial advisors . . . who end up providing services for the bond transaction work once the election is successful.''). From the time that the MSRB first proposed ''pay to play'' regulation for the municipal securities market, it has received comments from market participants requesting the extension of such regulation to persons that may now be deemed municipal advisors. *See* Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Political Contributions and Prohibitions on Municipal Securities Business, Release No. 34–33482 (January 14, 1994), 59 FR 3389, 3402–03 (January 21, 1994) (File No. SR–MSRB–94–02) (summarizing concerns from several commenters that Rule G–37, as initially proposed in 1994, did not apply to certain market participants including third-party solicitors and independent financial advisors).

[102] Financial regulators have brought enforcement actions charging financial advisors with violations of various MSRB fair practice rules in connection with alleged activities that follow or include ''pay to play'' practices and *quid pro quo* exchanges. Other enforcement actions are in response to a specific violation of Rule G–37. *See, e.g., In re Wheat, First Securities, Inc.,* SEC Initial Dec. Rel. No. 155 (December 17, 1999) (finding violation of Rule G–17 and Florida fiduciary duty law for financial advisor's false disclosures to municipal entity regarding the use of a third party—who had ''[o]ver the years, . . . made hundreds, if not thousands, of political contributions'' that ''secure[d]'' his access to officials—to secure its advisory contract with the county); *In re RBC Capital Markets Corp.,* SEC Release No. 59439 (February 24, 2009) (finding that a financial advisor made advances in violation of Rule G–20 on behalf of a municipal entity client to pay for travel and entertainment expenses unrelated to the bond offering); FINRA Letter of Acceptance, Waiver and Consent No. 2009016275601 (February 8, 2011) (finding that dealer that also engaged in financial advisory activities violated a number of MSRB rules, including engaging in municipal securities business notwithstanding a triggering contribution under Rule G–37, and making payments to unaffiliated individuals for the solicitation of municipal securities business under Rule G–38). Criminal authorities have also brought actions against a former Philadelphia treasurer, municipal securities professionals and a third-party intermediary seeking business on behalf of such municipal securities professionals for their participation in a complex scheme involving ''pay to play'' practices. *See, e.g.,* Indictment *U.S.* v. *White, et al.,* No. 04–370 (E.D. Pa. June 29, 2004). In addition, the Commission brought and settled charges against the former treasurer of the State of Connecticut and other parties alleging that engagements to provide investment advisory services were awarded as the *quid pro quo* for payments made to officials that were funneled through third-party intermediaries. *See, e.g., SEC* v. *Paul J. Silvester, et al.,* Litigation Release No. 16759 (October 10, 2000); Litigation Release No. 20027 (March 2, 2007); Litigation Release No. 19583 (March 1, 2006); Litigation Release No. 16834 (December 19, 2000). Similar activity in connection with investment advisers seeking to manage the assets of the New York State Common Retirement Fund resulted in guilty pleas to criminal charges and remedial sanctions in parallel administrative orders. *See, e.g., SEC* v. *Henry Morris, et al.,* Litigation Release No. 22938 (March 10, 2014). For further instances of ''pay to play'' activity involving third-party intermediaries and solicitors that may now be defined as municipal advisors, *see* Order Adopting IA Pay to Play Rule, 75 FR at 41019–20.

services on behalf of the investment adviser.[103]

Section 15B(b)(2)(L)(iv) of the Act [104] requires that rules adopted by the Board

not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv) of the Exchange Act. While the proposed rule change would affect all municipal advisors, including small municipal advisors, the MSRB believes it is necessary and appropriate to address ''pay to play'' practices in the municipal market. The MSRB believes that the approach taken under the proposed rule change (which has for more than two decades applied to dealers of diverse sizes) would appropriately accommodate the diversity of the municipal advisor population, including small municipal advisors and sole proprietorships.

The MSRB recognizes that municipal advisors would incur costs to meet the requirements set forth in the proposed rule change. These costs may include additional compliance and recordkeeping costs associated with initially establishing compliance regimes and ongoing compliance, as well as separate legal and compliance fees associated with the triggering of a ban on applicable business or an application for relief from such a ban. Small municipal advisors, however, will necessarily have fewer personnel whose contributions may trigger disclosure obligations or subject the municipal advisory firm to a ban on applicable business under the proposed rule change. Small municipal advisors can also reasonably be expected to have relatively fewer municipal advisory engagements than larger firms and fewer municipal entities with whom they engage in municipal advisory business. Thus, their compliance costs are likely to be significantly lower than relatively larger municipal advisors.

The MSRB also believes that the proposed amendments to Rule G–37(i) regarding application for an exemption from a ban on applicable business and proposed amendments to Rule G–37(j) regarding the automatic exemption from a ban on applicable business provide significant relief to all municipal advisors, including small municipal advisors, from the consequences of an inadvertent triggering contribution. In particular, the automatic exemption provision would provide a regulated entity relief from a ban on applicable business without the need to resort to a formal application for an exemption, which may involve the use of outside legal counsel or compliance professionals.

Additionally, because small municipal advisors can be reasonably expected to employ fewer personnel and/or have fewer engagements, they are likely to have less information to report to the MSRB under the proposed rule change. Further, municipal advisors that meet the standards to file a Form G–37x in lieu of a Form G–37 may avail themselves of relief from all other reporting obligations as long as they continue to meet those standards. Thus, the MSRB believes that the proposed rule change is consistent with the Dodd-Frank Act's provision with respect to burdens that may be imposed on small municipal advisors.

Finally, the MSRB believes that the proposed rule change will allow small municipal advisors to compete based on merit rather than their ability or willingness to make political contributions, which may be a significant benefit relative to the status quo.

The MSRB also believes that the proposed rule change is consistent with Section 15B(b)(2)(G) of the Exchange Act,[105] which provides that the MSRB's rules shall prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved.

The proposed rule change would require, under proposed amendments to Rule G–8, that a municipal advisor make and keep certain records concerning political contributions and the municipal advisory business in which the municipal advisor engages. Proposed amendments to Rule G–9 would require that these records be preserved for a period of at least six years. The MSRB believes that the proposed amendments to Rules G–8 and G–9 related to recordkeeping and records preservation will promote compliance and facilitate enforcement of the proposed amendments to Rule G–37.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act [106] requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In addition, Section 15B(b)(2)(L)(iv) of the Exchange Act provides that MSRB rules may

not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.[107]

The Board's Policy on the Use of Economic Analysis in Rulemaking, according to its transitional terms, does not apply to the Board's consideration of the proposed rule change, as the rulemaking process for the proposed rule change began prior to the adoption of the policy. However, the policy can still be used to guide the consideration of the proposed rule change's burden on competition. The MSRB also considered other economic impacts of the proposed rule change and has addressed any comments relevant to these impacts in other sections of this filing.

The Board has evaluated the potential impacts of the proposed rule change, including in comparison to reasonable alternative regulatory approaches, relative to the baseline. The MSRB does not believe that the proposed rule change will impose any additional burdens, relative to the baseline, that are not necessary or appropriate in

[103] The IA Pay to Play Rule prohibits an investment adviser and its covered associates from providing or agreeing to provide payment to any person to solicit a government entity for investment advisory services unless the person is, in relevant part, a ''regulated person.'' *See* 17 CFR 275.206(4)–5(a)(2)(i)(A). A ''regulated person'' includes a municipal advisor, provided that MSRB rules prohibit such municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made; and the Commission finds that such rules impose substantially equivalent or more stringent restrictions on municipal advisors as the IA Pay to Play Rule imposes on investment advisers and that such rules are consistent with the objectives of the IA Pay to Play Rule (the ''SEC finding of substantial equivalence''). *See* 17 CFR 275.206(4)–5(f)(9)(iii). The compliance date for the IA Pay to Play Rule's ban on third-party solicitation is July 31, 2015. *See* Investment Advisers Act Release No. 4129 (June 25, 2015), 80 FR 37538 (July 1, 2015). However, the staff of the SEC's Division of Investment Management has indicated that until the later of (i) the effective date of a FINRA ''pay to play'' rule that obtains the SEC finding of substantial equivalence or (ii) the effective date of an MSRB ''pay to play'' rule that obtains the SEC finding of substantial equivalence, it would not recommend enforcement action to the Commission against an investment adviser or its covered associates for violation of the IA Pay to Play Rule's ban on third-party solicitation. *See* SEC, Staff Responses to Questions About the Pay to Play Rule, at Question I.4, available at *https://www.sec.gov/divisions/investment/pay-to-play-faq.htm.* The proposed rule change is intended to impose at least substantially equivalent standards on municipal advisors to the standards imposed on investment advisers under the IA Pay to Play Rule for purposes of the SEC finding of substantial equivalence, however, such a finding may be made only by the Commission.

[104] 15 U.S.C. 78*o*–4(b)(2)(L)(iv).

[105] 15 U.S.C. 78*o*–4(b)(2)(G).

[106] 15 U.S.C. 78*o*–4(b)(2)(C).

[107] 15 U.S.C. 78*o*–4(b)(2)(L)(iv).

furtherance of the purposes of the Act. To the contrary, the MSRB believes that the proposed rule change is likely to increase fair competition.

''Pay to play'' practices may interfere with the process by which municipal advisors or the third-party clients of a municipal advisor third-party solicitor are chosen since the receipt of contributions made by such persons might influence an ME official to award business based, not on merit, but on the contributions received. ''Pay to play'' practices may also raise artificial barriers to entry and detract from fair competition among municipal advisors and the third-party clients of municipal advisor third-party solicitors.[108]

The MSRB believes that the proposed rule change will make it more likely that municipal advisors (and the third-party clients of a municipal advisor third-party solicitor) will be selected based on merit and cost, rather than on contributions to political officials. By serving to level the playing field upon which municipal advisors compete for business and solicit business for others, the proposed rule change will help curb manipulation of the market for municipal advisory services (and municipal securities business and investment advisory services, to the extent a municipal advisor third-party solicitor is used to obtain or retain such business). Municipal entities are, in turn, more likely to receive higher-quality advice and lower costs in procuring such business and services.

As noted by the SEC in the IA Pay to Play Approval Order, the efficient allocation of advisory business may be enhanced when it is awarded to investment advisers that compete on the basis of price, quality of performance and service and not on the influence of political contributions.[109] It is a similar case with the awarding of municipal advisory business to municipal advisors and municipal securities business to dealers. The SEC also noted in the same approval order that investment advisory firms, and particularly smaller investment advisory firms, will be able to compete based on merit rather than their ability or willingness to make political contributions.[110] The SEC's reasoning is equally applicable to the potential impact on municipal advisors and dealers of the proposed rule change. A merit-based process is likely to result in a more efficient allocation of professional engagements, compared to the baseline state.

In addition, the proposed rule change subjects municipal advisory activities to a regulatory regime comparable to the regulatory regimes for other entities and persons in the financial services industry, in particular those such as dealers or investment advisers who provide services to municipal entities and are subject to existing ''pay to play'' rules including Rule G–37 and the IA Pay to Play Rule, respectively.

The MSRB considered whether costs associated with the proposed rule change, relative to the baseline, could affect the competitive landscape. The MSRB recognizes that the compliance, supervisory and recordkeeping requirements associated with the proposed rule change may impose costs and that those costs may disproportionately affect municipal advisors that are not also broker-dealers or that have not otherwise previously been regulated in this area. During the comment period, the MSRB sought information that would support quantitative estimates of these costs, but did not receive any relevant data.

The MSRB believes that the SEC estimates of the costs associated with implementing the IA Pay to Play Rule may provide a guide to the initial, one-time costs that previously unregulated municipal advisors might incur under the proposed rule change. Because even the largest municipal advisory firms are generally smaller than large investment advisory firms, however, the MSRB believes the costs of compliance associated with the proposed rule change will be lower than those associated with the IA Pay to Play Rule.

The MSRB also recognizes that the proposed rule change may cause some firms—either because they have engaged in competition primarily on the basis of political contributions or because of the costs of compliance—to exit the market. Some municipal advisors may consolidate with other municipal advisors in order to benefit from economies of scale (*e.g.,* by leveraging existing compliance resources of a larger firm) rather than to incur separately the costs associated with the proposed rule change. While this might reduce the number of firms competing for business, consolidated firms might compete more effectively on price, which would offer benefits to municipal entities. Some firms wishing to enter the market may find the costs of compliance create barriers to entry. Finally, some dealer-municipal advisors may separate and form dealer-only and municipal advisor-only firms to avoid the ''cross-ban.'' If separations result in lost efficiencies of scope, such firms may compete less effectively on price—potentially raising issuance costs, but the presence of such firms also may potentially foster greater competition, particularly among smaller firms.

The MSRB recognizes that small municipal advisors and sole proprietors may not employ full-time compliance staff and that the cost of ensuring compliance with the requirements of the proposed rule change may be proportionally higher for these smaller firms, potentially leading to exit from the industry or consolidation. However, as the SEC recognized in its Order Adopting SEC Final Rule, the market for municipal advisory services is likely to remain competitive despite the potential exit of some municipal advisors (including small entity municipal advisors) or the consolidation of municipal advisors.[111]

The MSRB also believes that the proposed amendments to Rule G–37(i) regarding application for an exemption from a ban on applicable business and proposed amendments to Rule G–37(j) regarding the automatic exemption from a ban on applicable business provide significant relief to all municipal advisors, including small municipal advisors, from the consequences of an inadvertent triggering contribution. In particular, the automatic exemption provision would provide a regulated entity relief from a ban on applicable business without the need to resort to a formal application for an exemption, which may involve the use of outside legal counsel or compliance professionals.

Overall, the MSRB believes that the proposed rule will not, on its own, significantly change the number or concentration of firms offering municipal advisory services and that the increased focus on merit and cost will result in a more competitive market.

The MSRB solicited comment on the potential burdens of the draft amendments to Rules G–37, G–8 and G–9 in a notice requesting comment, which notice incorporated the MSRB's preliminary economic analysis.[112] The specific comments and the MSRB's responses thereto are discussed in Section C.

[108] Because of the illicit nature of the activity, quantifying the extent of *quid pro quo* corruption is difficult. In its order providing for the registration of municipal advisors, however, the Commission noted that the new municipal advisor registration and regulatory regime is intended to mitigate some of the problems observed with the conduct of some municipal advisors, *including ''pay to play'' practices. See* Order Adopting SEC Final Rule, 78 FR at 67469.

[109] *See* Order Adopting IA Pay to Play Rule, at 41053.

[110] *See id.*

[111] *See* Order Adopting SEC Final Rule, at 67608.

[112] MSRB Notice 2014–15, Request for Comment on Draft Amendments to MSRB Rule G–37 to Extend its Provisions to Municipal Advisors (August 18, 2014) (''Request for Comment'').

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The MSRB received thirteen comment letters in response to the Request for Comment.[113] The comment letters are summarized below by topic and the MSRB's responses are provided.

Support for the Proposed Rule Change

Most commenters supported to some degree the initiative to extend the policies contained in Rule G–37 to municipal advisors. The Public Interest Groups stated that, by recognizing that municipal advisors may play a key role in underwriting and other municipal funding decisions, the MSRB's expansion of the scope of the rule will help promote the integrity of the contracting process. BDA supported the objective of the draft amendments on the grounds that it would create a level playing field between dealers and municipal advisors. SIFMA maintained that it is important that all market participants are subject to the same rules applicable to political activity, and that the draft amendments significantly advance that interest. NAIPFA supported the draft amendments without qualification. Sanchez noted the draft amendments would address practices that create artificial barriers to competition.

Several commenters expressed support for specific provisions in the draft amendments. The Public Interest Groups and CCP supported replacing the term ''official of an issuer'' with the new defined term ''official of a municipal entity.'' CCP further supported the draft amendments' creation of different categories of ''officials of a municipal entity.'' SIFMA and CCP both expressed support for the purpose for which these categories were created—namely, to ensure that there is a nexus between a contribution and the awarding of business that gives rise to a sufficient risk of corruption, or the appearance thereof, to warrant a ban on applicable business.

De Minimis Contributions

Under draft amended Rule G–37(b)(ii)(A), contributions made by an MFP or MAP to an ME official for whom the MFP or MAP is entitled to vote would be *de minimis* and would not trigger a ban on municipal securities business or municipal advisory business if such contributions made by such MFP or MAP do not, in total, exceed $250 per election. Five commenters said that the MSRB should harmonize this *de minimis* exclusion with those set forth for investment advisers under the IA Pay to Play Rule,[114] and two of these five commenters said that the *de minimis* exclusion should be harmonized with those set forth for swap dealers under the Swap Dealer Rule.[115] As described below, however, the comments differed with regard to the extent of harmonization suggested and the offered rationale for harmonization. Two additional commenters opposed any modification to the *de minimis* exclusion.[116]

Raising the Threshold for the Existing De Minimis Exclusion

The five commenters that supported greater harmonization agreed that Rule G–37 should be modified to raise the threshold from $250 to $350 for the existing *de minimis* exclusion under draft amended Rule G–37(b)(ii).

SIFMA, BDA and C&D supported a $350 *de minimis* threshold principally on the basis of promoting more efficient administration of federal ''pay to play'' programs and reducing the compliance burdens on those regulated entities that are also subject to the IA Pay to Play Rule and the Swap Dealer Rule[117]—both of which have a *de minimis* threshold of $350 for a contribution to an official for whom the contributor is entitled to vote.[118] SIFMA expressed the view that both the $250 *de minimis* threshold in Rule G–37 as well as the $350 *de minimis* threshold utilized in the IA Pay to Play Rule[119] appear to be somewhat arbitrary. However, it argued, to the extent a *de minimis* amount is exempted, it should be uniform across the federal ''pay to play'' regimes. In contrast, NAIPFA expressed unqualified support for the draft amendments and specifically opposed any increase in the *de minimis* threshold of $250. Sanchez also opposed any change to the *de minimis* threshold, commenting that Rule G–37 has been an important tool in enhancing free and fair competition and that a change in the *de minimis* threshold would provide a distinct and unfair advantage to large financial services firms over smaller firms.

CCP and Callcott framed their arguments for a $350 *de minimis* threshold based on First Amendment concerns. Because the IA Pay to Play Rule[120] appeared to embody a determination that a *de minimis* threshold of $350 was sufficient to prevent *quid pro quo* corruption, or the appearance thereof, they suggested the MSRB's proposed $250 *de minimis* threshold could not be ''narrowly tailored to achieve a compelling government interest.'' While CCP was skeptical as to whether the *de minimis* thresholds under the IA Pay to Play Rule are consistent with constitutional requirements, it expressed concern that the MSRB did not articulate why these thresholds are not sufficient for purposes of Rule G–37. Callcott argued that, although Rule G–37's $250 *de minimis* threshold was upheld by the DC Circuit in *Blount*[121] in 1995, the rule cannot continue to withstand constitutional scrutiny in the wake of the IA Pay to Play Rule[122] and Supreme Court cases decided since *Blount,* including *McCutcheon* v. *FEC.*[123] In contrast, Sanchez stated that unlike some of the recent Supreme Court rulings on political contributions, Rule G–37 is narrowly tailored to only affect persons who seek specific types of business with municipal entities and not citizens at large.

The MSRB is sensitive to the effect of differing ''pay to play'' *de minimis* thresholds for dealers and municipal advisors that also operate in the

[113] Comments were received from American Council of Engineering Companies: Letter from David A. Raymond, President & CEO, dated October 1, 2014 (''ACEC''); Anonymous Attorney: Email from Anonymous, dated October 1, 2014 (''Anonymous''); Bond Dealers of America: Letters from Michael Nicholas, Chief Executive Officer, dated October 1, 2014 (''First BDA'') and October 8, 2014 (''Second BDA'') (together, ''BDA''); Caplin & Drysdale, Chtd.: Letter from Trevor Potter and Matthew T. Sanderson, dated September 30, 2014 (''C&D''); Castle Advisory Company LLC: Email from Stephen Schulz, dated August 18, 2014 (''Castle''); Center for Competitive Politics: Letter from Allen Dickerson, Legal Director, dated October 1, 2014 (''CCP''); Dave A. Sanchez: Letter from Dave A. Sanchez, dated November 5, 2014 (''Sanchez''); Hardy Callcott: Email from Hardy Callcott, dated September 9, 2014 (''Callcott''); National Association of Independent Public Finance Advisors: Letter from Jeanine Rodgers Caruso, President, dated October 1, 2014 (''NAIPFA''); Public Citizen, et al.: Letter from Bartlett Naylor, Financial Policy Advocate, et al., dated October 1, 2014 (''The Public Interest Groups''); Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated September 30, 2014 (''SIFMA''); and WM Financial Strategies: Letter from Joy A. Howard, Principal, dated October 1, 2014 (''WMFS'').

[114] *See* 17 CFR 275.206(4)–5.

[115] *See* 17 CFR 23.451. BDA, C&D, CCP, Callcott and SIFMA proposed harmonization with the IA Pay to Play Rule. BDA and SIFMA also proposed harmonization with the Swap Dealer Rule.

[116] NAIPFA and Sanchez opposed modification to the *de minimis* exclusion.

[117] C&D also noted that a $350 threshold would partly account for the effects of inflation since the Board first established $250 as the threshold in 1994.

[118] *See* 17 CFR 275.206(4)–5(b)(1); *see also* 17 CFR 23.451(b)(2)(i)(A).

[119] *See id.*

[120] *Id.*

[121] *Blount* v. *SEC,* 61 F.3d 938 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1119 (1996).

[122] *See* 17 CFR 275.206(4)–5.

[123] *McCutcheon* v. *FEC,* 572 U.S. ____, 134 S. Ct. 1434 (2014) (''*McCutcheon*'').

investment advisory market or the swap market. However, the Board believes that, to the extent possible and appropriate, consistency between the regulatory treatment of dealers and municipal advisors, who operate in the same market and typically with the same clients, is vital to curb *quid pro quo* corruption or the appearance thereof in the municipal market. Dealers have been subject to the requirements of Rule G–37 for more than two decades, and as commenters have noted, its terms, including its *de minimis* threshold, have been effective in combating corruption or the appearance of corruption in connection with the awarding of municipal securities business to dealers.[124]

Moreover, as acknowledged by several of the commenters, in *Blount,* the D.C. Circuit previously determined that Rule G–37 was constitutional on the ground that the rule was narrowly tailored to serve a compelling government interest.[125] The court found the interest in protecting investors from fraud and protecting underwriters from unfair, corrupt practices to be compelling.[126] The MSRB does not believe that differing *de minimis* threshold determinations for other markets precludes a determination that the MSRB's *de minimis* threshold for the municipal market is narrowly tailored. The MSRB also believes that commenter references to recent Supreme Court decisions are misplaced. Those cases, for example, did not address regulations aimed at preventing *quid pro quo* corruption or the appearance thereof with respect to individuals engaged in securities-related business with municipal entities, or even regulations regarding individuals engaged in business with a governmental entity more generally. Additionally, recent jurisprudence relating to political contributions and government contractors implicitly contradicts the notion that *Blount* does not survive *McCutcheon. Wagner, et al.,* v. *FEC,*[127] decided *en banc* by the U.S. Court of Appeals for the District of Columbia Circuit after *McCutcheon,* unanimously upheld a provision in the Federal Election Campaign Act that prohibits contributions made in connection with federal elections by federal government contractors. In upholding the provision, the *Wagner* court repeatedly cited *Blount* with approval, noting that it upheld Rule G–37 against First Amendment challenge[128] and that it found Rule G–37 to be '' 'closely drawn,' in part because it 'restrict[ed] a narrow range of . . . activities for a relatively short period of time,' and those subject to the rule were 'not in any way restricted from engaging in the vast majority of political activities.' '' [129] Accordingly, the MSRB has determined to extend the current *de minimis* threshold applicable to dealers in Rule G–37 to municipal advisors through the proposed rule change.

Adding an Additional De Minimis Exclusion

Three of the five commenters that supported greater harmonization also urged the MSRB to add an additional *de minimis* exclusion for contributions made by an MFP or MAP to an ME official for whom the MFP or MAP is not entitled to vote if such contributions do not, in total, exceed $150 per election.[130] These commenters based their arguments on First Amendment concerns. C&D cited statements by the Commission when it adopted the IA Pay to Play Rule,[131] noting that the Commission acknowledged that the $150 limit for contributions to officials for whom the investment adviser could not vote was justified because non-residents might have legitimate interests in those elections, such as the interest of a resident of a metropolitan area in the city in which the person works. C&D suggested that a similar rationale would apply with respect to personnel of dealers and municipal advisors. Similarly, CCP argued that the Supreme Court's ruling in *McCutcheon,* reiterating the importance of associational rights, would make little sense if bans on out-of-district contributions were constitutional. Callcott noted that the ''narrow tailoring'' conclusion of *Blount* cannot continue to survive and noted that the lack of a *de minimis* threshold for contributions to ME officials for whom an MAP is not entitled to vote is particularly vulnerable to First Amendment challenge.

In contrast, BDA, SIFMA and Sanchez did not advocate establishing a second *de minimis* contribution exclusion. BDA expressed concern that such an extension would create considerable chaos in the municipal securities market, and BDA and Sanchez both noted that the current approach in Rule G–37 is accepted and appears to be working well. Specifically speaking to recent Supreme Court jurisprudence, Sanchez expressed the view that Rule G–37 is narrowly tailored to only affect persons who seek specific types of business with municipal entities and not citizens at large.

As discussed above, the MSRB has determined to extend the current *de minimis* threshold applicable to dealers in Rule G–37 to municipal advisors through the proposed rule change. Current Rule G–37 and the proposed amendments are intended to address *quid pro quo* corruption and the appearance thereof in connection with the awarding of municipal securities business, municipal advisory business, and engagements to provide investment advisory services. Even in the absence of actual *quid pro quo* corruption, contributions to officials for whom an MFP or MAP is not entitled to vote are at heightened risk of the appearance of *quid pro quo* corruption, as the MFP or MAP's non–*quid pro quo* interest in that election is less likely to be immediately apparent to the public. Rule G–37 has previously withstood constitutional scrutiny and the proposed rule change would not amend the current *de minimis* thresholds in Rule G–37. The MSRB agrees with Sanchez that the proposed amendments to Rule G–37 are narrowly tailored. The MSRB notes again that comments based upon, or referring to, recent Supreme Court decisions are misplaced. Those cases presented different facts and circumstances and, for example, did not address regulations aimed at preventing *quid pro quo* corruption or the appearance thereof with respect to individuals engaged in securities-related business with municipal entities, or even regulations regarding individuals engaged in business with a governmental entity as a general matter. Further, as described above, *Wagner,* decided since *McCutcheon,* upheld a complete ban with no *de minimis* exclusion on contributions to federal campaigns by federal contractors. This suggests that Rule G–37's more tailored temporary limitation on business activities resulting from non-*de minimis* contributions to ME officials with the ability to influence the awarding of business to the regulated entity (and in the case of a municipal advisor third-party solicitor, the regulated entity clients or investment adviser clients of the municipal advisor third-party solicitor) would also survive constitutional scrutiny.

[124] *See* comment letter from Sanchez; comment letter from SIFMA.

[125] *See Blount,* 61 F.3d at 944, 947–48.

[126] *See id.* at 944.

[127] 793 F.3d 1 (D.C. Cir. 2015) (en banc) (''*Wagner*'').

[128] *Id.* at n. 19.

[129] *Id.* at 26 (quoting *Blount,* 61 F.3d at 947–48).

[130] C&D, CCP and Callcott proposed this approach.

[131] *See* comment letter from C&D, citing Order Adopting IA Pay to Play Rule, at 41035.

Look-Back

SIFMA requested that the MSRB revise the ''look-back'' for MFPs and MAPs, which would provide that a regulated entity would be subject to a ban on applicable business for a period of two years from the making of a triggering contribution, even if such contributions were made by a person before he or she became a ''municipal finance representative'' or ''municipal advisor representative'' of the regulated entity. Under SIFMA's proposed revision, a new exclusion would be added to the ''look-back'' for a contribution made by an individual that, at the time of the contribution, was subject to either the IA Pay to Play Rule or the Swap Dealer Rule if the contribution was made within the *de minimis* exceptions under those rules.

The MSRB has determined not to adopt SIFMA's proposed exclusion. The goal of Rule G–37, and the proposed amendments, is to address *quid pro quo* corruption or the appearance thereof when a contribution is made to an ME official and business of that municipal entity is awarded to the contributor. The MSRB believes that the risk of such corruption or the appearance of such corruption in the municipal securities market is not diminished simply because a contribution does not trigger a ban in a different market under a different regulatory scheme. The exclusion proposed by SIFMA would, in effect, create a bifurcated *de minimis* threshold: One for MFPs and MAPs that were formerly investment advisers or swap professionals and another for all other MFPs and MAPs. As stated above, the MSRB believes that it is important to have a consistent *de minimis* threshold applicable to all regulated entities in the municipal market, as they operate in the same market and typically with the same clients.

Official of a Municipal Entity

WMFS suggested that the MSRB remove the concept of the different types of ME officials from the draft definition of ''official of a municipal entity.'' [132] WMFS stated that it was not aware of any elected official that would be able to influence the selection of a municipal advisor without also having the ability to influence the selection of an underwriter. Thus, in its view, the draft amendments to this definition would unnecessarily complicate the rule and could create an enforcement loophole.

CCP, by contrast, welcomed the constitutional ''tailoring'' of the definition of ''official of a municipal entity'' through the creation of different categories of ME officials, although it suggested the definition was otherwise overbroad and vague. CCP noted that the definition of the term ''official of a municipal entity'' would extend to losing candidates who ultimately do not play a role in the selection of any dealer or municipal advisor, and, thus pose ''little to no danger of pay-to-play corruption.''

The MSRB recognizes that it may be uncommon for an ME official to have the ability to influence the selection of only one type of professional. However, the MSRB has not received any comments that categorically state, much less demonstrate, that there are no such officials. Further, as CCP and other commenters acknowledged, the categories of ME officials are designed to narrowly tailor the rule to ensure that there is a nexus between a contribution made to an ME official and the ability of that ME official to influence the awarding of business to the contributor's firm (or in the case of a municipal advisor third-party solicitor, a regulated entity client or investment adviser client). With regard to CCP's remaining arguments, apart from the creation of the separate categories and the renaming of the ''official of an issuer'' term to ''official of a municipal entity,'' all other elements of the longstanding ''official of an issuer'' definition are unchanged from that found in current Rule G–37. The fact that losing candidates ultimately have no influence in the selection of professionals does not avoid the potential appearance of *quid pro quo* corruption in the case of contributions to candidates. Thus, the MSRB has determined not to revise the definition of ''official of a municipal entity'' in response to the comments received.

Cross-Bans

SIFMA stated that the cross-ban provision in draft amended Rule G–37(b)(i)(C) (proposed paragraph (b)(i)(D)) should be eliminated. SIFMA argued that the cross-ban provision is overly broad and does not comport with the MSRB's stated goal of requiring a link between a triggering contribution and the business banned by that contribution.

In contrast, The Public Interest Groups supported the cross-ban provision, noting that otherwise permitting contributions from one line of business of a dealer-municipal advisory firm to an ME official that has influence over awarding business to the other line of business within the same firm would invite firms to ''create legal fictions for [contributions] between its dealer and advisory services.'' Sanchez stated that the cross-ban would be appropriate for dealer-municipal advisors because many individuals within such firms engage in both dealer and municipal advisory activity, and to the extent that they do not, the business lines can be very closely related. Thus, Sanchez concluded, a contribution from persons or entities associated with one line of business of a dealer-municipal advisory firm and the awarding of business to the other line of business within the same firm will usually constitute *quid pro quo* corruption or give rise to the appearance thereof.

The MSRB does not believe that the cross-ban provision is inconsistent with the MSRB's goal of requiring a link between a ban on applicable business and a contribution made to an ME official with the ability to influence the awarding of that type of business. On the contrary, the cross-ban is a special provision narrowly tailored to ensure that the only business a dealer-municipal advisor will be prohibited from engaging in during the two-year period is the business that the ME official to whom the contribution was made had the ability to influence. While the cross-ban would subject a dealer-municipal advisor to a ban of a scope consistent with the type of influence held by the ME official to whom the contribution was made, the scope of the ban would not be dependent on the particular line of business with which the contributor is associated. The MSRB believes that this is the appropriate result given that, even though a dealer-municipal advisor may have two lines of business, the entity should be considered a single economic unit.

Moreover, the goal of the cross-ban is to address actual *quid pro quo* corruption or its appearance. The comments submitted by Sanchez and The Public Interest Groups support the view that there is a public perception of *quid pro quo* corruption when business is awarded to a dealer-municipal advisor following the making of a contribution to an ME official with the ability to influence the selection of that firm for such business. These comments further support the MSRB's view that this appearance of *quid pro quo* corruption is not dependent on the particular line of business with which the contributor is associated.

[132] The draft amendments included two categories of ME officials: an ''official with dealer selection influence'' and an ''official with municipal advisor selection influence.'' As described above, the proposed rule change retains these categories and adds an additional category of ME official, an ''official of a municipal entity with investment adviser selection influence.'' *See* proposed Rule G–37(g)(xvi)(C).

Municipal Advisor Third-Party Solicitors

Under draft amended Rule G–37(b)(i)(A)(2) and (b)(i)(B)(2) (proposed paragraph (b)(i)(C)(2)), the triggering contributions made to an ME official by a municipal advisor third-party solicitor could trigger a ban on municipal securities business for a dealer that engaged the solicitor, or a ban on municipal advisory business for a municipal advisor that engaged the solicitor. SIFMA opposed these provisions, arguing that they would ''turn back a well-established precept that market participants do not control third parties.'' If not removed, SIFMA suggested, alternatively, that these provisions impose a ban only when the contribution is made to an ME official with selection influence over the type of business the solicitor was engaged to solicit.

The MSRB does not believe that the imposition of a two-year ban on a dealer client or municipal advisor client under these provisions as a result of political contributions made by an engaged municipal advisor third-party solicitor (or its MAP or a PAC controlled by either the municipal advisor third-party solicitor or an MAP of the municipal advisor third-party solicitor) is inappropriate or onerous. In order to achieve the purposes of the rule, the MSRB believes the two-year ban must be extended to apply to such contributions and has determined not to substantively amend the provision as suggested by SIFMA.

These provisions are narrowly tailored in that they would subject the regulated entity client to a ban on business with a municipal entity only when the regulated entity client engages a municipal advisor third-party solicitor to solicit a municipal entity for business on behalf of the regulated entity. A regulated entity may have a number of means available to help prevent its municipal advisor third-party solicitor from making triggering contributions, including as SIFMA identified, contractual provisions and the training of solicitor personnel. While such actions may not guarantee compliance with the proposed rule change, in such situations, regulated entity clients could possibly avail themselves of an automatic exemption from a ban on business under section (j), as amended by the proposed amendments to Rule G–37. Moreover, if a regulated entity becomes subject to a ban on business in such circumstances, and requests exemptive relief from the relevant agency under proposed Rule G–37(i), the extent to which, prior to the triggering contribution, the regulated entity developed and instituted procedures reasonably designed to ensure compliance with the rule, including procedures designed to ensure the compliance of any engaged municipal advisor third-party solicitor, would be among the factors that would be considered by the agency in determining whether to grant such exemptive relief.

The MSRB understands SIFMA's suggestion that a ban for a regulated entity client should apply only when the municipal advisor third-party solicitor's triggering contribution is made to an ME official with selection influence over the type of business the solicitor was engaged to solicit. However, as with the cross-ban provision, the goal of the municipal advisor third-party solicitor provisions is to address actual *quid pro quo* corruption or its appearance. Just as non-*de minimis* contributions from a person associated with a different line of business of a dealer-municipal advisory firm can present an appearance of *quid pro quo* corruption, so too do the contributions of a party specifically hired to solicit the municipal entity for business on behalf of the dealer-municipal advisor. Similar to the cross-ban, the arising of an appearance of *quid pro quo* corruption is not dependent on the particular line of business the solicitor was engaged to solicit.

Municipal Advisor Representative

SIFMA suggested that the MSRB narrow the scope of persons that could be a ''municipal advisor representative'' under draft amended Rule G–37(g)(iii) and thus could trigger a ban on applicable business or disclosure obligations for a municipal advisor. In SIFMA's view, only an associated person of a municipal advisor that is ''primarily engaged'' in municipal advisory activities should be a municipal advisor representative. By revising the term ''municipal advisor representative'' in this manner, SIFMA commented, the term would align with the relevant term for dealers and would move closer to the more narrowly defined group of persons subject to ''pay to play'' regulation under the IA Pay to Play Rule and the Swap Dealer Rule. SIFMA also commented that there is little risk that the political contributions of persons not ''primarily engaged in'' municipal advisory activities would create an appearance of *quid pro quo* corruption.

The MSRB has determined not to narrow the ''municipal advisor representative'' definition as suggested by SIFMA. Under the proposed rule change, the term ''municipal advisor representative'' would cross-reference the MSRB's ''municipal advisor representative'' definition under its municipal advisor professional qualification rules,[133] which itself is based on the scope of the definition of ''municipal advisor'' in the Dodd-Frank Act [134] and relevant rules and regulations thereunder. Under the SEC Final Rule, ''municipal advisor'' is to be broadly construed, and is not limited by the standard that a person must be ''primarily engaged in'' certain activities to be a municipal advisor.[135] Further, in granting authority to the Board to regulate municipal advisors, including regulation with respect to ''pay to play'' practices, Congress appears to have contemplated that all municipal advisors would be subject to ''pay to play'' regulation by the Board, regardless of the degree to which they engage in such municipal advisory activities.[136] Moreover, the MSRB's approach under the proposed rule change would create more consistency between defined terms in MSRB rules.

Other Constitutional Issues

Because they relate to an area of First Amendment protection, many commenters on the draft amendments framed their comments in light of their reading of the applicable constitutional standards. In addition to the policy matters discussed above, commenters expressed concerns as to the application of Rule G–37, as amended by the proposed amendments, to ''independent expenditures.'' They also urged the consideration of alternatives to the draft amendments and made various other comments, discussed below.

Independent Expenditures

Callcott and CCP stated that the Board should clarify that ''independent expenditures'' in support of ME officials are permitted under the proposed

[133] *See* Rule G–3(d)(i).

[134] *See* 15 U.S.C. 78*o*–4(e)(4).

[135] *See generally* SEC Final Rule; Order Adopting SEC Final Rule.

[136] As explained in the Request for Comment, the regulation of municipal advisors is, as the SEC has recognized, generally intended to address problems observed with the unregulated conduct of some municipal advisors, including ''pay to play'' practices. *See* Order Adopting SEC Final Rule, at 67469. ''Indeed, Congress determined to grant rulemaking authority over municipal advisors to the MSRB, in part, because it already 'has an existing, comprehensive set of rules on key issues such as pay-to-play . . . and that consistency would be important to ensure common standards.''' Request for Comment, at 2 (quoting Senate Report, at 149 (2010)).

amendments to conform to Supreme Court case law.[137]

The MSRB has previously stated in interpretive guidance under Rule G–37 that MFPs are free to, among other things, solicit votes or other assistance for an issuer official so long as the solicitation does not constitute a solicitation of or coordination of contributions for the issuer official.[138] In addition, in upholding the constitutionality of Rule G–37, the *Blount* court observed that ''municipal finance professionals are not in any way restricted from engaging in the vast majority of political activities, including making direct expenditures for the expression of their views, giving speeches, soliciting votes, writing books, or appearing at fundraising events.'' [139] In addition, the proposed amendments, like current Rule G–37, would generally not prohibit contributions to so-called ''super PACs'' or independent expenditure-only committees.[140] Like current Rule G–37, the proposed rule change would not impose any restriction on ''independent expenditures'' in support of ME officials.

Alternatives to the Draft Amendments

CCP stated that the MSRB should consider alternatives to the draft amendments, including tougher penalties, stronger investigative tools, whistleblower protections and providing exemptions for municipal advisory contracts that are put out for bid in a transparent way.

The MSRB has determined not to amend the proposed rule change in response to these comments. As part of its normal rulemaking process and consistent with its policy on economic analysis, the MSRB has considered alternatives to the proposed rule change; however, in each case, it determined that these alternatives would likely fail to achieve the same benefits as the proposed rule change or would achieve the same or substantially similar benefits at likely higher cost.[141] The MSRB is sensitive to the constitutional implications of Rule G–37 and believes that the proposed rule change strikes the appropriate balance between protecting constitutional freedoms and addressing *quid pro quo* corruption and the appearance thereof in the municipal securities market. For example, the MSRB has continued to improve its investigative tools to audit suspected ''pay to play'' activities involving dealers in the municipal market. However such tools alone would not be sufficient to meet the objectives of the proposed rule change because municipal advisors, in their capacity as such, are currently not subject to any ''pay to play'' rules. Improved tools to uncover *quid pro quo* corruption are meaningless without legal obligations designed to prohibit such practices. A similar rationale applies with respect to tougher penalties and whistleblower protections. Additionally, while the definition of ''municipal securities business'' set forth in current Rule G–37(g)(vii) and in proposed Rule G–37(g)(xii) effectively provides the exemptions CCP describes for certain municipal securities business conducted on a competitive bid basis, the MSRB understands that the nature of municipal advisory business does not currently lend itself to a competitive bid process in a manner comparable to which it is conducted for municipal securities business.

Other

Callcott interpreted the draft amendments to Rule G–37 to prohibit contributions to political parties, which would in Callcott's view have caused Rule G–37 to be unconstitutional. The proposed amendments to Rule G–37, like current Rule G–37, would not prohibit the making of political contributions to political parties. Rather, proposed amended section (c) would prohibit the solicitation and coordination of payments to a political party of a state or locality where the regulated entity is engaging or seeking to engage in business. Accordingly, the MSRB has determined not to further amend proposed section (c) in response to this comment.

CCP stated that draft amended section (e), the anti-circumvention provision, is insufficiently tailored under the First Amendment. The MSRB believes that this provision, which would be consistent with similar provisions in other federal ''pay to play'' regulations, including the IA Pay to Play Rule and the Swap Dealer Rule, would be narrowly tailored to prohibit regulated entities and their MFPs and MAPs from, directly or indirectly, doing any act that would result in a violation of sections (b) or (c) of Rule G–37. Accordingly, the MSRB has determined not to make any changes to section (e) in response to this comment.

CCP stated that a number of other terms or provisions under the draft amendments were vague or unclear. Specifically, CCP indicated that the draft amended MFP definition and draft MAP definition would make Rule G–37 less clear and difficult to determine what constitutes a sufficient ''control'' relationship for purposes of establishing vicarious liability for several categories of MFPs or MAPs. In addition, CCP expressed a belief that the draft amended definition for the term ''solicit'' was overly broad and vague because it would be difficult to determine when an ''indirect communication'' constituted a solicitation. CCP also noted that section (c) under draft amended Rule G–37 was overbroad because it would be difficult to determine whether a dealer or municipal advisor was ''seeking'' to engage in municipal securities business or municipal advisory business with a municipal entity or in a state or locality.

[137] The Federal Election Commission defines an ''independent expenditure'' generally as an expenditure ''for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.'' 11 CFR 100.16(a).

[138] *See* Solicitation of Contributions, reprinted in *MSRB Rule Book* (May 21, 1999).

[139] *Blount,* 61 F.3d at 948; *see* Reminder of Obligations Under Rule G–37 on Political Contributions and Rule G–27 on Supervision When Sponsoring Meetings and Conferences Involving Issuer Officials, reprinted in *MSRB Rule Book* (March 26, 2007) at n. 1, quoting *Blount,* 61 F.3d at 948.

[140] However, consistent with current Rule G–37 and related interpretive guidance, regulated entities and their MFPs and MAPs would be prohibited from soliciting others (including affiliates of the regulated entity or any PACs) to make contributions to certain ME officials. Additionally, regulated entities and certain categories of MFPs and MAPs would be prohibited from soliciting others (including affiliates of the regulated entity or any PACs) to make contributions to certain ME officials. Further, contributions by a PAC controlled by the regulated entity or an MFP or MAP of the regulated entity to certain ME officials may result in a ban on municipal securities business or municipal advisory business with that municipal entity. Furthermore, regulated entities and their MFPs and MAPs would be prohibited from circumventing Rule G–37 by direct or indirect actions through any other persons or means, including, for example, using an affiliated PAC as a conduit for making a contribution to an ME official. *See* MSRB Guidance on Dealer-Affiliated Political Action Committees Under Rule G–37 (December 12, 2010).

[141] For example, the MSRB considered not requiring a nexus between the influence that may be exercised by an ME official who receives a contribution and the business in which the regulated entity is engaged or is seeking to engage. A broader set of potential ban-triggering events would likely increase costs and may negatively impact competition without significantly improving market integrity or merit-based competition. The MSRB also considered not allowing an orderly transition period for pre-existing non-issue-specific contractual obligations following a ban on business. This alternative would risk imposing significant costs on municipal entities and, because the ban-triggering event would by definition occur after a firm had been selected, does not appear to address the identified needs better than the proposed rule change. The MSRB also considered, but ultimately rejected for the reasons stated herein, modeling the ''pay to play'' regime for municipal advisors on other ''pay to play'' regimes in the financial services market in favor of the approach taken in the proposed rule change.

The MSRB disagrees with each of these assertions. The proposed amendments set forth, for municipal advisors generally, based upon their activities, functions and positions, categories that are analogous and substantially similar to those used to describe various types of MFPs under the current rule. The proposed amendments to the definition of municipal finance professional are non-substantive (*i.e.,* assigning names to the categories), and, thus would have no impact on an analysis or determination regarding control relationships for purposes of establishing vicarious liability among various MFPs, and, by extension, MAPs. Further, as discussed *supra,* Rule G–37, including section (c), previously withstood constitutional scrutiny in *Blount,* and the proposed amendments simply would extend the core of section (c) to municipal advisors. In addition, while the ''solicit'' definition would be amended under the proposed rule change, the proposed amended definition in subsection (g)(xix) would be consistent with the current definition of ''solicit'' that it would replace.[142] Both the proposed and current definitions of ''solicit'' incorporate the ''indirect communication'' language. Moreover, the MSRB previously issued interpretive guidance regarding the term ''solicitation'' for purposes of Rule G–37.[143] As discussed *supra,* the MSRB intends to extend the existing interpretive guidance on Rule G–37 for dealers to municipal advisors on analogous issues. Thus, the MSRB believes at this time that there is sufficient guidance regarding these provisions and terms.

Modification of the Two-Year Ban

Draft amended Rule G–37(b)(i)(E) would provide for a modification of the ending of the two-year ban on applicable business under certain circumstances when business with the municipal entity is ongoing at the time of the triggering contribution. SIFMA stated that this modification should be tailored to apply only to any municipal entity with which a regulated entity is engaged in business at the time of the contribution. SIFMA explained that, according to its reading of the modified two-year ban, in cases where the recipient of a triggering contribution is an ME official of *multiple* municipal entities, a regulated entity would be prohibited from engaging in applicable business with each municipal entity for the extended period of time, even if the regulated entity was engaged in ongoing business with only one of the municipal entities at the time of the contribution.

To provide additional clarity, the MSRB has amended this provision and consolidated it with the provisions pertaining to the orderly transition period in a single paragraph. Under paragraph (b)(i)(E) in the proposed rule change, a triggered ban on applicable business with a given municipal entity will be extended by the duration of the orderly transition period described in proposed Rule G–37(b)(i)(E). The length of a ban on applicable business for one municipal entity with which a regulated entity is banned from engaging in applicable business is unaffected by the length of the ban on applicable business with another municipal entity. This is the case even where the ban on applicable business with both municipal entities stemmed from the same contribution to an ME official with the ability to influence the awarding of business to both municipal entities.[144]

Recordkeeping and Reporting

Duplicate Books and Records

BDA and Sanchez sought clarification as to whether the draft amendments would require dealer-municipal advisors to keep duplicate books and records. BDA specifically expressed concern that the draft amendments would require employees who act as both a municipal advisor and serve as bankers in an underwriter capacity to keep dual records and disclosures. In addition, Sanchez suggested that Rules G–8 and G–9 should be revised to not require separate maintenance of information that is included on Form G–37 and to make clear that the availability of Form G–37 on EMMA would satisfy the maintenance requirement.

The proposed amendments would not require a dealer-municipal advisor to make and keep dual records and disclosures. The MSRB therefore has determined not to amend Rules G–8 and G–9 as suggested by commenters. In addition, as noted in the Request for Comment, dealer-municipal advisors could make all required disclosures on a single Form G–37. Additionally, the proposed amendments to Rules G–8 and G–9 would not prohibit dealer-municipal advisors from making and keeping a single set of the records that would be required under the proposed amendments. Rather, the proposed amendments would provide dealer-municipal advisors with the flexibility to consolidate such records or to keep such records separate as long as they are kept in compliance with all of the terms of Rules G–8 and G–9. If a dealer-municipal advisor were to elect to keep a consolidated set of such records, such records would need to clearly identify whether an MAP or MFP is solely an MAP, solely an MFP, or both.

The MSRB also has determined, at this time, not to further revise Form G–37 and Rules G–8 and G–9 to require the disclosure of much of the information required to be kept under those rules in lieu of separately maintaining such records. Those data are necessary for examiners to examine for compliance with the provisions of Rule G–37 and the MSRB believes that requiring the public disclosure of such information would likely unjustifiably add to, rather than reduce, the compliance burden for regulated entities.

Books and Records When No Contributions Are Made

Castle and WMFS both expressed support for regulation to curb ''pay to play'' practices, but stated that there should be no books, records or filing requirements for municipal advisors that do not make political contributions. To support this approach, WMFS cited the requirement under the Dodd-Frank Act that the Board not impose an unnecessary burden on small municipal advisors.[145] The Public Interest Groups recommended that the MSRB substantially broaden the recordkeeping that would be required under the proposed amendments to require regulated entities to disclose all political contributions made by any affiliate and to itemize these contributions for comparison to relevant underwritings.

The MSRB believes that the information that would be required to be reported to the Board on Form G–37, even in the absence of any reportable contributions for the applicable reporting period, is important to

[142] *See* discussion of proposed definition of ''solicit'' in ''Municipal Advisor Third-Party Solicitors'' and n. 39, *supra.* The current definition of ''solicit,'' which would be deleted, provides: ''Except as used in section (c), the term 'solicit' means the taking of any action that would constitute a solicitation as defined in rule G–38(b)(i).'' Rule G–37(g)(ix). Rule G–38(b)(i) provides: ''The term 'solicitation' means a direct or indirect communication by any person with an issuer for the purpose of obtaining or retaining municipal securities business.''

[143] *See* MSRB Interpretive Notice on the Definition of Solicitation Under Rules G–37 and G–38 (June 8, 2006).

[144] For example, if a ban triggering contribution is made to an ME official of three municipal entities, and the regulated entity avails itself of an orderly transition period spanning one week for one municipal entity and two weeks for the second municipal entity, but does not avail itself of an orderly transition period for the third municipal entity, its ban with the first municipal entity is extended by one week, its ban with the second municipal entity is extended by two weeks, and its ban with the third municipal entity is not extended.

[145] *See* 15 U.S.C. 78*o*–4(b)(2)(L)(iv).

evaluate compliance with the proposed amended rule and to facilitate public scrutiny of a regulated entity's political contributions (even if made in a different reporting period) and applicable business. The MSRB therefore has determined not to propose the amendments suggested by these commenters. The MSRB believes that the limited nature of the information required to be reported when a regulated entity does not have any reportable contributions and the available relief from any reporting obligations in certain circumstances under the proposed amendments to Rule G–37(e)(ii) sufficiently accommodate small municipal advisors. Similarly, the records that a municipal advisor would be required to make and keep current under the proposed amendments to Rules G–8 and G–9 are necessary to examine municipal advisors for compliance with Rule G–37, as amended by the proposed amendments, and would generally be limited for a municipal advisor that does not make any political contributions. These records would likely also be limited for a small municipal advisor, which necessarily will have fewer MAPs for which it would be required to keep records.

The MSRB seeks to appropriately balance the burden of complying with the proposed rule change's public reporting requirements with the benefit to the public of such disclosure. Moreover, the MSRB is cognizant of the constitutional implications of the proposed rule change, and seeks to narrowly tailor the rule to achieve its stated objectives. At this juncture, the MSRB does not believe that the additional public disclosure suggested by The Public Interest Groups is warranted for the proposed rule change to achieve its objectives.

Paper Submissions

Sanchez suggested that the MSRB should enhance the searchability of Form G–37 submitted to the Board in furtherance of the Board's stated objective to promote public scrutiny of the contributions made by regulated entities. Sanchez also suggested that the MSRB not allow the submission of paper versions of Form G–37.

The MSRB agrees and proposed subsection (e)(iv) of Rule G–37 would require all Form G–37 submissions to be submitted to the Board in electronic form, thereby eliminating the option to submit paper versions of these forms. The MSRB also plans to set forth in the *Instructions for Forms G–37, G–37x and G–38t,* referenced in subsection (e)(iv) of the proposed amendments to Rule G–37 a requirement that all electronic submissions be in word-searchable portable document format (PDF). All regulated entities have the ability to access the MSRB's electronic submission portal, through which electronic Form G–37 and Form G–37x are submitted. Further, given the significant technological advances since the MSRB first required the submission of Form G–37, the now widespread availability of computers and PDF software, and low percentage of Forms G–37 the MSRB currently receives in paper form, the MSRB believes the burden as a consequence of no longer accepting paper submissions will be relatively low.

Miscellaneous

ACEC expressed the view that the ''look-back'' in the draft amendments would create a potential conflict with existing employment law which, ACEC stated, does not favorably view asking an applicant questions during the hiring process that are not directly related to the job. In addition, ACEC stated that the MSRB should provide guidance as to what constitutes an indirect contribution to a trade association PAC. Regarding PACs, The Public Interest Groups expressed concern regarding political giving by PACs that may or may not be controlled by a dealer or an MFP of the dealer. It stated that the current disclosure and reporting apparatus does not provide the appropriate deterrent to prevent circumvention of Rule G–37 through the use of PACs.

While the MSRB is sensitive to the fact that regulated entities may be subject to many regulatory schemes, it does not believe that the look-back, which has existed under Rule G–37 for approximately two decades, would be inconsistent with other areas of law. The proposed rule change merely extends this same concept to municipal advisors. Similarly, the MSRB intends to extend the existing interpretive guidance under Rule G–37 for dealers to municipal advisors on analogous issues. The MSRB believes at this time that there is sufficient guidance regarding contributions to and through PACs as well as circumvention of Rule G–37.

WMFS stated that the MSRB should consider prohibiting the making of contributions to bond ballot campaigns. While the MSRB is sensitive to concerns about bond ballot contributions, the established objective of this rulemaking initiative is to extend the principles embodied in Rule G–37 to municipal advisors, with appropriate modifications to take into account the differences between the regulated entities and the existence of municipal advisor third-party solicitors and dealer-municipal advisors. While bond ballot contributions are not the subject of this initiative, the MSRB continues to review disclosures regarding contributions made to bond ballot campaigns and will separately make any determination whether to engage in further rulemaking in this area.[146]

ACEC requested that the MSRB clarify whether the *de minimis* exclusion would apply separately to primary and general elections. The Board has previously stated that, if an issuer official is involved in a primary election prior to the general election, an MFP who is entitled to vote for such official may contribute up to $250 for the primary election and $250 for the general election to the official.[147] As noted, the MSRB intends all existing interpretive guidance for dealers to apply to the analogous interpretive issues for municipal advisors. Thus, under the proposed rule change, the *de minimis* exclusion would apply separately to primary and general elections.

ACEC also urged the MSRB to reserve action on the proposed rule change until the Commission has fully clarified the definition of municipal advisory services. The MSRB has determined not to delay this rulemaking initiative. Since July 1, 2014, all municipal advisors, including municipal advisors that are also engineers and do not qualify for an exclusion or exemption under the SEC Final Rule, have been required to comply with the provisions of the SEC Final Rule. They are also subject to a number of MSRB rules, such as Rule G–17, regarding fair dealing, Rule G–44, regarding supervisory and

[146] Since February 1, 2010, the MSRB has required disclosure, under Rule G–37, of non-*de minimis* contributions to bond ballot campaigns made by dealers and certain of their associated persons. In 2013, the MSRB amended Rule G–37 to require the disclosure of additional information related to the contributions made by dealers and certain of their associated persons to bond ballot campaigns and the municipal securities business engaged in by dealers resulting from voter approval of the bond ballot measure to which such contributions relate. The proposed rule change would extend these disclosure provisions to municipal advisors. In connection with the 2013 rulemaking initiative, the MSRB stated that the more detailed disclosures will help inform the Board whether further action regarding bond ballot campaign contributions is warranted, up to and including a corresponding ban on engaging in municipal securities business as a result of certain contributions. *See* MSRB Notice 2013–09, SEC Approves Amendments to Require the Public Disclosure of Additional Information Related to Dealer Contributions to Bond Ballot Campaigns Under MSRB Rules G–37 and G–8 (April 1, 2013).

[147] *See* MSRB Rule G–37 Interpretive Notice—Application of Rule G–37 to Presidential Campaigns of Issuer Officials (March 23, 1999).

compliance obligations, and Rule G–3, regarding registration and professional qualification requirements. At this juncture, all municipal advisors should be registered as such, and in compliance with applicable rules. Accordingly, the MSRB has determined not to reserve action on this rulemaking initiative.

Anonymous stated that registered investment advisers that are also municipal advisors should be exempt from the proposed rule change because, in its view, such municipal advisors are already subject to stringent political contribution compliance and recordkeeping requirements. The MSRB has determined not to exempt such municipal advisors from the proposed rule change. As discussed *supra,* the MSRB is sensitive to the effect of differing regulation for the limited number of dealers and municipal advisors that also operate in the investment advisory market or the swap market. However, the Board does not believe that municipal advisors that also act as investment advisers should be subject to different regulation than their non-investment adviser municipal advisor counterparts.

Lastly, ACEC stated that some commercial entities not primarily in the business of providing advisory services related to municipal securities may, nonetheless, be engaged in activities that are regulated (*e.g.,* engineers). It noted that for the larger among these firms, implementing a compliance regime consistent with the proposed amendments would be challenging and that the MSRB should consider these administrative costs in the context of this rulemaking initiative. As described *supra,* the MSRB has considered the impact of the proposed rule change on all municipal advisors, including small municipal advisors and municipal advisors that have not previously been subject to federal financial regulation, and continues to believe that the proposed rule change is necessary to address *quid pro quo* corruption or the appearance thereof in the municipal market.

Economic Analysis

There were no comments received that were specific to the preliminary economic analysis presented in the Request for Comment nor did commenters provide any data to support an improved quantification of benefits and costs of the rule. Comments about the compliance burdens of specific elements of the draft amendments are discussed above.

Implementation Period and Transitional Effect

SIFMA requested an implementation period of no less than six months from the effective date of the proposed rule change.

In response to this comment, the MSRB has revised section (h) of the draft amendments to Rule G–37 to provide that the prohibitions in proposed amended section (b) of Rule G–37 (regarding the ban on business) would only arise from contributions made on or after an effective date to be announced by the MSRB in a regulatory notice published no later than two months following SEC approval of the proposed rule change. Such effective date shall be no sooner than six months following publication of the regulatory notice and no later than one year following SEC approval of the proposed rule change. This lengthening of the implementation period should mitigate compliance costs and provide sufficient time for municipal advisors to identify the MAPs and MFPs that will be subject to the proposed rule change and for dealers and municipal advisors to modify existing, or adopt new, relevant policies or procedures.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MSRB–2015–14 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–MSRB–2015–14. 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 MSRB. 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–MSRB–2015–14 and should be submitted on or before January 20, 2016.

For the Commission, pursuant to delegated authority.[148]

Brent J. Fields,

Secretary.

[FR Doc. 2015–32822 Filed 12–29–15; 8:45 am]

BILLING CODE 8011–01–P

[148] 17 CFR 200.30–3(a)(12).

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

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